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Comparative Law and Constitutional Adjudication:
A South African Perspective*

by

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1. Introduction

The ‘rise of world constitutionalism’,¹ the ‘globalisation’ of human rights, the rule of law and judicial review,² ‘transnational constitutional discourse’,³ the emergence of a ‘transcultural, normative value system’⁴ – these are some of the terms that are being bandied about in the literature on comparative constitutional law. The use of these terms suggests that something greater is at work than the revival of ‘mere academic’ interest in the similarities and differences between constitutional systems. Renewed interest in comparative constitutionalism is linked to the emergence of a transnational value consensus or legal orthodoxy, and/or processes of economic globalisation. The ‘new comparativism’,⁵ so it seems, does not leave the conceptual framework of constitutional law untouched, but goes hand in hand with processes and ideas that call into question some of the key concepts and distinctions that constitute constitutional law. The distinction between the national and transnational is one area in which traditional ideas are being challenged.⁶ The ‘new comparativism’ does not fit easily with

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¹ B. Ackerman ‘The rise of world constitutionalism’ (1997) 83 *Virginia LR* 771.

² See eg H. Klug *Constituting democracy: law, globalism and South Africa’s political reconstruction* (2000).

³ V. Jackson and M. Tushnet ‘Introduction’ in V. Jackson and M. Tushnet eds *Defining the field of comparative constitutional law* (2002) xii. See also C. Scott and P. Alston ‘Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney’s* legacy and *Grootboom’s* promise’ (2000) 16 *South African Journal on Human Rights* 206 at 213 (referring to the creation of ‘a pan-constitutional law of human rights through inter-constitutional dialogue’).

⁴ D. Komars ‘Comparative constitutional law: its increasing relevance’ in V. Jackson and M. Tushnet eds *Defining the field of comparative constitutional law* (2002) 61 at 65.

⁵ To borrow a term from L. Weinrib ‘Constitutional conceptions and constitutional comparativism’ in V. Jackson and M. Tushnet eds *Defining the field of comparative constitutional law* (2002) 3.

⁶ P. Fitzpatrick ‘“The new constitutionalism”: globalism and the constitution(s) of nations’, unpub-

traditional notions of state sovereignty and exceptionalism or with rigid distinctions between one's own legal system and those of foreign jurisdictions. Today, it is increasingly asserted that comparative analysis is indispensable to a proper understanding of one's own constitutional system.⁷ Consider the following statement by Lorraine Weinrib:

"Where this 'new comparativism' has taken hold, comparative analysis is regarded as integral to the activity of constitutional adjudication or as supplying commentators with insights appropriate to the internal workings of specific constitutional regimes."⁸

The point should, however, not be overstated. While there is an emphasis on shared values and interpretive practices and a recognition that different national constitutional systems are related to each other, there is, as yet, no indication that the differences between national constitutions are about to dissolve.⁹ On the contrary, constitutional comparison is often used to highlight the differences between national and foreign constitutions, and to draw attention to certain distinctive features of a country's constitution, history, socio-economic context and national identity.¹⁰ The point is not to follow blindly, but to compare, to identify similarities and differences, to study and evaluate the reasoning of foreign courts, having due regard to the national constitutional text and context.¹¹

In this paper, I consider the possibilities of comparative constitutional law; the ways in which it can enrich constitutional argument and adjudication. I argue that comparative analysis can, *inter alia*, help to create a space within which different constitutional imaginations can contend with each other. It also serves to promote substantive legal reasoning and a culture of justification, and provides constitutional interpreters, in the suggestive phrase of André van der Walt, with a 'history of examples', a 'history of errors' and a 'history of possibilities'.¹² At the same time, however, I caution against a too idealistic vision of comparative constitutionalism. I argue that the 'new comparativism' should not be turned into a new orthodoxy; that we should be mindful of the historical and social contingency of supposedly universal norms.

Published paper read at the University of the Western Cape, September 2003. Other areas include assumptions about the meaning of democracy, popular sovereignty and the separation of powers; ideas about the role of a bill of rights and methods of constitutional interpretation; and the distinction between public and private law.

⁷ See eg F. Venter *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states* (2000) 256.

⁸ Weinrib (supra) 3–4.

⁹ Some commentators foresee that the boundaries between national and foreign law will still become far more fluid. Weinrib writes: "The comparative engagement is so pervasive and so important that its characterization as comparative reference or analysis is inadequate and awkward. In the early decades of this practice, we see a variety of separate and disparate legal systems cross-fertilizing each other; later generations will perceive the decentralized operation of cognate legal systems." *Id.* 22.

¹⁰ P. Häberle 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat' 1989 *Juristen Zeitung* 913 at 917–918 writes that the point of comparative constitutional analysis is to enrich constitutional argument, not to impoverish it through the elimination of the differences between legal cultures. See also section 3.3 below.

¹¹ See *Ferreira v Levin NO* and *Vryenhoek v Powell NO* 1996 (1) SA 984; 1996 (1) BCLR 1 (CC) para 72; *Bernstein v Bester NO* 1996 (2) SA 751; 1996 (4) BCLR 449 (CC) paras 132–133.

¹² A. van der Walt *Constitutional property clauses: a comparative analysis* (1999) 38.

I rely heavily on South Africa's experience of the past ten years. South African judges regularly refer to and analyse foreign law in constitutional decisions. This is so for a number of reasons. In the first place, the drafters of both South Africa's interim and final constitutions¹³ drew upon the constitutions and experience of other constitutional democracies. There are many provisions in these constitutions which bear the stamp of German, Canadian or some other influences.¹⁴ The role of foreign examples in the negotiations and deliberations preceding the adoption of these constitutions already created a sense that South Africa was becoming part of a broader constitutionalist tradition.¹⁵ Secondly, it was to be expected that South African judges would have turned to foreign law for guidance in the absence of an indigenous constitutional jurisprudence. Before the introduction of the interim Constitution in 1994, South Africa followed a system of parliamentary sovereignty, and the majority of judges had no experience in adjudicating a supreme constitution. Thirdly, both the interim and final constitutions expressly authorise reliance on foreign law in constitutional interpretation. Section 39(1) of the final Constitution provides:

'When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.'

In section 2, I consider two very different accounts of the relationship between comparative law and the globalisation of constitutionalism. This discussion introduces themes that are central to this article, such as the relation between universality and contingency; between similarity and difference, between the idea of an emerging transnational value consensus and the articulation of constitutional values through local democratic struggles, and between the normative and institutional dimensions of

¹³ Respectively the Constitution of the Republic of South Africa, Act 200 of 1993 and the Constitution of the Republic of South Africa, 1996.

¹⁴ The following are but a sample of the academic contributions which shed light on foreign influences on South Africa's interim and final Constitutions: D. van Wyk et al eds *Rights and constitutionalism: the new South African legal order* (1994); S. Woolman 'Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitation clause' (1994) 10 *South African Journal on Human Rights* 60; J. De Waal 'A comparative analysis of the provisions of German origin in the interim Bill of Rights' (1995) 11 *South African Journal on Human Rights* 1; A. van der Walt *The constitutional property clause* (1997); P. Hogg 'Canadian law in the Constitutional Court of South Africa' (1998) 13 *SA Publicleg/Public Law* 1; R. Simeon 'Considerations on the design of federations: the South African Constitution in comparative context' (1998) 13 *SA Publicleg/Public Law* 42.

¹⁵ Which is not to suggest that the role of foreign examples during the constitution-making process inevitably had to give rise to a constitutional jurisprudence which is characterised by the extensive use of comparative interpretation. It could, for instance, be argued a la Justice Scalia of the Supreme Court of the United States, that comparative experience is relevant to the making of a constitution, but not to interpreting one. See *Printz v United States* 521 US 898 at 921 n 11 (1997). Alternatively, the courts could have restricted the consultation of foreign law to only those systems which had clearly influenced provisions in the South African Constitution. Cf the discussion by S. Choudhry 'Globalization in search of justification: Toward a theory of comparative constitutional interpretation' (1999) 74 *Indiana LJ* 819 at 838–839, 866–885 of the genealogical approach to comparative constitutional interpretation. If such an approach were adopted, only those systems which had a close historical relationship with the South African constitutional order would have been deemed relevant.

constitutionalism. In section 3, I then turn to the uses and possibilities of comparative constitutional law, with specific reference to the jurisprudence of the South African Constitutional Court. This discussion allows me to further elaborate some of the themes identified in the previous section. Finally, in section 4, I look at some of the ways in which similarity and difference are constructed in comparative constitutional discourse. I am interested not only in the capacity of comparative analysis to deepen our understanding of our own constitutional context and history, but also in the reductions which often characterise the comparisons we make.

2. Comparative law and the 'globalisation of constitutionalism'

In this section, I examine two accounts of the relation between the new comparativism and the globalisation of constitutionalism. The first is Weinrib's account of the postwar constitutionalist tradition; the second Heinz Klug's analysis of the role of globalisation in South Africa's transition to constitutional democracy. Weinrib conceives the globalisation of constitutionalism in terms of an emerging transnational value consensus and shared interpretive method; Klug, on the other hand, focuses more on the interaction between global constitutionalism and local democratic struggles.

2.1 The postwar conception of constitutionalism

Weinrib¹⁶ contrasts the new comparativist sensibility to the narrow, nationalist perspective of Justice Scalia of the United States Supreme Court. Justice Scalia has insisted, in cases concerning the constitutionality of the death penalty,¹⁷ that constitutional practice in other democracies is irrelevant to an inquiry into standards of decency under the United States Constitution.¹⁸ His exclusive focus on American conceptions of decency goes hand in hand with his insistence that such conceptions could be gathered reliably only from domestic legislation and jury practice, that judges should show extreme deference to expressions of the people's will through legislation, and that they should avoid imposing their own subjective values upon the democratic process. Weinrib's analysis shows that, despite the rhetoric of popular sovereignty, legislative supremacy and judicial objectivity, Justice Scalia's judgment in *Stareford v Kentucky* 'ventures at will beyond the confines of the reliable, objective legislated record. It rests on questionable analogies, inconsistent approaches to statutory interpretation, and unsupported and nonlegitimated value judgments.'¹⁹ His 'rejection of comparativism arises as part of a constitutional conception that offers only an illusory flight

¹⁶ (Supra).

¹⁷ See *Stareford v Kentucky* 492 US 361 at 369 n 1 (1989).

¹⁸ See also V. Jackson 'Ambivalent resistance and comparative constitutionalism: opening up the conversation on "proportionality", rights and federalism' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583; and Choudhry (1999) 74 *Indiana LJ* 819 (supra) 822-823, 830-832 for a discussion of the powerful hold of legal particularism and exceptionalism on the legal imagination in the United States.

¹⁹ Weinrib (supra) 13.

from substantive values and judicial authority',²⁰ and is rooted in a value system that favours stability and moral stasis over social transformation and change.

The postwar constitutional conception which informs the constitutions of Germany, Canada, South Africa and a range of other countries stands in sharp contrast to the nationalist, positivist, deferential and morally static constitutional conception of Justice Scalia. According to Weinrib, these constitutions 'invite comparative reflection and analysis because they rest on a shared constitutional conception that, by design, transcends the history, cultural heritage, and social mores of any particular nation-state'.²¹ Central to this constitutional conception is the notion of human dignity. Failure to respect dignity cannot be justified with reference to any particular national or religious tradition, or in the name of majoritarian political processes. This emphasis on dignity recalls Kant's notion of 'cosmopolitan right': the idea that 'a violation of a right on one place of the earth is felt in all'.²²

The postwar conception of constitutionalism rests further upon shared understandings of interpretive methodology and of the judiciary's role vis-à-vis that of the legislature and executive. The interpretation of rights guarantees is expressly value-laden, and the inquiry into the justification of fundamental-rights limitations involves courts in proportionality analysis which is, equally, a form of substantive reasoning. In terms of the postwar conception, the flight from substantive values and deference to the will of legislative majorities that characterise the judgment of Justice Scalia amount to an evasion of the court's responsibility to uphold a supreme Constitution and give substantive reasons for its decisions. However, insists Weinrib, inquiry into substantive value is not to be equated with the imposition of judges' subjective beliefs. Judges who adhere to the postwar constitutional conception are constrained by an established methodology. Weinrib clearly regards this methodology, with its emphasis on purposive interpretation and proportionality analysis, as more constraining than the supposedly value-neutral interpretive methodology espoused by Justice Scalia. Moreover, judicial vigilance in the face of fundamental-rights violations is not tantamount to a usurpation of legislative power. Under the postwar constitutional conception, democracy is not equated with the supremacy of expressions of the will of legislative majorities. Legislatures, like all other bearers of public power, are subject to the constitutional demand to respect human dignity. Far from negating democracy, judicial findings of unconstitutionality often 'intensify ... democratic engagement' and promote more 'focused deliberation'.²³

Weinrib's account of the postwar constitutional conception provides valuable insights into the similarities between postwar constitutions, as well as similarities in the conceptions of rights, democracy and judicial role that inform their interpretation. It also demonstrates how engagement with comparative materials can broaden the judicial imagination, constrain judicial decision-making, and facilitate substantive reasoning and democratic dialogue.

²⁰ Id 8.

²¹ Id 15. See also L. Weinrib 'Constitutionalism in the age of rights - a prolegomenon' (2004) 121 *South African Law Journal* 278.

²² Id 3, 15 (quoting I. Kant 'Toward perpetual peace' in M. Gregor and A. Wood eds *Immanuel Kant: practical philosophy* (1996) 317 at 330-331).

²³ Id 21.

However, it may well be asked whether Weinrib's focus on shared values and interpretive methods takes sufficient cognizance of the power relations within which 'global constitutionalism' has taken root. Because she takes the aftermath of the Second World War as the defining moment in the development of the new conception of constitutionalism, she is able to describe the new constitutionalism in terms of an evolving value consensus which exists independently of current power relations. She thus manages to avoid inquiring into the more immediate causes of the latest wave of constitution-making and constitutional interpretation. More specifically, she avoids issues such as the role of international power in framing constitutional options, and the links between the new comparativism and economic globalisation.²⁴

A second possible criticism relates to Weinrib's emphasis on the similarities between constitutional systems. One line of criticism may focus on the differences between national systems in order to show that she overestimates the degree of convergence. Another may question the idea of an emerging value consensus by pointing not so much to the differences between individual countries, but to the persistence of ideological differences and reasonable interpretive disagreement within those countries. For instance, it may be pointed out that, even in countries such as South Africa which seem to have espoused dignity as a central value which animates the interpretation of all rights,²⁵ there is concern that a dignity-based approach may, in some areas, impair the capacity of the legal system to develop adequate responses to inequality and disadvantage.²⁶ Yet another, closely related, line of criticism may question the desirability of the type of 'grand narrative' which emphasises similarity at the expense of difference,²⁷ and progresses

²⁴ See D. Schneiderman 'Comparative constitutional law in an age of economic globalization' in V. Jackson and M. Tushnet eds *Defining the field of comparative constitutional law* 237.

²⁵ In *S v Makwanyane* 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) para 144, the rights to life and human dignity were described as 'the most important of all human rights, and the source of all other personal rights' in the Bill of Rights. The Constitutional Court further stated in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) para 35 that the value of human dignity 'informs the interpretation of many, possibly all, other rights'. Among the rights that have been interpreted in the light of human dignity, are the guarantee against cruel, inhuman or degrading punishment (*Makwanyane* (supra)); *S v Williams* 1995 (3) SA 632; 1995 (7) BCLR 861 (CC); and the rights to equality (eg *President of the Republic of South Africa v Hugo* 1997 (4) SA 1; 1997 (6) BCLR 708 (CC) para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) paras 21–26, 120–129) and privacy (*National Coalition for Gay and Lesbian Equality v Minister of Justice* paras 30, 120). See also A. Chaskalson 'The third Bram Fischer lecture: Human dignity as a foundational value of our constitutional order' (2000) 16 *South African Journal on Human Rights* 193; L. Ackermann 'Equality and the South African Constitution: the role of dignity' (2000) 63 *ZaëRV* 537.

²⁶ See eg C. Albert and B. Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248; D. Davis *Democracy and deliberation: transformation and the South African legal order* (1999) 69–97. See also H. Botha 'Equality, dignity, and the politics of interpretation' (2004) 19 *SA Publickereg/Public Law* 724.

²⁷ Cf Cotterrell's comment that, even though comparative law is concerned with difference and similarity, it generally privileges unity and consistency of legal meaning over difference. This is particularly true in the current socio-political climate, in which comparative law is driven to harmonisation by economic globalisation, processes of regional integration, etc. P. Cotterrell 'Seeking similarity, appreciating difference: comparative law and communities' in A. Harding and E. Örüç eds *Comparative law in the 21st century* (2002) 34 at 38–39, 44–45. See also P. Legrand 'European legal systems are not converging' (1996) 45 *International and Comparative Law Quarterly* 52. Legrand argues that the common-law and civil-law traditions are irreducibly different, and represent distinct ways of looking at the world. In his view, the idea that

steadily towards the establishment of a constitutional *ius commune*.²⁸ It may be argued that such an approach is dangerous, as it portrays certain trends and tendencies as natural and necessary when they are, in fact, socially and historically contingent.²⁹

In her defence, it must be said that Weinrib does not seek to erase differences among different constitutional systems. The conception of constitutionalism she advocates leaves room for the consideration of particular social and historical contexts: it is 'sufficiently general to allow different constitutions to develop in accordance with their own histories, constitutional arrangements, and challenges'.³⁰ It may even allow departures from the general norm in areas in which an emerging transnational consensus can be discerned – provided, however, that such departures are adequately justified, and 'rest on reasoning rooted both in the general constitutional conception as well as the particularities of national context compatible with that conception'.³¹ Moreover, the postwar constitutional conception, while constraining the range of arguments and justifications that may be legitimately raised, does not predetermine the outcomes of constitutional cases in an unyielding manner, nor does it preclude the possibility of reasonable interpretive disagreement.

And yet, I cannot help feeling that, unless accompanied by a more rigorous analysis of the power relations at work and of the contradictions inherent in 'global constitutionalism', narratives of an unfolding value consensus or a transnational constitutional conception may turn too easily into an uncritical stance towards a new legal orthodoxy or an apology for economic globalisation. A better understanding of the political and economic forces that have helped shape the new comparativism, and thus of its social and historical contingency, may assist, in the words of David Schneiderman, in 'opening up spaces for critique and democratic self-government'.³² It is for this reason that I now turn to Klug's analysis of the role of globalisation in South Africa's transition to democracy.

2.2 Global constitutionalism and local democratic struggles³³

Klug locates South Africa's shift to constitutionalism and judicial review within the dynamics of globalisation. He suggests that the timing of South Africa's political transi-

European legal systems are converging, or that a new European *ius commune* is in the making, is based on a preoccupation with the 'surface' manifestations of legal cultures, such as rules, concepts and institutional questions, and a neglect of the 'deep structures' of legal systems, ie the cultural presuppositions, *Weltanschauungen* and cognitive structures that are deeply embedded within a particular legal system. Id 56.

²⁸ Cf Legrand's criticisms (supra) of the idea that a new European *ius commune* is emerging. See also the critical comments of A. van der Walt 'Resisting orthodoxy – again: thoughts on the development of post-apartheid South African law' (2002) 17 *SA Publickereg/Public Law* 258 on the idea of a new constitutional *ius commune*.

²⁹ Cf A. van der Walt *Constitutional property clauses: a comparative analysis* (1999) 37–38.

³⁰ Weinrib (supra) 4.

³¹ Id 6.

³² Schneiderman (supra) 244.

³³ The first four paragraphs of this section were taken from H. Botha '(Global) constitutional culture, (local) democratic struggles, and the limits of an institutional approach: Review of *Constituting democracy: law, globalism and South Africa's political reconstruction*' (2003) 18 *SA Publickereg/Public Law* 268.

tion was crucial: it happened at a time when the rule of law, fundamental rights and a market economy came to be regarded as essential components of democratic governance. The fact that political negotiations in South Africa had become part of the international agenda, combined with the international hegemony of the rule of law and fundamental rights, placed local contestants under pressure to adopt the vocabulary of constitutionalism and justiciable rights.³⁴

Klug shows how international political culture and the globalisation of constitutionalism facilitated political dialogue – both by narrowing down the range of legitimate constitutional alternatives, and by providing a shared vocabulary for the articulation of often conflicting interests. On the one hand, it defined the outer limits of what would be regarded as an internationally acceptable settlement. For instance, the policy of nationalisation, as initially favoured by the ANC, was effectively silenced by developments within the international arena. The apartheid government's proposals for 'power sharing' suffered a similar fate. On the other hand, there are a whole range of constitutional options that are compatible with prevailing international standards. The plasticity of constitutional concepts, the tensions inherent in democratic constitutionalism, and the dynamic interplay between global constitutional culture and local contexts and histories enabled protagonists from widely divergent backgrounds and ideological bents to appeal to the same vocabulary of constitutionalism and fundamental rights.³⁵

He describes this process in terms of a dialectical interaction between (or 'hybridization' of) a global 'text' of constitutionalism and local struggles. The global text is indeterminate and contains hegemonic and counter-hegemonic strains. Because of its normative power, it 'defines the outer limits of constitutional legitimacy and thus shapes the imaginations of those seeking alternative forms of governance in the context of their own very specific struggles for political and constitutional change'.³⁶ At the same time, however, the global text is constantly reformulated through these struggles, and depends for its meaning on its application within particular local contexts.

Klug locates the 'universal element' of global constitutionalism that is received into national constitutional systems not in a universally accepted value such as human dignity, but in a series of tensions inherent in constitutional democracy: between property and participation, between individual autonomy and equality, between fundamental rights and democracy. These contradictions, it seems, are constitutive of constitutional democracy. They provide a space within which different attempted mediations can contend with one another. Put differently, the essence of constitutional democracy lies in its contradictory nature, which allows different constitutional imaginations to coexist and which accords a vital role to local democratic struggles in the (always temporary) reconciliation of these tensions.³⁷

³⁴ See Klug *Constituting democracy* (supra) 76–85 for a discussion of the resultant shifts in the policies of both the ANC and the apartheid regime.

³⁵ See the discussion at 85–92 of the proposals of the ANC and the South African Law Commission, which were informed by fundamentally different assumptions about the purpose of a bill of rights, the role of the state, the nature of equality and the protection and redistribution of property.

³⁶ *Id.* 48–49.

³⁷ *Id.* 22–23.

It is interesting to compare Klug's account of global constitutionalism with that of Weinrib. The two accounts have in common a rejection of the legal formalist idea that judges can extract the meaning of constitutional provisions from the relevant legal materials, without having recourse to their own conceptions of the constitution and of constitutional morality. Both recognise the central role of human actors in the construction of legal meaning; the element of choice in constitutional adjudication. At the same time, both acknowledge that constitutional interpreters are not radically free to put their own meanings into the text, but are constrained by, *inter alia*, the text, context and structure of the Constitution – and the weight of comparative examples and international opinion. Moreover, both appear to recognise that, in that respect, the difference between constitutional founders and interpreters is but one of degree.³⁸ As Frank Michelman states in his foreword to André van der Walt's work on constitutional property clauses:

'As Van der Walt sees them, the drafters of constitutional clauses act contingently, in pursuit of politically chosen ends, but they are not Humpty-Dumpty. They are not totally, existentially free to reinvent a currently circulating, trans-national language of the law, historically accidental as that, too, may be. Rather, the drafters of bills of rights ... exercise their choices by entering into pre-existent language games. They adopt cognizable broad textual structures. They noticeably follow, or they unmistakably decline to follow, certain broadly familiar textual arrangements. They use, or they unmistakably decline to use, certain broadly familiar terms and terminological oppositions in certain conventional ways.'³⁹

There are, however, important differences. Whereas Weinrib defines the postwar constitutional conception in terms of an evolving value consensus and the emergence of a common interpretive methodology, Klug emphasises the indeterminacy of the global text and the contradictions inherent in it. Weinrib's argument contains a definite universalist streak (her emphasis on the centrality of human dignity and reliance on Kant's notion of 'cosmopolitan right'); Klug, on the other hand, is more interested in the interaction between global text and local context. Moreover, Klug, unlike Weinrib, does not treat the globalisation of constitutionalism in abstraction from questions about international and economic power. Unlike Weinrib's somewhat ahistorical approach, Klug's account enables us to see constitutionalism as socially and historically contingent: the result of the interaction between a global text of constitutionalism (which is itself the product of constantly shifting power relations) and local democratic struggles. Current constitutional forms and trends are not viewed as the

³⁸ Cf also Jackson (supra) 590 (criticising the view of Justice Scalia that comparative experience is relevant to making a constitution but not to interpreting one, and arguing that the process of interpretation in some respects resembles that of constitution-making); F. Michelman *Brennan and democracy* (1999) (arguing that a judge who cares about democracy, may have to 'take responsibility for becoming a national founder, basic law-giver, and cultural prophet all rolled up in one' (51); and that '[a] minor national refounding occurs with every judicial resolution of a reasonably contested question of constitutional meaning' (52); M. Tushnet 'The possibilities of comparative constitutional law' (1999) 108 *Yale LJ* 1225 at 1285–1306 (describing constitution-making as a process of bricolage, rather than engineering, and arguing that such an understanding casts doubt on the view of a constitution as 'a tightly integrated document governed by a form of conceptual determinism' (1300), and opens the way for an understanding of all interpretation as 'creative' and 'activist' (1301)).

³⁹ F. Michelman 'Foreword' in A. van der Walt *Constitutional property clauses: a comparative analysis* (1999) xviii.

result of an evolutionary process but, rather, as the contingent product of past struggles, which are embraced for a variety of ideological reasons and that often undergo adaptations and transformations when applied in new contexts.⁴⁰

Yet another difference relates more directly to the use of comparative law in constitutional adjudication. Where Weinrib is interested primarily in the emergence of a common interpretive methodology, Klug focuses on the interpretive strategies by means of which courts negotiate conflicting normative and institutional demands and thus secure their own institutional legitimacy.⁴¹ What is interesting from this perspective, are the ways in which courts draw upon comparative law and global constitutional culture to legitimate certain interpretive possibilities and delegitimate others, and to assert and circumscribe their institutional authority.⁴²

I believe that both Weinrib's normative-*cum*-interpretive and Klug's political-*cum*-institutional perspectives are important in trying to understand the uses of comparative law in constitutional adjudication. I will draw upon both these perspectives in the remainder of this article. My aim is not to arrive at a synthesis of or reconciliation between these perspectives, but rather to use them to illuminate different aspects of the same problem and, occasionally, to interrogate each other.

3. What does comparative analysis have to offer constitutional adjudication?

In this section, I argue that comparative analysis can enrich constitutional argument and adjudication by: offering examples of the interpretations given by other courts to more or less similar provisions; exposing judges to the normative weight of an evolving transnational value consensus and/or the currency of a widely followed interpretive approach; enabling lawyers and judges, through a consideration of the differences between their own constitution and those of others, to develop a more adequate understanding of their own system and of the contingency of the legal culture within which it functions; promoting substantive reasoning and a culture of justification; opening up certain interpretive possibilities and foreclosing others; warning judges of past errors and wrong turns; and assisting courts in securing their institutional role.

3.1 The value of previous judgments, or: a history of examples

Judges are in the habit of consulting case law. The authority and weight attached to previous court decisions will, of course, depend on factors such as the particular legal system (whether it forms part of the common-law or civil-law tradition), whether a

⁴⁰ See also C. Du Pré 'The importation of law: a new comparative perspective and the Hungarian Constitutional Court' in Harding and Örücü *Comparative law in the 21st century* (2002) 267 (adopting a perspective of 'importation', which focuses on the ways in which local actors use comparative law for their own purposes).

⁴¹ See Klug *Constituting democracy* (supra) 139–177.

⁴² See Botha (2003) 18 *SA Publiekreg/Public Law* 268 (supra) for a discussion of the possibilities and limits of this kind of institutional analysis.

centralised or decentralised system of review is followed, and the place of a court within the judicial hierarchy. However, judges often find it valuable to consult previous decisions, even if they are not bound to follow them. An examination of previous interpretations of the same or similar legal rules and of the reasoning process employed by other judges has obvious benefits: it serves to shape the judge's perception of the range of legitimate interpretations and outcomes, confirm and add authority to her own views on the matter, refine her thinking, and/or alert her to potential gaps and weaknesses in a particular interpretation or line of argument.

The same considerations apply to the consultation of comparative constitutional case law. The value of comparison is perhaps most obvious in the interpretation of constitutional provisions which have clearly been influenced by the law of foreign countries. For example, this would be the case where the provision to be interpreted in the South African Constitution bears a clear resemblance to provisions in the German or Canadian Constitution, or has been influenced by judicial interpretation in those countries. But even in the absence of evidence of such direct influence, foreign case law may facilitate the court's task by providing it with a 'history of examples'⁴³ and a conceptual framework for the interpretation of constitutional provisions.

3.2 Embracing a larger constitutionalist tradition

Constitutional comparison exposes judges to the normative weight of a perceived emerging transnational value consensus. It affords them the opportunity to embrace international conceptions of 'evolving standards of decency', and to legitimate their decisions with reference thereto. The South African Constitutional Court has, in cases dealing with the constitutionality of the death penalty,⁴⁴ corporal punishment⁴⁵ and the prohibition of homosexual sodomy,⁴⁶ referred extensively to the position in other democratic societies. In each of these cases, the court came to the conclusion that the laws and practices in question infringed constitutional rights, and could not be justified in an open and democratic society. In the corporal punishment case, the Court noted a 'growing consensus in the international community' that judicially imposed whipping 'offends society's notions of decency and is a direct invasion of the right which every person has to human dignity'.⁴⁷ The Constitution, in the view of the Court, offered South Africans the opportunity to

'join the mainstream of a world community that is progressively moving away from punishments that place an undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights'.⁴⁸

Reliance on international trends carries certain risks – particularly in a country where there is a strong sense of the distinctiveness of its constitutional history and

⁴³ A. van der Walt *Constitutional property clauses: a comparative analysis* (1999) 38.

⁴⁴ *S v Makuwanyane* (supra).

⁴⁵ *S v Williams* (supra) paras 26–50.

⁴⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (supra) paras 39–57.

⁴⁷ *S v Williams* (supra) para 39.

⁴⁸ Para 50.

tradition, or where socio-economic conditions or religious and cultural value systems are believed to be different from those obtaining in constitutional democracies which are usually held up as exemplary. That the South African Constitutional Court is alive to these dangers, is evident from the careful manner in which it has negotiated the gap between the global text of constitutionalism and the local context. The Court regularly stresses that, while due regard must be had to foreign law, it is the South African Constitution which must be interpreted, and that its provisions must be placed within the context of South African society.⁴⁹ In addition, the Court has been careful not to be seen as privileging 'Western' conceptions of decency over, say, African conceptions. For instance, in the death penalty case, the Court's references to the reasoning of foreign courts and tribunals was held in balance by its reliance on the indigenous African concept of *ubuntu*, which was taken to signal values of respect, dignity, compassion and solidarity.⁵⁰ The Court was thus able to downplay the perceived tension between its own construction of evolving standards of decency and the wishes of the majority of South Africans who, it had been argued, favoured the retention of the death penalty.⁵¹

3.3 Contingency and difference

It is sometimes claimed that judicial consideration of comparative law is defensible only to the extent that such law is comparable to that of the home country.⁵² This is true to the extent that courts should not place uncritical reliance on foreign case law, but should carefully consider the similarities and differences between the relevant constitutional provisions, as well as the place they occupy within the broader context of their respective constitutional systems. However, it would be a mistake to assume that it serves little or no purpose to consult interpretations of constitutional provisions that appear to be substantially different from one's own. This is so for at least three reasons.

In the first place, if it is true that all identities are relational, that we understand concepts (eg equality or constitutional supremacy) in terms of what they are not (eg arbitrariness or parliamentary sovereignty), we may often find it helpful to consider constitutions and constitutional provisions quite different from our own. Consider, for instance, the role of the Constitution of the United States in shaping understandings of the South African Constitution. I think it is fair to say that the Constitution of the

United States has, in many respects, served as a negative model for constitutional development in South Africa.⁵³ The meaning of constitutional provisions and the spirit and ethos of the South African Constitution are often defined in contradistinction to the meaning and underlying philosophy of the United States Constitution. It has, for instance, been asserted that United States jurisprudence in the area of state rights is 'not a safe guide' for understanding the South African division of powers among the national and provincial spheres of government.⁵⁴ Moreover, the Constitutional Court has held that, unlike the United States Constitution, the South African Constitution does not expressly recognise (subject to procedural safeguards) the legitimacy of the death penalty;⁵⁵ does not seek to erect a wall of separation between church and state;⁵⁶ does not treat freedom of expression as a preferred freedom which necessarily trumps conflicting rights;⁵⁷ is not a 'charter of negative liberties', but imposes positive duties on the state;⁵⁸ and cannot be interpreted to sanction the criminal prohibition of gay sodomy.⁵⁹ In addition, it is said that, unlike its counterpart in the United States, the South African Constitution prescribes a two-stage inquiry into the violation of fundamental rights,⁶⁰ and cannot be interpreted to afford different levels of scrutiny to different rights;⁶¹ or to embrace a formal conception of equality which is blind to personal attributes such as race, colour or gender; or to subject race-conscious measures which are aimed at the protection and advancement of persons disadvantaged by past discrimination, to strict scrutiny.⁶² Paradoxically, comparison with the United States often serves to sensitise South African constitutional interpreters to the unique features of their own constitutional text and context. To paraphrase Michelman,⁶³ the fact that the drafters of a constitution declined to adopt a certain familiar formulation

⁵³ See generally H. Klug 'Model and anti-model: the United States Constitution and the "rise of world constitutionalism"' 2000 *Wisconsin LR* 397. Klug argues that, while American notions of federalism, separation of powers, rights and democratic constitutionalism continue to inform and inspire constitutional innovations elsewhere, there are also alternative constitutional models (eg the German and Canadian ones) available, and that 'United States jurisprudence has been increasingly used as a counter-example, as a source of distinction, or merely distinguished as inapposite' (607). See also R. Blake 'The frequent irrelevance of US judicial decisions in South Africa' (1999) 15 *South African Journal on Human Rights* 192.

⁵⁴ *Ex parte Speaker of the National Assembly: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289; 1996 (4) BCLR 518 (CC) para 23.

⁵⁵ *S v Makwanyane* (supra) paras 40, 55–56, 80 (Chaskalson P), 154, 157 (Ackermann J), 179 (Didcott J) and 198 (Kentridge AJ). A similar point is made about other constitutions, such as the Indian one – see paras 70–79.

⁵⁶ *S v Lawrence*; *S v Ngidi*; *S v Solberg* 1997 (4) SA 1176; 1997 (10) BCLR 1348 (CC) paras 99–102.

⁵⁷ *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409; 2001 (5) BCLR 449 (CC) para 41; *Khumalo v Holomisa* 2002 (5) SA 401; 2002 (8) BCLR 771 (CC) paras 25, 42–44.

⁵⁸ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938; 2001 (10) BCLR 995 (CC) para 45.

⁵⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* (supra) paras 53–55.

⁶⁰ *S v Makwanyane* (supra) paras 97, 100. See also paras 101–102 for an explanation of the 'practical consequences' of this difference in approach. Here, Chaskalson P seems to suggest that the two-stage approach followed in terms of the South African Constitution, will often result in a more stringent evaluation of a fundamental-rights limitation.

⁶¹ *Christian Education South Africa v Minister of Education* (supra) paras 29–31.

⁶² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490; 2004 (7) BCLR 687 (CC) para 74; *Minister of Finance v Van Heerden* 2004 (6) SA 121; 2004 (11) BCLR 1125 (CC) paras 26, 29, 147–148.

⁶³ 'Foreword' (supra) xviii.

⁴⁹ See eg *S v Makwanyane* (supra) para 37; *S v Williams* (supra) paras 50, 51.

⁵⁰ *S v Makwanyane* (supra) paras 130–131 (Chaskalson P), 223–227 (Langa J), 243–245, 250, 260 (Madala J), 263 (Mahomed J), 307–309, 311, 313 (Mokgoro J). See also paras 258 (Madala J), 300, 304, 306 (Mokgoro J) and 371–383, 386–387 (Sachs J) on the importance of indigenous and African values. In *S v Williams* (supra) paras 31–32, 34, the Court was able to draw upon decisions of the Supreme Courts of Namibia and of Zimbabwe, in which it had been held that corporal punishment constitutes inhuman or degrading punishment. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757; 2000 (10) BCLR 1051 (CC) paras 45–47.

⁵¹ See paras 87–89 (holding that public opinion is not decisive of the constitutionality of the death penalty). See also Klug *Constituting democracy* (supra) 164–166.

⁵² See eg J. van der Vyver 'Constitutional free speech and the law of defamation' (1995) 112 *South African Law Journal* 572 at 594–595; K. Malan 'Reëgsvergeljking in fundamentele-regte litigasie' (1997) 60 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 214.

or textual structure, can be just as revealing as the reception of elements of a foreign constitution into one's own.⁶⁴

Secondly, comparison with legal systems that are materially different from our own, gives us a better sense of the contingency of our own legal culture. It enables us to unearth some of the hidden assumptions and unarticulated premises that shape our responses to legal problems, and to question the logical necessity of certain links or inferences that we normally take for granted.⁶⁵ This is particularly important in a country like South Africa, where the Constitution's transformative aspirations are often frustrated by the legalistic and conservative mindset of lawyers and judges.⁶⁶

The third point is closely related to the previous two. Vicki Jackson points out that comparison with other legal systems is inevitable, whether or not we subscribe to a comparativist methodology. Even if we believe, like Justice Scalia, that our constitutional arrangements are unique, that belief is based on 'an implicit comparison to other systems'.⁶⁷ Jackson notes that 'what we think we know about [other countries] forms part of the lattice work of assumptions and beliefs that constitute, "our traditions", "common sense", or "contemporary understandings"'.⁶⁸ She argues that we are better able critically to reflect on our own practices and understandings if we become aware of these assumptions and beliefs about other nations and legal systems. 'If comparison is (or is becoming) inevitable, then comparison should be conscious, knowing, well-informed, and reasoned.'⁶⁹

3.4 Substantive reasoning and justification

Lorraine Weinrib's analysis of the postwar constitutional conception suggests that the new comparativist sensibility is part and parcel of a broader interpretive approach, which is characterised by a commitment to substantive – as opposed to formalistic – legal reasoning and which subjects exercises of public power to the demand for justification. The point of constitutional comparison cannot be simply to find the answers to legal questions in comparative materials,⁷⁰ or to blindly follow foreign law. (This is

⁶⁴ Cf the comments of O'Regan J in *Makwanyane* (supra) para 324 on the significance of the decision of the drafters of the Constitution to use a different formulation of the right to life from that found in the constitutions of other countries or in international human rights conventions. The Court in *Makwanyane* placed great emphasis on the fact that the South African Constitution, unlike the constitutions of most other countries, does not contain a textual qualification of the right to life.

⁶⁵ See V. Curran 'Dealing in difference: comparative law's potential for broadening legal perspectives' (1998) 46 *American Journal of Comparative Law* 657; Choudhry (1999) 74 *Indiana LJ* 819 (supra) 837–838; Tushnet (supra) 1227.

⁶⁶ See K. Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

⁶⁷ Jackson (supra) 600. It is increasingly asserted that all lawyers are involved in comparative work today. See W. Twining 'Comparative law and legal theory: the country and western tradition' in I. Edge ed *Comparative law in global perspective* (2000) 21 at 53.

⁶⁸ Jackson (supra) 600–601.

⁶⁹ *Id* 601.

⁷⁰ Admittedly, judges are sometimes guided by a strong sense of an emerging transnational value consensus (see 3.2 above), in which case they may be thought to apply the answer found in comparative law.

evident from the fact that decisions of foreign courts do not constitute legally binding precedent, and that courts often find the reasoning of a foreign court that is lower down in the judicial hierarchy of its country, more persuasive than that of a higher court.)⁷¹ The point is, rather, to inquire whether the court can benefit from the reasoning employed by foreign courts – with due regard to similarities and differences in the text and structure of the respective constitutions, the broader legal system and culture, and the social and historical context. The emphasis should therefore be on the persuasiveness of the other court's reasoning and a proper contextualisation of its judgment. By extension, this also requires the court to inquire into the values underlying the own constitution and the social and historical context within which it functions.

Comparative law is also relevant to an inquiry into the justification offered for a fundamental-rights limitation. A showing that similar restrictions are in place in other constitutional democracies may facilitate the state's task of establishing the proportionality of the limitation. Conversely, it will be more difficult for the state – or other party relying on the justifiability of the limitation – to justify it if less restrictive means are used to achieve the same purpose in a number of other democratic societies.⁷²

3.5 Possibility and constraint

It should be clear from the discussion so far⁷³ that comparative law serves both to constrain the range of legitimate interpretations and outcomes, and to create different interpretive possibilities which enable different constitutional imaginations to contend with each other. Comparative analysis will sometimes delegitimise certain interpretive possibilities – for instance, where there is evidence of a growing transnational consensus that a certain practice is unacceptable. At other times, it may allow judges to move beyond their initial impression that a particular interpretation is inescapable, and open up alternative interpretive possibilities.⁷⁴

Häberle provides important insights into the capacity of comparative law to enrich constitutional argument and to open up new interpretive possibilities.⁷⁵ He refers to comparative law as a 'fifth method' of constitutional interpretation which, in the modern constitutional state, supplements the four 'classical' methods of interpretation identified by Savigny, namely textual, systematic (or contextual), historical and teleological (or purposive) interpretation. The dynamic interaction between these modes of interpretation – and the impossibility of systematising them within a strict hierarchy

But even then, there is still a need to compare the relevant constitutional provisions and to contextualise the reasoning of foreign courts.

⁷¹ See Malan (supra) 229.

⁷² Cf the dissenting judgment of O'Regan J in *Harksen v Lane* NO 1998 (1) SA 300; 1997 (11) BCLR 1489 (CC) paras 105–110 (fact that all the jurisdictions surveyed, except one, regulate the law of insolvency without reliance on similarly invasive measures, taken as an indication that limitation is not justifiable). See also *De Lange v Smuts* NO 1998 (3) SA 785; 1998 (7) BCLR 779 (CC) paras 97, 99.

⁷³ See 2.2 and 3.2 above.

⁷⁴ Van der Walt *Constitutional property clauses* 38 writes that comparative analysis can provide us with a 'history of possibilities'. See also Michelman 'Foreword' (supra) xix.

⁷⁵ P. Häberle 1989 *Juristen Zeitung* (supra) 916ff.; *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (1992).

-- results in interpretive pluralism and enables communities and interest groups to advance different social visions as constitutionally compatible. It is to be expected that the addition of comparative analysis to the existing modes of interpretation will result in a shift of forces in the 'forcefield' of constitutional law.⁷⁶ This may further result in challenges to the interpretive complacency of lawyers, academics and judges, and rekindle a sense of the openness of legal meaning and the contestability of received wisdom.

3.6 A history of errors

André van der Walt⁷⁷ argues that comparative law provides us with a 'history of errors': while it cannot tell us definitely what we should do, it often alerts us to the mistakes made by others, and thus provides valuable guidance as to what we should not do.

Courts are generally less inclined to follow foreign decisions that are discredited in their home countries, or are thought to rest upon standards that are unprincipled or difficult to apply.⁷⁸ They are even less likely to follow decisions or interpretive approaches that are believed to have sparked a constitutional crisis in their home countries. Such decisions often exercise a powerful hold on the constitutional imagination, and are turned into a negative model of constitutional development.

Sometimes, judges justify a decision not to intervene, or to give a particular right (usually liberty rights) a restrictive interpretation, with reference to foreign examples of the usurpation by judges of legislative power, and the dire consequences it had for constitutionalism and the legitimacy of the judiciary in those countries. By far the best known of these narratives of judicial transgression is that of the *Lochner* era in the United States. Sujit Choudhry⁷⁹ shows that the history of the *Lochner* era has had a profound influence on the development of Canadian constitutional law. In South Africa, too, the spectre of *Lochner* has been invoked to delegitimize interpretations which, it is argued, would disguise judges' own political and ideological preferences as constitutionally mandated, or which would seriously impede the state in the discharge of its regulatory and redistributive functions.⁸⁰

⁷⁶ See Häberle 1989 *Juristen Zeitung* (supra) 917. The same metaphor is employed by F. Michelman 'A constitutional conversation with Professor Frank Michelman' (1995) 11 *South African Journal on Human Rights* 477 at 483 (describing different interpretive methods as 'multiple poles in a complex field of forces, among which judges navigate and negotiate') and Choudhry (1999) 74 *Indiana LJ* 819 (supra) 480-481 to express the plural and open nature of constitutional reasoning. See also H. Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249 for an exploration of the same metaphor in a slightly different context, with reference to D. Kennedy 'Freedom and constraint in adjudication: a critical phenomenology' (1986) 36 *Jnl of Legal Education* 518.

⁷⁷ *Constitutional property clauses: a comparative analysis* (supra).

⁷⁸ See eg *Du Plessis v De Klerk* 1996 (3) SA 850; 1996 5 BCLR 658 (CC) para 34 (Kentridge AJ), 109 (Ackermann J) (referring to academic critique of *Shelley v Knaener* 334 US 1 (1948)).

⁷⁹ 'The *Lochner* era and comparative constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1.

⁸⁰ See eg *Ferreira v Levin NO* (supra) para 182. Another history which has been invoked by South African constitutional lawyers to warn against attempts to use the Constitution to protect existing distributions of wealth and power, is that of the Supreme Court of India during the first twenty five years after the adop-

3.7 Securing the courts' institutional role

Klug⁸¹ argues in his study of South Africa's constitutional transition that the judiciary in a newly established constitutional democracy is in a precarious situation: on the one hand, it is vested with vast constitutional powers; on the other, it is institutionally weak and often distrusted by certain sections of the population. According to Klug, South Africa's Constitutional Court has shown great skill in the way it has established its authority as final arbiter of the Constitution while, at the same time, refraining from action that was likely to put it on a collision course with the legislature or executive.

The Court's use of comparative materials has been central to its endeavours to secure its own legitimacy. In the first place, its reliance on comparative law has helped the Court to denounce the suspicion that it decides cases in an unprincipled or overtly political manner. Even when interpreting flexible constitutional standards, and in the absence of previous (South African) case law that could guide them in their decision-making, judges of the Constitutional Court remained confident that their function is a legal, not a political one; that they are properly constrained by legal materials; and that they are bound to exercise their discretion in a reasoned and principled manner. Underlying this conviction is a vision of constitutionalism that is grounded not in abstract rules that are supposed to predetermine the outcomes of cases, but in the reasoned application of legal principles.⁸² Sujit Choudhry⁸³ argues that the Court's use of comparative law has been instrumental to the establishment and legitimation of such a jurisprudence. Choudhry shows that the Court has, particularly in cases dealing with the interpretation and application of fundamental rights within the context of the criminal process, extracted a body of principles from foreign jurisprudence. Its reliance on foreign law enabled the Court to present these principles as transcendent (in the sense that they are to be found in more than one legal system),⁸⁴ and to emphasise that they are legal principles, as opposed to 'mere' moral principles or political ideals.

Secondly, the Court has made clever use of comparative analysis in attempting to negotiate the conflicting institutional demands made upon it. For instance, the Court has drawn upon comparative law to develop an understanding of the separation of powers that does not tolerate serious intrusions of one branch of government into the functional sphere of another,⁸⁵ yet that is flexible enough to allow for a significant de-

tion of that country's Constitution. See eg D. Davis, M. Chaskalson and J. de Waal 'Democracy and constitutionalism: the role of constitutional interpretation' in D. van Wyk et al eds *Rights and constitutionalism: the new South African legal order* (1994) 1 at 36-45, 62.

⁸¹ *Constituting democracy* (supra).

⁸² See eg the case law referred to by Choudhry (1999) 74 *Indiana LJ* 819 (supra) 841, and the claim of Justice Laurie Ackermann that the Court's dignity-based equality jurisprudence enables it to adjudicate conflicts between equality and freedom in a neutrally principled manner. L. Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) 63 *ZaRV* 537. See also Botha (2004) 19 *SA Pub-lic Law* 724 (supra) for a critical analysis of Ackermann's argument.

⁸³ (1999) 74 *Indiana LJ* 819 (supra) 841-855.

⁸⁴ See 3.2 above.

⁸⁵ See *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877; 1995 (10) BCLR 1289 (CC).

gree of overlap between their respective spheres of competence.⁸⁶ On the basis of this understanding, the Court has been able to uphold the judiciary's independence and integrity⁸⁷ while, at the same time, recognising the interest of the legislature and executive in the proper functioning of the courts.⁸⁸

The Court also relied heavily upon comparative law in defining rights such as freedom, privacy⁸⁹ and property.⁹⁰ It was clearly felt that a too extensive or libertarian interpretation of these rights could frustrate the achievement of important government objectives such as land reform, effective economic regulation, and the protection of women and children against violence. For instance, the majority of the Court held in *Ferreira v Levin NO*⁹¹ that the constitutional right to freedom and security of the person should not be given the wide meaning favoured by Ackermann J, that is as the right of every person 'not to have "obstacles to possible choices and activities" placed in their way by ... the State'.⁹² Chaskalson P (as he was then) pointed out that the phrase 'freedom and security of the person' is not given such an extensive interpretation in public international law, but is used primarily to denote a person's physical integrity.⁹³ Moreover, in view of the textual differences between section 11(1) of the interim Constitution and the corresponding provisions in the constitutions of the United States, Canada and Germany, as well as structural differences relating to the place of these provisions in their respective constitutions, the generous interpretations given to such provisions by American, German and, to some extent, Canadian courts, are not suitable to the interpretation of section 11(1).⁹⁴ If section 11(1) were to be given a too extensive interpretation, courts would have to invalidate all regulatory laws which could not be justified as being necessary in an open and democratic society.⁹⁵

⁸⁶ Cf *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) paras 108–109, 111–112 (separation of powers can never be complete, and is not a fixed or rigid constitutional doctrine); *Minister of Health v Treatment Action Campaign (2)* 2002 (5) SA 721; 2002 (10) BCLR 1033 (CC) paras 98–99 (rejecting the idea that courts are not allowed to make orders that have an impact on government policy).

⁸⁷ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883; 2001 (1) BCLR 77 (CC) (appointment of judge as head of special investigating unit found to be in breach of the separation of powers between the executive and the judiciary); *De Lange v Smuts NO* 1998 (3) SA 785; 1998 (7) BCLR 779 (CC) (power of non-judicial officers to commit a witness to prison, held to be unconstitutional).

⁸⁸ *S v Dodo* 2001 (3) SA 382; 2001 (5) BCLR 423 (CC) (statutory power prescribing mandatory minimum sentences found not to be inconsistent with the doctrine of separation of powers); *Van Rooyen v S* 2002 (5) SA 246; 2002 (8) BCLR 810 (CC) (fact that the executive has a strong influence in the appointment of the Magistrate's Commission does not mean that magistrates' courts lack institutional independence).

⁸⁹ In *Bernstein v Bester NO* (supra), the Court's view that privacy should be 'acknowledged in the truly personal realm', but that the scope of the right shrinks 'as a person moves into communal relations and activities such as business and social interaction' (para 67), was backed up by a survey of the position under the European Convention on Human Rights, the United States Constitution, the Canadian Charter of Rights and Freedoms and the German Basic Law. See paras 72–79.

⁹⁰ *First National Bank v Commissioner for the South African Revenue Services; First National Bank v Minister of Finance* 2002 (4) SA 768; 2002 (7) BCLR 702 (CC).

⁹¹ (Supra).

⁹² Para 54 (per Ackermann J).

⁹³ Para 170.

⁹⁴ Paras 175–181.

⁹⁵ See also *Prinsloo v Van der Linde* 1997 (3) SA 1012; 1997 (6) BCLR 759 (CC), where similar concerns were expressed within the context of the interpretation of the equality guarantee: 'If each and every dif-

They would thus be required to sit in judgment on 'what are essentially political decisions'⁹⁶ and to intrude into the functional sphere of the legislature. In the view of Chaskalson P, a too broad interpretation of section 11(1) would bring the Court perilously close to the dangers of *Lochner v New York*: a 'misguided understanding of what liberty actually require[s] in the industrial age'⁹⁷ and an attendant overreach on the part of the judiciary. Ironically, close adherence to the interpretations followed in other jurisdictions would, in this area, bring South Africa's constitutional jurisprudence out of step with the substantive position in these countries, where the powers of the courts are circumscribed either by textual qualifications (Canada)⁹⁸ or by the availability of different levels of scrutiny (the United States).

In addition, comparative law sometimes assists the Court in distinguishing areas in which intervention is appropriate, from areas in which deference should be paid to the other branches of government. I have already referred to the use of cautionary tales of judicial transgression to justify deference in certain areas.⁹⁹ Courts are also more inclined to defer to the policy choices of the legislature and executive in areas in which foreign courts allow the political branches a considerable discretion. In a case involving the constitutionality of a ban on prostitution,¹⁰⁰ the Court noted that the responses of open and democratic societies to the problems associated with prostitution 'vary enormously', and that '[t]he issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts'.¹⁰¹ In the view of the Court, a finding of unconstitutionality would be inappropriate in a case in which the limitation in question is not severe and is designed to achieve important purposes, and where – as is evidenced by the wide variety of responses of open and democratic societies – 'people may reasonably disagree as to the most effective means for the achievement of those purposes'.¹⁰²

Thirdly, the Constitutional Court has made extensive use of comparative law in cases which concern the nature and scope of the courts' remedial powers. Its findings that the reading-in of words into a statute,¹⁰³ and the issuing of mandatory and structural interdicts¹⁰⁴ are not in breach of the doctrine of separation of powers and may, in appropriate cases, constitute appropriate relief under the Constitution, were backed up with ample reference to the position in other constitutional democracies.¹⁰⁵

ferentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct.'

⁹⁶ *Ferreira* (supra) para 174.

⁹⁷ Para 182 (quoting from L. Tribe *American constitutional law* 2ed (1988) 769).

⁹⁸ In terms of section 7 of the Canadian Charter of Rights and Freedoms, the right to liberty and security of the person may be encroached in accordance with the principles of fundamental justice.

⁹⁹ See 3.6 above.

¹⁰⁰ *Jordan v S* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC).

¹⁰¹ Para 90.

¹⁰² Para 94.

¹⁰³ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) paras 64–88.

¹⁰⁴ *Minister of Health v Treatment Action Campaign (2)* (supra) paras 107–113.

¹⁰⁵ The Court has also engaged in in-depth comparative analysis in *Fose v Minister of Safety and Security* 1997 (3) SA 786; 1997 (7) BCLR 851 (CC), a case in which it declined to extend the courts' remedial

4. Constructing similarity and difference

4.1 (*The poverty of*) theory and method

The identification of similarities and differences is at the heart of comparative legal analysis. I have argued in the previous section that the elaboration of such similarities and differences is partly constitutive of our understanding of our own legal and constitutional order. But on what basis are we to make such appraisals of similarity and difference? How are we to negotiate the divide between different legal systems, rules, institutional settings, legal cultures, and social, economic and cultural contexts, in order to engage in meaningful comparison? These are difficult questions, which are left largely unresolved by academic writing. One problem is comparative law's traditional private-law bias. Until recently, comparative law focused almost exclusively on private-law issues.¹⁰⁶ Whether, and to what extent, work done from within this private-law paradigm can be brought to bear on constitutional issues, remains the subject of contention.

Secondly, and even more fundamentally, comparative law's theoretical and methodological apparatus for dealing with the similarities and differences between legal systems and cultures, remains largely underdeveloped. Even leading exponents of the comparative method, like Zweigert and Kötz,¹⁰⁷ argue that comparative law is 'still at the experimental stage', that 'there has been very little systematic writing about the methods of comparative law', and that 'the right method must largely be discovered by gradual trial and error'. Other authors note a disengagement from methodological issues in contemporary writings on comparative law. According to David Kennedy,¹⁰⁸ there seems to be 'a professional consensus' among comparativists today that the methodological questions that were once the subject of intense contestation, 'could not be answered'. The scholar who attempts to resolve these issues, or takes sides in these methodological debates, risks being seen as theoretically 'naive' and unsophisticated.¹⁰⁹ Today, scholars who analyse similarities and differences between the law of different jurisdictions, do so largely intuitively, mindful of general warnings about what constitutes bad practice in the field, but without trying to fit their analysis into a broader theoretical and methodological framework.

Some would argue that this is a strength rather than a weakness; that it is precisely because comparative law is not obsessed with questions of the proper methodology,

powers. After having surveyed the position in the United States, Canada, the United Kingdom, Trinidad and Tobago, New Zealand, Ireland, India, Sri Lanka and Germany and under the European Convention for the Protection of Human Rights (paras 24–56), and on the basis of a careful analysis of the relevant similarities and differences between these countries and South Africa, Ackermann J. who delivered the main judgment, found that an order of an award of constitutional damages was not appropriate in the circumstances of that case.

¹⁰⁶ See A. Harding 'Comparative public law: a neglected discipline?' in I. Edge ed *Comparative law in global perspective* (2000) 101; W. Ewald 'Comparative jurisprudence (1): what was it like to try a rat?' (1995) 143 *Univ Pennsylvania LR* 1889; Twining (supra).

¹⁰⁷ *An introduction to comparative law* 3 ed (transl. T. Weir, 1998) 33.

¹⁰⁸ 'The politics and methods of comparative law' in M. Bussani and U. Mattei eds *The common core of European private law: essays on the project* (2002) 131 at 152.

¹⁰⁹ *Id* 146.

that it provides an important corrective to the formalism and dogmatism that often characterise 'national' law.¹¹⁰ It could, for instance, be argued – quite plausibly, in my view – that an obsession with the development of 'objective' criteria for determining the relevance of foreign law, would deprive comparative constitutional law of at least some of its potential for promoting substantive reasoning and broadening the constitutional imagination. If a set of fairly rigid criteria for the delineation of similarity and difference were to take centre stage, courts would be deprived of valuable opportunities to learn from the law of other countries and the reasoning of foreign courts. Imagine, for example, a categorical rule that United States case law in the area of hate speech or defamation must be disregarded by South African courts, on the basis that freedom of expression is not a preferred freedom under the South African Constitution.¹¹¹ Or a rule that judicial interpretations of the establishment clause in the United States Constitution are irrelevant to cases dealing with freedom of religion under the South African Constitution, as the latter does not contain an establishment clause. These rules seem to flow logically and necessarily from the relevant differences between the constitutions of the United States and South Africa. And yet, it could be asked whether they do not rest upon the rather too glib assumption that the relevant similarities and differences between constitutional systems can be neatly pinned down in advance. This assumption appears to rest upon another one: that constitutional systems, rules, etc are more or less stable identities, and that it is the task of the comparativist to determine relevant similarities and differences on the basis of the objective properties of the rules, concepts or institutional arrangements under consideration.¹¹²

But comparative analysis need not rest on this type of objectivist approach. Choudhry¹¹³ mentions, as an example of what he terms the 'dialogical' mode of comparative analysis, the separate judgment of Sachs J in the *Solberg* case.¹¹⁴ In that case, the constitutionality of a law prohibiting the sale of liquor on Sundays and religiously based holidays was in issue. Chaskalson P held in his judgment that an 'establishment clause' should not be read into the freedom of religion guarantee in the interim Constitution, and that the interim Constitution did not envisage a rigid separation between church and state.¹¹⁵ He found that the law in question did not infringe religious freedom, as it did not 'force people to act or refrain from acting in a manner contrary to their religious beliefs'.¹¹⁶ By contrast, Sachs J relied heavily on the reasoning of O'Connor J of the United States Supreme Court in the *Lynch* case.¹¹⁷ In that case,

¹¹⁰ Zweigert and Kötz (supra) 33–34 write: 'Comparative law not only shows up the emptiness of legal dogmatism and systematics but, because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules, it develops a new and particular system, related to those demands in life and therefore functional and appropriate.'

¹¹¹ Van der Vyver (supra) 595 goes even further. He argues that '[r]eliance in South Africa on American free-speech jurisprudence is ... indefensible', and that American case law in this area does not qualify as 'comparable law' which may be considered by the courts. See also Malan (supra) 228–229.

¹¹² I have criticised this type of objectivism in 'Metaphoric reasoning and transformative constitutionalism (part 1)' 2002 *Tydskrif vir Suid-Afrikaanse Reg* 612.

¹¹³ (1999) 74 *Indiana LJ* 819 (supra) 862–864.

¹¹⁴ (Supra) paras 135–180.

¹¹⁵ Paras 99–105.

¹¹⁶ Para 92.

¹¹⁷ *Lynch, Mayor of Pawtucket v Donnelly* 465 US 668, 687–688 (1984).

O'Connor J held that the establishment clause prohibits government endorsement or disapproval of religion. Government is not allowed to send a message to those who do not adhere to a particular faith that they are 'not full members of the political community'.¹¹⁸ For Sachs J, O'Connor J's reasoning helps to unlock another dimension of the right to freedom of religion, which is not captured in Chaskalson P's definition of the right as simply freedom from coercion in the area of religion. In an open and pluralistic society like South Africa, which professes a commitment, through its constitution, to the political equality of all citizens, regardless of their religion or belief, state conduct which sends out the message that Christians are full members of the political community, while Hindus, Muslims and Jews are not, is inherently problematic. For this reason, Sachs J found that the law prohibiting the sale of liquor on Sundays and Christian holidays, limited the right to freedom of religion.

However, Sachs J was careful not to be seen to rely uncritically on United States jurisprudence. He pointed out that he did not regard the judgments in question as precedents to be followed by South African courts, but that he found the reasoning employed in them helpful in coming to terms with the 'problems which face any modern court' in the area of church/state relations, and in 'elucidating the meaning of [the South African] constitutional text'.¹¹⁹ Interestingly, his reliance on the reasoning of judges in the United States in an area in which, it may at first appear, United States law has little to offer constitutional interpreters in South Africa, resulted not in an uncritical transplant of foreign doctrine, but in a careful reinterpretation of South Africa's constitutional text in view of the historical context.¹²⁰ Sachs J showed how, prior to 1994, the state not only sought to enforce a Christian morality, but also relegated other religious communities to the margins of society. This was done, *inter alia*, through the non-recognition of Hindu and Muslim marriages.¹²¹ On the basis of this historical experience, he concluded that 'the concern expressed by O'Connor J about the message sent by State endorsement of religion to non-adherents ... has special resonance in South Africa'.¹²²

This kind of 'dialogical' interpretation is not premised on the idea that the similarities and differences between legal systems can be neatly mapped in advance, nor does it succumb to the literalist fallacy that the social and historical context matters only once it has been determined that the text does not provide a conclusive answer. Here, comparative analysis serves to broaden the court's inquiry, to bring new perspectives to bear on the interpretation of a provision, and to bring the social and historical context more sharply into focus.

If we understand constitutional adjudication to be a value-laden, contextual enterprise, dialogical reasoning is clearly better suited to the needs of comparative constitu-

¹¹⁸ Quoted by Sachs J in para 138.

¹¹⁹ Para 141.

¹²⁰ Choudhry (1999) 74 *Indiana LJ* 819 (supra) 863 writes: 'Justice Sachs did not accept [the principle laid down by O'Connor J in *Lynch*] in the manner of universalist interpretation, that is, as a transcendent norm applying across societies. Instead, he used *Lynch* as an invitation to peer into South African history and determine whether political equality was bound up with freedom of religion in a way that justified its adoption as a constitutional principle for South Africa today.'

¹²¹ Paras 149–153.

¹²² Para 152.

tional law than the kind of formalist approach alluded to above. In terms of the formalist approach, the relevance of foreign law is determined by means of a comparison of 'surface' phenomena: the texts of the respective provisions, legal doctrine, and sometimes also the place of a particular provision or rule within a larger textual setting (eg is the limitation of a right authorised either in terms of a general or specific limitation clause? how is its importance ranked in relation to other rights? etc). On the basis of that comparison, a foreign legal rule or interpretation – or sometimes, an entire area of law – is then found to be relevant or irrelevant to the interpretation of one's own constitution. What is excluded by such an approach, is a consideration of those affinities and differences which do not immediately meet the eye, but which may emerge from a more thoroughly contextual inquiry. By contrast, the dialogical approach holds open the possibility that what may at first appear to be similar, may turn out to be quite different, and that what may appear too different to have any relevance to the court's inquiry may, on closer inspection, reveal deeper affinities with one's own constitution.

I have suggested above that the emergence of contextual, substantive and/or dialogical modes of comparative constitutional analysis may have something to do with comparative law's disengagement from theoretical and methodological issues. It is now time to question that link. It is, I think, far more likely that the dialogical use of comparative materials arises from a particular vision of constitutional adjudication, than that it is the result of an 'anything goes' attitude on the part of comparativists. If anything, a disengagement from theoretical questions allows comparativists to fall back uncritically onto a narrow and formalist conception of law, legal interpretation, and the comparative method. It is, conceivably, the flight from theory which enables comparativists to continue focusing on rules, concepts, and other 'surface' phenomena, while disregarding the social, cultural and intellectual contexts within which they are embedded. Similarly, the flight from theory serves to insulate some of the other key assumptions on which comparative law is traditionally based, such as the private law/public law distinction¹²³ and the idea that it is the task of the comparativist simply to 'match' the rules of one system to those of another,¹²⁴ from critical questioning. An engagement with theoretical issues is needed, not in order to place comparative law on an 'objective' foundation, but in order to unearth and critically examine the assumptions underlying current understandings of comparative analysis.

4.2 Context, history, and power

Some of the best theoretical contributions in the field of comparative law are critical of the traditional focus on black-letter law, and urge instead that closer attention be paid to the context(s) in which legal rules, concepts and institutions are embedded. It is pointed out that it is impossible to understand the rules of a foreign legal system, without having a grasp of the experiences and ideas that have shaped it, or of the as-

¹²³ See Kennedy 'The politics and methods of comparative law' (supra) 187–190 on the ways in which comparative law reinforces the distinction between private and public law.

¹²⁴ See Ewald (supra) 1981–1983. Ewald calls this the 'telephone-book approach' to comparative law (1983).

sumptions, beliefs and worldviews into which lawyers in that system are socialised. After all, law is not simply a collection of rules, but a culturally and historically conditioned means of carving up and ordering the social world. The meaning of rules, concepts and institutional arrangements can therefore not be understood in abstraction from the surrounding legal culture, or the cognitive framework which shapes lawyers' responses to legal questions. The comparativist, it is argued, must realise the inadequacy of her own categories and presuppositions in trying to understand foreign law. She must be ready to immerse herself in foreign legal culture, to un-learn some of her own attitudes and beliefs, to try to look at the social and legal universe through the eyes of someone who has been socialised into that particular legal culture.¹²⁵

But perhaps, the problem with much of the work in the traditional vein is not just its fixation on rules and neglect of context, history and culture. Perhaps, the problem also lies in the way in which crude generalisations about a foreign legal system often stand in for 'context', and highly selective narratives about a country's legal past pass as 'history'. But then again, perhaps this is simply the other side of the 'rules-fixation' coin. After all, there is no such thing as 'a-contextual' legal reasoning,¹²⁶ or legal reasoning which does not rely – at least implicitly – on narratives.¹²⁷ Usually, a neglect of context and history simply comes down to a refusal to question or explain one's own assumptions about the relevant social, cultural and historical context.

In this section, I consider two examples of the type of reliance on comparative law that may be thought to be problematic. I am interested, in the first place, in the ways in which the complexities of foreign legal systems are reduced to crude generalisations, and the richness of history makes way for rather simplistic tales. Secondly, I am interested in the ways in which these uses of comparative law frame lawyers' understanding of their own legal system, and privilege certain ways of seeing over others.

In an article on the law of delict and the horizontal application of the Bill of Rights in the South African Constitution, Johan van der Walt¹²⁸ takes issue with 'a favourite pastime of South African legal theorists', namely that of '[c]ontrasting the generalising approach' of the Roman-Dutch law of delict with 'the casuistic approach' of the English law of torts.¹²⁹ It is frequently claimed that Roman-Dutch law, which forms the backbone of South African private law, is far more principled, coherent and flexible than the English common law, and far better capable of developing on the basis of general principles. Why then, asks Van der Walt, have South African courts been so reluctant to recognise a cause of action, in terms of the general principles of delict, in cases involving a failure on the part of the state to protect individuals from harm which could be reasonably foreseen?¹³⁰ For Van der Walt, the answer lies in the chasm be-

¹²⁵ See Curran (supra); Ewald (supra); Legrand (supra).

¹²⁶ M. Minow and E. Spelman 'In context' (1990) 63 *Southern California LR* 1597 at 1651 argue that it is impossible to 'make judgments outside of a context; the question is always what context matters or what context should we make matter for this moment'.

¹²⁷ See eg S. Woolman 'Out of order? Out of balance? The limitation clause of the final Constitution' (1997) 13 *South African Journal on Human Rights* 102 at 124–128 (showing how judges, 'otherwise sceptical' of storytelling (124), rely on stories in their judgments).

¹²⁸ 'Horizontal application of fundamental rights and the threshold of the law in view of the Carmichele saga' (2003) 19 *South African Journal on Human Rights* 517.

¹²⁹ *Id* 530.

¹³⁰ Van der Walt's article was prompted by the case of *Alix Carmichele*, who was brutally assaulted by a

tween the generalising approach of the Roman-Dutch law of delict, and the formalism of the English law of civil procedure which was received in South Africa in the nineteenth century. The reluctance of South African courts to recognise new causes of action, is a relic of the rigidity of the English writ system – a system which was abolished in England in the 1870s, but which lives on in the South African law of procedure.

Van der Walt thus shows how reliance on stereotypical views about a foreign legal system, can serve to hide the shortcomings of one's own. By portraying the English law of torts as casuistic, formalistic and rigid, South African legal scholars were able to highlight the generality, flexibility and rationality of their own, Roman-Dutch-based private law. The comparison with English law (or, rather, with a caricature of English law), together with the dichotomy between substance and procedure, blinded scholars to the formalism and rigidity of South Africa's law of procedure, and the ways in which it had infiltrated private law. The often exclusionary effects of judicial interpretations of the requirement that a cause of action must be established, were thus masked behind the supposed generality and flexibility of the law of delict.

This example further illustrates a point already made above: that the belief that our legal or constitutional arrangements are exceptional or unique, itself rests upon (an often implicit) comparison with other legal systems, and that a closer examination of our assumptions about other legal systems is likely to promote critical reflection on our own interpretive assumptions and practices.¹³¹ By extending and deepening our understanding of foreign law, we may become more aware of the contradictions and flaws inherent in our own, and thus better able to imagine more humane alternatives.

The second example is meant to illustrate the ways in which a particular reading of the constitutional history (or fragments of the history) of a foreign country, may shape perceptions of the range of legitimate options in interpreting one's own national constitution. The example is a familiar one in the literature on comparative constitutional law, namely the history of the *Lochner* Court in the United States, and the ways in which foreign courts have invoked the ghost of *Lochner* in cautioning and justifying judicial self-restraint. In a perceptive article, Choudhry¹³² shows how *Lochner* has served as a negative model of constitutionalism, not only in the United States, but also in Canada.¹³³ He explores the different meanings ascribed to *Lochner*, and argues that

man who had a previous conviction for indecent assault, and who had been released on bail pending his trial on a charge of rape. It was while out on bail that he assaulted Carmichele. Carmichele claimed damages from the state, arguing that his release on bail constituted a breach of the state's duty to protect citizens from crime. The High Court granted absolute immunity from the state on the basis that the state was not under a legal duty to protect Carmichele from harm. The judgment was upheld by the Supreme Court of Appeal. Carmichele then appealed to the Constitutional Court, which found that the High Court and Supreme Court of Appeal should have considered Carmichele's constitutional rights. The matter was referred back to the High Court which, in an about-turn, held that the facts founded a good claim in law. Van der Walt asks why the result which was eventually reached in view of the indirect horizontal application of the Bill of Rights, could not also have been reached on the basis of the general principles of delict.

¹³¹ See 3.3 above.

¹³² 'The *Lochner* era and comparative constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1.

¹³³ *Lochner* has featured far less prominently in South African constitutional discourse. Thus far, the history of that era has been expressly invoked by the Constitutional Court on only one occasion. As indicated above (see 3.7 above), Chaskalson P. alluded to the dangers of *Lochnerism* in *Ferreira v Levin NO* (supra), in

'Lochner discourse' provides a fine example of a dialogical-style of comparative constitutional analysis, where legal actors engage with comparative materials in an attempt to come to a more adequate understanding of the normative and institutional underpinnings of their own constitution. In his view, the history of the *Lochner* era provides a rich resource for constitutional debates over the 'appropriate relationship between state and market', 'the nature of the judicial role', and 'the institutional costs of sustained and prolonged conflict between courts and democratically accountable institutions'.¹³⁴

Not everyone agrees that *Lochner* discourse has much to contribute to current constitutional understandings. According to Stuart Woolman,¹³⁵ *Lochner* is a rhetorical device which does more to mystify than to edify. Woolman offers a number of arguments in support of his contention. For instance, he points out that today, the overwhelming majority of constitutional actors (whether in the United States, Canada, or South Africa) are united in their opposition to the judicial ideology and economic libertarianism that characterised the jurisprudence of the *Lochner* Court. *Lochner* has become an anachronism in an age in which the need for labour and social welfare legislation is widely accepted.¹³⁶ For this reason, *Lochner* has very little explanatory value. It serves as a symbol of constitutional failure, or as shorthand for serious judicial encroachments on the functional spheres of the coordinate branches. However, it has very little to offer constitutional interpreters who are confronted with the tension between democ-

rejecting the broad interpretation given to the right to personal freedom by Ackermann J. However, it might be a mistake to assume, on the basis of that solitary reference, that *Lochner* discourse has played an insignificant role in the development of the Court's jurisprudence. Given its pervasive influence on the constitutional jurisprudence of some of the countries that are most widely referred to by the Court, it is at least conceivable that the narrative of *Lochner* may have helped shape the Court's responses to a variety of issues, even in cases where the narrative was not invoked expressly. Moreover, it is possible that some of the Court's styles of reasoning and adjudicative reflexes (eg the avoidance of contentious normative questions) may have been shaped by its perception of the dangers inherent in *Lochnerism*. Some commentators view the rejection in *Ferreira* of Ackermann J's expansive reading of freedom as a defining moment in the development of the Court's jurisprudence. For I. Currie 'judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138 at 150-155, *Ferreira* represents a victory of judicial 'minimalism' over attempts to develop a substantive vision of constitutionalism. It marks a preference for judgments that are incompletely theorised, and that rest upon narrow, rather than broad grounds. That the majority in *Ferreira* expressly linked their rejection of Ackermann J's substantive vision of judicial review to their reading of *Lochner*, may have been more than a mere historical coincidence.

¹³⁴ Choudhry (2004) 2 *International Journal of Constitutional Law* 1 (supra) 52.

¹³⁵ 'Metaphors and mirages: some marginalia on Choudhry's "The Lochner era and comparative constitutionalism" and ready-made constitutional narratives' (2005) 20 *SA Public Law* 281.

¹³⁶ Woolman refers approvingly to Ackermann J's refutation in *Ferreira* (supra) of the fears raised by Chaskalson P. Ackermann J wrote at para 65: 'I believe this fear to be unfounded. *Lochner*... was decided in 1905 at a time and in a socio-economic context completely different from ours in 1995. I do not believe that we ought to allow ourselves to be haunted by the *Lochner* ghost. It is to me inconceivable that the broad sweep of labour legislation in this country could be struck down because of an argument that it infringed rights of contractual freedom protected by the Constitution.' See also G. Peller 'The metaphysics of American law' (1985) 73 *California LR* 1151; and M. Horwitz 'The transformation of American law, 1870-1960' (1992) 7 (showing that the substantive due process jurisprudence of the *Lochner* Court was firmly rooted in the representational metaphors of classical legal consciousness, and that attempts to understand and criticise it in terms of contemporary understandings of freedom, equality and the judicial function are therefore misguided).

racy and constitutionalism in areas marked by considerable disagreement over normative issues and/or the appropriate measure of judicial activism or restraint.

But while at one level *Lochner* discourse serves merely to confirm general truths on which constitutional interpreters are mostly agreed in any event, at another level it is not nearly as innocent. Woolman shows that the focus on *Lochner*, rather than cases like *Brown v Board of Education*¹³⁷ or *Roe v Wade*,¹³⁸ already frames the problem of judicial review in a particular way. *Lochner* discourse rests upon the questionable assumption that judges can avoid relying on their own political beliefs. But, as Woolman points out, politics played a significant role in constitutional adjudication in the United States long before the advent of the *Lochner* era, and it continues to do so today. By focusing on a line of decisions that rested on a judicial ideology and economic theory that appear strangely anachronistic today, the impression is created that the politics of adjudication can be overcome. However, closer scrutiny of constitutional history is likely to produce the opposite conclusion: that the politics of adjudication is intractable and irremediable. *Lochner* discourse tends to result in a flight from substance and a turn to formalist and proceduralist modes of adjudication. It tends to perpetuate the fallacy that judges act in an apolitical manner when they base their decisions on formal grounds, or when they avoid difficult normative issues. Woolman argues that *Lochner* discourse misrepresents the real dangers facing constitutional adjudication in South Africa:

'The real trap for South Africa's courts ... is neither minimalism nor a *Lochneresque* maximalism. The real danger is a radically under-theorised jurisprudence that fails to signal to other political actors, and the citizenry, the kinds of justification that the final Constitutional requires for every exercise of public and private power.'¹³⁹

4.3 Pitfalls and politics

It would appear, then, that the interplay between our understanding of national and foreign law is fraught with difficulty. First of all, there is the risk of misunderstanding foreign law. Inevitably, our best efforts at understanding foreign legal rules, concepts and interpretations come up against the limits of our understanding of the legal culture and context in which they are embedded. Invariably, we fall back onto the conceptual and cognitive framework that is part and parcel of our own legal culture in trying to understand foreign law. Add to that limited time and resources, and the instrumentalist attitude which characterises most of our forays into foreign legal territory (that is studying foreign law not as an end in itself, but as a means to enhance our understanding of our own national law), and misreadings of foreign legal materials appear inevitable.

But perhaps we should not be overly concerned about the likelihood of misunderstanding. If the aim is to enhance our understanding of our own national law through comparative analysis, the fact that some of the finer nuances of foreign law and foreign

¹³⁷ 347 US 483 (1954).

¹³⁸ 410 US 113 (1973).

¹³⁹ Woolman (supra) 313.

legal cultures are likely to elude us, is not necessarily fatal. As Mark Tushnet¹⁴⁰ suggests, for foreign constitutional experience to be useful, it must first pass through the categories and presuppositions of one's own legal culture. The metaphor of filtration is interesting, as it captures both the role of pre-understanding in interpretation, and the risk of simply reducing foreign experience to what we already know. To learn from foreign experience, we need to filter out what is considered irrelevant for our purposes.¹⁴¹ Much of this process of filtration occurs at the level of tacit assumptions and presuppositions, and does not rise to the level of conscious deliberation. What we can learn from foreign experience, is thus restricted by deeply ingrained ways of looking at and ordering our world. At the same time, however, it would be a mistake to assume that the categories and presuppositions through which foreign experience is filtered, are fixed and immutable. As we become familiar with a foreign legal system, we become more aware of the limits of our own categories and presuppositions in trying to make sense of it, and we slowly acquire new ways of thinking about familiar problems. In the process, the categories and presuppositions through which foreign legal materials pass, may themselves undergo adaptations and transformations, which may lead us to look differently at foreign experience than before, and to start emphasising aspects we previously thought unimportant, and vice versa.

A second danger is that, by focusing on certain aspects of foreign experience, we might misrepresent the challenges facing us, or misinterpret the local context. It is simply not always the case that comparative analysis brings the own social and historical context more sharply into focus. Sometimes, it does more to avert our gaze from local needs and circumstances. Woolman's critique of *Lochner* discourse demonstrates the dangers inherent in uncritical reliance on foreign models or anti-models. Consider, also, the judicial debate in *Du Plessis v De Klerk*,¹⁴² a case in which the Constitutional Court was confronted with the question whether the Bill of Rights in South Africa's interim Constitution could be applied directly to relationships between individuals. In coming to the conclusion that the rights in the Bill of Rights generally did not have direct horizontal application, Kentridge AJ in his leading majority judgment relied heavily on the position in Canada and Germany.¹⁴³ In his dissenting judgment, Kriegler J was critical of the reliance placed on foreign law by the majority. He insisted that an examination of the South African Constitution was the proper starting point of the Court's inquiry, and that any comparative study would have to be undertaken with great caution, taking due cognisance of South Africa's unique constitutional and political history, and the Constitution's 'unabashedly egalitarian and libertarian' underpinnings.¹⁴⁴ Unlike the majority, he found that the Bill of Rights did have direct horizontal application.

¹⁴⁰ (Supra) 1308.

¹⁴¹ Cf Tushnet's observation (id 1308) that 'we can learn from experience elsewhere only to the extent that we avoid too much detail about that experience'.

¹⁴² (Supra).

¹⁴³ Paras 33-41 (per Kentridge AJ).

¹⁴⁴ Para 126.

My point here is neither that Kriegler J was right and the majority wrong,¹⁴⁵ nor that the court in *Du Plessis* should not have considered comparative law. It is, rather, a more general one: that comparative analysis is not always conducive to substantive reasoning, and that it may sometimes frame the court's inquiry in such a way that important social and historical considerations are hidden from view. In *Du Plessis*, the main problem with the comparative analysis undertaken by Kentridge AJ seems to be that it was used not to develop substantive lines of reasoning and thus to engage with the South African context, but as authority for a particular standpoint.¹⁴⁶ Put differently, Kentridge AJ's analysis of foreign jurisprudence displayed the same formalistic understanding of law as his interpretation of the relevant constitutional provisions. Both are characterised by an unwillingness to go beyond the apparent meaning of legal rules and standards, and to explore the moral and political reasoning underlying them.

It seems likely, then, that the formalism of Kentridge AJ's judgment is a product of his general vision of law, and has little if anything to do with his espousal of the comparative method. And yet, we may well ask why it is that lawyers and judges who embrace the new comparativist sensibility, often fall back uncritically on a formalist vision of law. Why is it that interpretive habits and reflexes which are arguably at odds with the spirit of the Constitution, have infiltrated the comparative work of constitutional lawyers and judges? Perhaps it is simply because South African lawyers and judges find it difficult to break out of their old, formalistic frame of mind. But perhaps, it may also have something to do with theoretical assumptions and biases that are deeply ingrained in the discipline of comparative law. I have argued above that these include comparative law's traditional focus on rules, concepts and institutions, and its unquestioning acceptance of the distinction between public and private law. Perhaps, then, it is not far-fetched to suggest that Kentridge AJ found tacit support for his formalist vision of law in the idea that it is the task of the comparativist simply to match the rules of one system to those of another. Similarly, it seems reasonable to presume that the sentiment that South Africa's Roman-Dutch based private law should be shielded from excessive constitutional interference, which appears to underlie much of his judgment, was reinforced and 'naturalised' by the status of the public/private law distinction in comparative law.¹⁴⁷

¹⁴⁵ There is much in Kriegler J's judgment which is problematic. See J. van der Walt 'Justice Kriegler's disconcerting judgment in *Du Plessis v De Klerk*: Much ado about direct horizontal application (read nothing)' 1996 *Tydskrif vir Suid-Afrikaanse Reg* 737; 'Perspectives on horizontal application: *Du Plessis v De Klerk* revisited' (1997) 12 *SA Publiekreg/Public Law* 1 for criticisms of some of the assumptions underlying Kriegler J's approach.

¹⁴⁶ Cf S. Woolman and D. Davis 'The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final constitutions' (1996) 12 *South African Journal on Human Rights* 361 at 368-371. The authors also criticise Kentridge AJ for his selective use of foreign jurisprudence, and for failing to get to grips with the intricacies of the United States state action doctrine.

¹⁴⁷ This may help to explain why Kentridge AJ viewed the practice in other countries, where some form of direct horizontal application does occur, as either exceptional (eg Ireland) or problematic and misguided (eg the United States).

5. Concluding remarks

At the beginning of this article, I suggested that the distinction between national and transnational law is becoming increasingly fluid. That is not to say that the differences between national legal systems are about to disappear. The point is rather that, increasingly, our understanding of national legal rules and principles is framed by our knowledge of foreign legal systems. Comparative law provides us with a history of examples and a history of errors. It offers us the possibility to affirm what we have in common with other nations, and to articulate that which sets us (or our legal system) apart. It broadens the range of interpretive possibilities, and often serves to bring the own historical and social context more sharply into focus.

However, I have also made a few cautionary remarks. It is my belief that our sense of exhilaration at the possibilities of comparative law should be tempered by a critical sensibility. What is required is a suspicion of 'grand narratives' which make current constitutional understandings appear natural and necessary,¹⁴⁸ and an awareness of the social and historical contingency of 'global constitutionalism' and the power relations within which it is enmeshed.

What is further required is a detailed analysis of the ways in which courts engage with comparative materials. Even on a superficial overview of South African case law, it is clear that the critical possibilities of comparative analysis are not always realised. Although the Constitutional Court generally uses comparative materials not as authority for a particular standpoint, but to develop lines of argument and to engage with the South African context, there are decisions in which foreign law is invoked to preclude, rather than to facilitate, reasonable debate, or in which the position in foreign countries is oversimplified, or in which the Court merely asserts that the position in South Africa is different from those in foreign countries, without attempting to explain the relevant differences.¹⁴⁹

Decisions such as these remind us of the difficulties attending comparative analysis. They should also alert us to the dangers inherent in the development of a new comparative orthodox. We need to be mindful of the politics of comparative law – that is, the ways in which assumptions, categories and distinctions which have traditionally informed the comparative enterprise, privilege certain ways of seeing over others. Our sense of exhilaration at the possibilities of comparative law thus needs to be held in balance by a critical understanding of the pitfalls and politics of comparative analysis.

¹⁴⁸ These include claims of an emerging universal value consensus, and attempts to resolve the contradictions inherent in global constitutionalism through institutional means.

¹⁴⁹ Cf Chaskalson P's statement in *S v Makwanyane* (supra) para 110 that the Court should not emulate the limitation test which was laid down by the Canadian Supreme Court in *R v Oakes*. He asserted that there are differences between the South African and Canadian constitutions, but gave no indication what the relevant differences are.

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