

This article is published in a peer-reviewed section of the Utrecht Law Review

## The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law

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### 1. Introduction

Among the many trends in research on the theory of interpretation and legal argumentation is the discussion between scholars about the role of *foreign law* and the comparative method in interpreting and applying legal texts.<sup>1</sup>

The phenomenon of the *global interaction* between national supreme and constitutional courts is widespread and is growing rapidly. Some examples might be useful for sketching out this controversial development in current constitutionalism. The constitutional courts which are most active in using *foreign law* include the established jurisprudence of the Supreme Courts of Canada<sup>2</sup> and Israel and the frequent references that constitutional judges in Latin American countries such as Argentina, Brazil and Colombia make to the Supreme Court of the United States. The Indian Supreme Court as well as the constitutional courts of Central and Eastern Europe are also extremely interesting examples of courts systematically using *foreign inferences* in interpreting national constitutions or in resolving national legal disputes. Unexpected comparative references may also be tracked down in the jurisprudence of France's Court of Cassation (*Cour de cassation*) (in particular under the former Chief Justice, Guy Canivet).<sup>3</sup>

In this context, the South African Constitutional Court jurisprudence constitutes a unique experience. Section 39 of the 1996 Constitution empowers the judges to incorporate *extra-systemic legal information* for interpreting the post-apartheid Bill of Rights. Because of this provision, the South African Constitutional Court developed an innovative hermeneutical technique based on *extra-systemic inferences*. For this reason, South African constitutional adjudication has become one of the most interesting on a global level because the judges in Johannesburg had to tackle the problem of systematically setting up the criteria and limits of this practice.

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1 See P. Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates*, 1992, p. 27, in which comparative law is explicitly listed among interpretive methods; K. Zweigart & H. Kötz, *Einführung in die Rechtsvergleichung*, Vol. I, 1984; also see the extensive comments of B. Markesinis, *Comparative Law in Courtroom and Classroom: The Story of the Last Thirty-Five Years*, 2003.

2 See the study of the former Canadian Supreme Court judge, Justice C. L'Heureaux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of Rehnquist Court', 1998 *Tulsa Law Journal* 34, pp. 15 et seq. and E. Rivlin, 'Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty', 2009 *Florida Journal of International Law* 21, pp. 1-27.

3 On this matter see the study on the use of comparative law by the *Cour de cassation*, by G. Canivet, 'The Practice of Comparative Law by the Supreme Courts: Brief Reflexions on the Dialogue between the Judges in French and European Experience', 2006 *Tulane Law Review* 80, pp. 1377-1400.

This article carries out a quantitative and qualitative analysis of 11 years of South African constitutional jurisprudence in which the Court has transformed a quantity of *extra-systemic* legal information (foreign law) into *judicial inferences*. In this context, four recurrent patterns of argument can be seen to occur: (1) *probative importation*; (2) *scanning the horizon*; (3) the mechanism of *setting two extremes*; (4) *comparative distinguishing*.

Two important consequences follow: first, the connection between interpretation, balancing and the comparative method appears in the realm of the global community; second, the classical concept of 'persuasiveness' has been emphasized, that is, the ability of a legal system and its interpreters to 'induce adherence' not just of the internal addressees but also of a wider 'audience'.<sup>4</sup>

### 1.1. Public law doctrine and the phenomenon's definition

Public law doctrine has been working on a broad and detailed classification of the phenomenon, speaking of: (1) *cross-judicial influence*;<sup>5</sup> (2) *cross-constitutional influence* <sup>6</sup> or *cross-constitutional fertilization*; (3) *judicial transplant*;<sup>7</sup> (4) *trans-judicial communication* or *judicial dialogue*;<sup>8</sup> and (5) *trans-judicial borrowing* or *precedent borrowing*.<sup>9</sup> This last definition explicitly connects the entire phenomenon with Anglo-American law, which follows the binding precedent principle (in its various forms). Thus modern precedent borrowing between constitutional judges would be an expansion of a typical common law format that evolved from a historically common practice among the judges of the ex-Commonwealth countries. Beginning in the 19th century these judges largely used foreign court precedents, generally British ones and in particular those of the *Privy Council*. The Privy Council was the court of final appeal for colonies and dominions, a function that it still performs today in relation to a small group of Caribbean countries. Its function of ensuring the exact observation and interpretation of the law deeply influenced the development of law in countries such as New Zealand, Australia, India, South Africa, Hong Kong, Caribbean countries and Canada (along with other countries in the colonial area of East and Southern Africa).<sup>10</sup>

Currently, as we shall see, the phenomenon of 'borrowing' precedents and interpretive solutions or argumentation models goes well beyond the legal rationale and the geo-cultural borders that defined the relationship between the British Empire's *centre* and its *peripheries*. The analysis of constitutional court rulings in legal systems that have adopted new constitutional texts (like Canada in 1982 or South Africa

4 This idea obviously refers to Chaim Perelman's theory of legal argumentation according to which 'the orator' (in our case the interpreter) has the objective of inducing 'adherence' by a specific 'audience' through rational argumentation (whose parameters and criteria are provided by the author). The argumentation is thus organized as an 'instrument' capable of influencing the audience (socio-psychological conception of argumentation). He elaborated on the notion of a 'universal audience' as 'a whole of *enlightened and rational* individuals who offer themselves to the game of argumentation' (or the potential whole of all those who develop argumentative skills). This leads to a differentiation between 'persuading' and 'convincing'. The first notion is connected to the idea of 'efficacy' of argumentation (or inducing the adherence of a limited audience), whereas the second is connected with the idea of 'validity' (or reaching the approval of the universal audience about the accuracy of the logical arrangement of the argument's elements), see C. Perelman & L. Olbrechts-Tyteca, *La Nouvelle Rhétorique. Traité de l'Argumentation*, 1958. In this specific case, the audience (the whole of the Member States) is objectively limited; thus the notion of *persuasion* seems more appropriate. On the notion of 'persuasiveness' see also P. Glenn, 'Persuasive Authority', 1987 *McGill Law Journal* 32, p. 261.

5 See A. K. Thiruvengadam, *Legal Transplants through Judiciaries: Cross-judicial Influences on Constitutional Adjudication in the Post World War II Era. A Study in Comparative Constitutional Law Focusing on Theoretical and Empirical Issues*, Paper on the Issue of Transjudicial Borrowings, New York University, 2001.

6 See S. Choudhry, 'Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation', 1999 *Indiana Law Journal* 74, p. 821.

7 See B. Ackerman, 'The Rise of World Constitutionalism', 1997 *Virginia Law Review* 83, no. 4, pp. 771-798.

8 See A.M. Slaughter, 'A Typology of Transjudicial Communication', 1994 *University of Richmond Law Review* 29, pp. 99-137; A.M. Slaughter, 'A Global Community of Courts', 2003 *Harvard International Law Journal* 44, pp. 191-219. It should be noted that the author was one of the first to start the debate on this practice.

9 See K.L. Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models', 2003 *International Journal of Constitutional Law* 1, p. 296.

10 New Zealand replaced the Privy Council with a new local Supreme Court (as a court of final appeal) on 1 January 2004. For more details see P. Nevill, 'New Zealand: the Privy Council is Replaced with a Domestic Supreme Court', 2005 *International Journal of Constitutional Law* 3, p. 115. In some ex-Commonwealth countries, appealing to the Privy Council was only recently formally annulled; in others, such as South Africa, it was abolished a long time ago. The case of Australia is worth noting: only in the 1980s did it eliminate this mechanism that put the national legal system in direct communication with the British one which, as stressed by Australian doctrine, had a profound legal influence. The mechanism of the Privy Council is analysed by P.K. Tripathi, 'Foreign Precedents and Constitutional Law', 1957 *Columbia Law Review* 57, p. 319. See also the study of S. Gardbaum, 'Japanese Law Symposium: the New Commonwealth Model of Constitutionalism', 2001 *American Journal of Comparative Law* 49, pp. 707-760.

in 1996) or in legal systems like Israel, shows that judges increasingly resort to practices of comparing constitutional law, expressly referring to and citing rulings and interpretive solutions of constitutional courts, including ones of Romano-Germanic tradition. Interpretive solutions are now being actively sought and borrowed by courts from different legal traditions, a practice that no longer arises out of subordination.

Subsuming this phenomenon under the function of interpretation allows us to refer to various theories and procedures of legal reasoning, thereby making it possible to verify whether we are dealing with a legally acceptable form of legal argumentation.<sup>11</sup> It is no longer a question of verifying the existence of this phenomenon as fact: the evidence is simply irrefutable. The issue is, rather, to analyse how this *extra-systemic* information is integrated in the interpretive phase and how the comparative method is actually used.

The positions of legal scholars are polarized between *celebratory* approaches toward the phenomenon and radical scepticism.<sup>12</sup> This study proposes to evaluate if and to what extent the comparative method can be a resource for constitutional judges,<sup>13</sup> in particular assessing the risk that its use could give judges an uncontrollable and arbitrary freedom when interpreting and applying the law.

## 1.2. Scenarios

Let us propose some hypotheses regarding the political and legal scenarios of the circulation of interpretive paradigms. We have the impression of standing before a potentially important transformation of liberal democratic constitutionalism; the increasing number of studies in this area show that constitutional scholarship has noticed the deep changes in action.<sup>14</sup>

First of all, we could imagine the emergence of cultural and linguistic areas where osmosis between systems takes place or the development of relationships between geopolitical areas sharing a common

11 Here reference is made to Robert Alexy's reconstruction of argumentation theories and techniques. In his famous study the author carefully examines the 'canons of interpretation' according to Von Savigny's models (grammatical, logical, historical and systematic elements), Larenz's (literal meaning, contextual meaning, the regulatory purposes, aims and normative intentions of the historical legislator, objective-teleological criteria, and conformity of interpretation to the constitution), and Wolff's (philological, logical, systematic, historical, comparative, genetic, and teleological interpretations) before dealing with his *theory of rational legal argumentation*; see R. Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, 1989, p. 3.

12 The ambivalence of the positions and the opposing views is evident. See W. Osiatynski, 'Paradoxes of Constitutional Borrowing', 2003 *International Journal of Constitutional Law* 1, pp. 244-268; W. Ewald, 'Comparative Jurisprudence (II): the Logic of Legal Transplant', 1995 *American Journal of Comparative Law* 43, p. 489; H. Klug, 'The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?', 2003 *Montana Law Review* 64, p. 133; D.E. Childress, 'Using Comparative Constitutional Law to Resolve Federal Questions', 2003 *Duke Law Journal* 53, p. 193.

13 See the extensive analysis in J. Fedtke & B. Markesinis, *Judicial Recourse to Foreign Law: a New Source of Inspiration?*, 2006.

14 It is interesting to note how many studies on this method of constitutional interpretation currently come from the United States where, paradoxically, as stressed by Ackerman, *supra* note 7, pp. 771-773, very few references are made to foreign constitutional jurisprudence or to comparative public law. In this context, the attitude of the Supreme Court of the United States is labelled by the author as 'emphatic provincialism'. The same outlook can be seen in P. McFadden, 'Provincialism in United States Courts', 1995 *Cornell Law Review* 81, p. 4. Other studies give voice to the growing interest in a dialogue between courts. On the subject see S.K. Harding, 'Comparative Reasoning and Judicial Review', 2003 *Yale Journal of International Law* 2, pp. 409-464, in which the attitude of the US Supreme Court, intent on creating a 'highly autonomous' national system (p. 412) is compared with the opposite attitude of the Canadian Supreme Court, which makes wide use of comparison with foreign systems. The author analyses the consequences that comparative law has on the processes of *decision-making* and the inevitable problems of systemic consistency that are triggered. On this matter also see K. Greenwalt, 'Free Speech in United States and Canada', 1992 *Law and Contemporary Problems*, Winter, p. 5; C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', 2000 *Oxford Journal of Legal Studies* 20, p. 499. Also see the important study of Choudhry, *supra* note 6, pp. 819-892, in which the author emphasizes the opinion of US Supreme Court Justice Scalia (in the famous and controversial *Lawrence v. Texas*, 539 US, 2003) according to which 'comparative analysis is inappropriate to the task of interpreting a Constitution' (p. 820). In this ruling, which declared unconstitutional the Texan law criminally punishing consensual homosexual sexual relations, the US Supreme Court took into consideration the judgments of the Strasbourg Court, which had ruled in the same way in numerous cases (in particular, Justice Kennedy cites *Dudgeon v. United Kingdom*); this explains the violent reaction of Scalia, who had often expressed himself radically against the *comparative constitutional references approach* (as in *Stanford v. Kentucky*, 429 US, 1989). Choudhry emphasizes instead the importance of the Canadian and South African models of openness toward 'extra-systemic jurisprudence'. The author hypothesizes that the *Canadian Charter of Rights and Freedom* has become a source of inspiration for analogous texts of other states: South Africa, Israel, Hong Kong and New Zealand (see *supra* note 6, p. 822, notes 6-9). See also M. Tushnet, 'The Possibility of Comparative Constitutional Law', 1999 *Yale Law Journal* 108, pp. 1225-1309; D. Fontana, 'Refined Comparativism in Constitutional Law', 2001 *UCLA Law Review* 49, p. 539; V.C. Jackson, 'Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality" Rights and Federalism', 1999 *University of Pennsylvania Journal of Constitutional Law* 1, p. 583. On the French front, see the study of J. Alard & A. Garapon, *Les Juges dans la Mondialisation. La Nouvelle Révolution du Droit*, 2005, and the analysis of one of the members of the Constitutional Council: O. Dutheillet de Lamothe, *Le constitutionnalisme comparatif dans la pratique du Conseil constitutionnel*, at 7th World Convention on Constitutional Law, Santiago, Chile (16 January 2004).

historical and political legacy (like the dialogue between the courts of countries formerly part of the same colonial dominion, such as the *Commonwealth*). We could then deduce that the choice of dialogue partners is not grounded in legal and systemic compatibility but in historical reasons or political and cultural influence. In addition to this, the format of common law allows judges greater familiarity in using case studies and in citing precedents. These elements could legitimately cause us to envisage the creation of a common law country *bloc* able to develop legal, political, economic and diplomatic influence on countries of a different legal tradition. Even though scholarship has for some time stressed the convergence in diverse legal fields, a contrast between 'legal families' can currently be seen in the political and legal dynamics of international criminal jurisdictions (limited, however, to criminal and criminal procedural matters).<sup>15</sup>

The *flow* of jurisprudence today, however, demonstrates a sizable volume of exchange between courts of *common law* countries and *civil law* ones, alleviating doubts about the creation of an opposition between legal and cultural *enclaves*.

Second, there is some perplexity about the limits of using foreign law since it can create inconsistency and confusion within a system. In fact, the study of this practice must consider the underlying risks regarding the arbitrary way in which judges are free to choose this or that system or this or that judgment, by investigating the problem of compatibility between the systems whose legal orientation is being *adopted* and those that import interpretive solutions.<sup>16</sup>

A doubt lurks, whose validity is to be verified, that in reality this practice hides an argumentative ploy capable of *fabricating* the effect of the audience's adherence to the interpreter.<sup>17</sup> National constitutional judges would simply confirm their authority by aligning themselves with the interpretations of judges from powerful democracies in accordance with a somewhat surreptitious rationale of subjection. For this reason it is important to evaluate if the spread of interpretive paradigms implies: (a) subjection; (b) mimesis; (c) affiliation with cultural and economic zones; (d) sharing of historical and political ties; or (e) derivation of constitutional formal models. Regarding this last case, we should verify whether the phenomenon is a particular feature of those systems having a new generation *Bill of Rights*. In fact, if we consider how the lists of fundamental rights of Canada, Israel, South Africa and Hong Kong are strongly linked to the circulation of models and how these are the legal systems that have a more developed

15 The use of *extra-systemic* law, apart from being a widespread practice between international and national judges (vertical circulation) and between different international jurisdictions (horizontal circulation), is a dynamic both known and discussed within the framework of ad hoc international criminal jurisdictions. International judges make use of different national criminal legal systems, though still in a rather asystematic manner and with an obvious lack of objectifying procedures. In international criminal justice there is, nevertheless, much perplexity about this methodology, especially concerning its scope. In addition to this, reference to doctrine and jurisprudence from different countries takes place in a slightly 'random' way. Since neither limits nor, more importantly, criteria of predictability of the national laws called upon have been set out, the methodology of judges in international criminal jurisdictions often turns into an evident imbalance of the right of defence. Some commentators have noted how the use of comparative law in international criminal jurisdictions often becomes a form of *ex-post* legitimacy of the judges' decision-making reasoning (see E. Fronza & N. Guillou, 'Etude critique des fragments existants de droit pénal commun: le crime de génocide', in M. Delams-Marty, *Variation autour d'un droit commun*, 2001, pp. 273-296; W.W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law', 2002 *Michigan Journal of International Law* 24, pp. 1-101. This judicial dynamic has some very interesting features, though it also has many problematic aspects. First, yet again international criminal courts prove to be a laboratory of new judicial methodologies; second, the international character of the courts – both in terms of the judges composing them and the courts' universalistic purpose – forces the development of legal thought on the use of multiple national laws in a comparative perspective. The conception of the International Criminal Court confirms all this. In any case, the problem has also been considered in reference to other courts with a supranational scope such as the European Court of Human Rights (see L. Favoreu, 'Corti costituzionali nazionali e Corte europea dei diritti dell'uomo', 2004 *Rivista di diritto costituzionale* [Constitutional Law Review], pp. 3-24).

16 Only a few lament the lack of rigorous constitutional theory on the circulation of interpretive paradigms: R.P. Alford, 'In Search of a Theory for Constitutional Comparativism', 2005 *UCLA Law Review* 52, pp. 669-714.

17 In particular for scholars coming from Romano-Germanic legal traditions based on a positivist framework, this represents an 'uncomfortable' dilemma because it would imply accepting a conception of judicial review as jurisprudential activity suspended between judicial and political realms. The problem in terms of legal theory and philosophy is very complex and cannot be dealt with here. Some important studies on the change in the limits of the judiciary function (not just regarding constitutional justice) can be found in C. Guarnieri & P. Pederzoli, *La puissance de juger*, 1996; L.M. Friedman, *Total Justice*, 1994; N.C. Tate & T. Vallinder, *The Global Expansion of Judicial Power*, 1995; A. Garapon, *Le Gardien des promesses*, 1996; W.K. Olson, *The Litigation Explosion*, 1991; H. Jacob et al., *Courts, Law and Politics in Comparative Perspective*, 1993; M. Cappelletti, *Giudici legislatori?*, 1984. On judges as *policy makers*, see M.M. Feeley & E.L. Rubin, *Judicial Policy Making and the Modern State*, 1998. Aside from the implicit contradictions in the judiciary function demonstrated by the theories of American and Scandinavian legal realism (see W.E. Rumble, *American Legal Realism*, 1968; G. Tarello, *Il realismo giuridico americano*, 1962); also see the analysis of the concept of *jurisprudence prétorienne* by O. Cayla, 'La chose et son contraire (et son contraire, etc.)', 1999 *Les Etudes philosophiques*, no. 3, p. 307; O. Cayla, 'La qualification ou la vérité du droit', 1993 *Droits, Revue Française de Théorie Juridique* [French Review of Judicial Theory], no. 18, pp. 3-16.

practice of borrowing interpretive paradigms, we can legitimately ask if constitutional judges, when interpreting their respective *Bill of Rights*, autonomously sense the need to check the views of their foreign ‘colleagues’ whose constitutions are endowed with similar recent charters of fundamental rights.<sup>18</sup>

Therefore, it is important to investigate the patterns of ‘migration’, checking to see whether we are simply dealing with a walk along a kind of pilgrimage route with obligatory stops at the ‘sanctuaries’ of contemporary constitutionalism.

To complete the picture of the scenarios, we should mention *bottom-up globalization*. The notion refers to putting systems (and interpretive, cultural and legal particularities) into global communication in which judges become main actors (sometimes autonomously and without ties to governmental activities or foreign policy). In this perspective, interpretive paradigm circulation becomes another force (from the bottom) that pushes towards the creation of interdependence and connection between systems outside the mechanisms strictly controlled by governments and legislatures.

In addition, the role of technology is also to be investigated. If we think of how the practice under examination is only conceivable in its current state with the tools of computerized communication, we can find support for this hypothesis in the fact that many bodies of constitutional justice created after the post-communist transitions in Central Eastern Europe immediately built efficient websites that made national constitutional jurisprudence available in *lingua francas* as a step for creating international political legitimacy. It is worth noting the website of the Supreme Court of Estonia, which was already running halfway through the 1990s, and the website of the Hungarian Court. A confirmation of the role of technology is exemplified by the judgment in which the Hungarian Constitutional Court abolished capital punishment in 1990, declaring it unconstitutional under the new legal system.<sup>19</sup> As we will see, the judicial reasoning contained in the court’s decision began a significant ‘migratory journey’ as an example of an alternative interpretive vision to the reasoning of the US Supreme Court. The most important traces of it (which demonstrate the penetration of the Hungarian interpretive paradigm) are found in the analogous ruling of the South African Constitutional Court, which decided on the same delicate issue in 1995.<sup>20</sup>

### 1.3. What exactly is the circulation of extra-systemic legal information and what are its implications?

The phenomenon we are observing has an underlying process: enlarging the interpretive and argumentative parameters that a judge may resort to when assigning meaning to a normative utterance, balancing and constructing a court decision’s rationale.

The phenomenon defined as ‘dialogue’ between judges leads not only to a transformation in interpretive practices but also to the idea of the legal system as a closed one. According to this rationale, the meaning of an utterance or resolving an issue of constitutionality could potentially be worked out using infinite *extra-systemic* parameters from an undefined number of legal systems other than the national one.

In other words, this type of reasoning would chip away at the idea of a closed group of positive legal norms. Rather than defining the norm applicable to a specific case, this closed system of positive legal norms defines and limits the parameters that a judge may use for interpreting the norm on which he bases his decision. The concern here is that using *extra-systemic* information could cause a lack of argumentative rationale and system coherence, leading to a crisis of the system’s unity.

The empirical analysis of South African jurisprudence in connection with the use of *extra-systemic* legal information reveals, in fact, a series of questions that the South African judges do not always answer in their decisions: (1) when is it necessary to draw on *extra-systemic* solutions; (2) how to choose *extra-systemic* parameters for the purpose of interpreting the national norm; this point contains two other questions: (a) where to draw the *extra-systemic* parameters from (from which legal systems and why); (b) how to check the actual ‘relevance’ and ‘compatibility’ between imported parameters and the issues

18 For some time South African constitutional doctrine has recognized a close connection with the German and Canadian legal systems. The latter was a source of inspiration in the creation phase and continues to be so in the current phase of interpretation; see P.W. Hogg, ‘Canadian Law in the Constitutional Court of South Africa’, 1998 *South African Public Law* 13, p. 16 (CC).

19 See Decision 23/1990, *Magyar Közlöny* [Hungarian Gazette], p. 31

20 An analysis of this fundamental South African court decision follows in the present text.

of law subject to national legal disputes; and (3) how to evaluate scientifically if the normative material imported assumes the same meaning in the original legal system as the one attributed by the importing judges.<sup>21</sup>

If the spread and refinement of this practice were ever made 'legitimate', the comparative method (as a scientific and knowledge seeking method) could become an indispensable tool for the legal scholar (and the judge) to fill in the gaps that the circulation of legal arguments risks generating.<sup>22</sup>

## 2. The South African 'model'

The Constitution of post-apartheid South Africa is the only one that has an express provision allowing judges to use *extra-systemic* information for interpreting it.<sup>23</sup> Section 39 of the 1996 Constitution (indexed as *Interpretation of the Bill of Rights*) states that the Constitutional Court, when interpreting the *Bill of Rights*, 'must' promote the 'values that underlie an open and democratic society', 'must' consider international public law and 'may' take foreign law into consideration.<sup>24</sup>

South African constitutionalist doctrine agrees on three main reasons for this provision.<sup>25</sup> First, the necessity of international legitimacy after decades of isolation under the apartheid regime, which had ignored international standards on fundamental rights. Second, the search for international points of reference capable of aiding the interpretive work of an entirely new constitutional text. The Constitution drafters became increasingly aware of not being able to find reference points in the previous regime based on a segregationist rationale (established with the *Republic of South Africa* of 1961), which led to the Constitutional Court having to formulate a particular form of historical interpretation of the Constitution aimed at reviving the common law of the 1910 *South African Union* (which partially recognized the rights and guarantees of *non-white people*). Third, the awareness that introducing judicial review in South Africa required a period of legal and cultural 'learning'. The transformation of the entire legal system was already a major effort for all the participants in the South African legal system, and the introduction of constitutional justice required developing a pedagogical approach to using this instrument for members of the ordinary judiciary and the constitutional judges themselves.<sup>26</sup>

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21 On this matter Markesinis, *supra* note 1, stresses the importance of developing the comparative method according to a *functionalist* approach. Comparatists should make available to judges and law professionals materials, studies and compilations supporting the application of legislative texts. The author sees the creation of new synergies between research and judicial activities as one of the ways to deal with the growing complexities of contemporary legal phenomena.

22 This idea is confirmed in B. Markesinis & J. Fedtke, 'The Judge as Comparatist', 2005 *Tulane Law Review* 80, pp. 11-167; and in D.E. Childress III, 'Using Comparative Constitutional Law in Resolving Domestic Federal Questions', 2003 *Duke Law Journal* 53, pp. 93-221.

23 One of the first studies on this subject is H. Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law', 1998 *University of Pennsylvania Journal of Constitutional Law* 1, pp. 205-283.

24 South African Constitution, 1996, Section 39: '(1) When interpreting the Bill of Rights, (a) a court, tribunal or forum 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. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' It is worth noting that these same provisions are also in the text of the Interim Constitution of 1993 although Section 35(1) has slightly different provisions: '*In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.*' In the transition from the interim text to the definitive one the phrase '*where applicable*' was removed. Constitutionalist doctrine and the Constitutional Court did serious interpretive work on the matter. Section 39 of the 1996 Constitution, in fact, seems to reinforce the openness of the South African constitutional system toward *extra-systemic* sources by eliminating the criteria of evaluating the applicability ('where applicable') of international public law or foreign law.

25 See J. Dugard, 'International Law and the Final Constitution', 1995 *South African Journal on Human Rights* 11, pp. 241-251; G. Carpenter, 'The South African Constitutional Court: Taking Stock of the Early Decisions', 1996 *Human Rights and Constitutional Law Journal of South Africa* 1, pp. 24-29; and Webb *supra* note 23, p. 219.

26 In the beginning the constitutional judges made pedagogical and explanatory efforts to illustrate in detail *constitutional procedural law*. This attitude appears to have been toned down in more recent decisions. This initial approach is explained by the fact that judicial review, which was previously unknown in the South African system, needed grounding and consensus among the various legal actors. The Court thus attempted to facilitate transparency through the argumentative and syntactical clarity of the Court's decisions, drafting long explanations of the new constitutional context. For example, the Court frequently 'illustrates' what should be the roles of the different institutional and private actors. The Court's concern is to minimize the perception of constitutional justice as an infringement on the separation of powers and on the sovereignty of the legislature (a comprehensive example is *Phillips and Others v. Director of Public Prosecutions and Others*, 2003 (202) SACR §12 (CC)).

For these reasons post-apartheid South Africa had to make a virtue of necessity. Acting as a listener, referring to interpretive models of other constitutional judges, calling upon widespread legal institutional culture and breathing life into a courageous constitutional compromise, it tried to make up for its decade-long cultural and legal delay.

### **2.1. International law and foreign law: different circuits of interpretation**

We should first deal with any possible misunderstandings that may arise when discussing the use of *extra*-systemic legal elements. Section 39, in reality, contains two distinct declarations. The first sets out the Court's obligation to consider international public law. However, this is part of the formal framework of the sources and participation of the South African constitutional system in an international system. The second, on the other hand, sets up a 'faculty' of the Court to consider '*foreign law*'.

These are two interpretive procedures that only appear to be similar and cannot be conceived of as one. In fact, as a matter of principle, international law is generally connected to the domestic legal system by positive enforcement norms through ratification procedures (though in different ways depending on the constitutional set-up). *Extra*-systemic information differs from the application of international norms of ratified conventions; in this case circulation occurs by importing alien legal elements from an extraneous constitutional system not formally connected to the 'importing' one.

Thus it is a mistake to consider making reference to norms of international systems (which is an obligation in South Africa grounded in constitutional norms) and *considering foreign law* as part of the same phenomenon. In this article, I consider the broad notion of *foreign law* in a more specific way. Foreign laws are, in reality, *legal information* of a different type coming from homologous foreign constitutional systems. They could be foreign *rationes decidendi*, argumentative tests, schemes of legal reasoning as well as national legislation on specific matters. The judges, during the argumentation (legal reasoning), transform this information in a proper *legal inference* able to provide a conceptual basis for the adjudication.

Making effective international public law norms binding on South Africa has nothing to do with the interpretive procedure based on *extra*-systemic information. On the one hand, norms are applied that have been produced by a system outside the national sphere but to which South Africa formally belongs; on the other hand, interpretive solutions made by foreign constitutional courts may be freely used for interpreting the Constitution.<sup>27</sup>

Furthermore, the *extra*-systemic parameters are not, as the Court confirms, *legally binding*; in fact, the Constitution simply 'authorizes' the interpreters to enlarge the category of interpretive parameters.

In addition, the Court often refers to *extra*-systemic parameters of international systems to which South Africa is not party (such as the European Convention on Human Rights and the Inter-American Convention). In this scenario circulation is created through another route of changing systems. Indeed, the relationship between the South African constitutional system and regional systems protecting human rights seems analogous in some ways to the one between the South African constitutional system and constitutional systems from which *extra*-systemic interpretive parameters are imported: in both cases the Court makes use of interpretive parameters of systems to which South Africa is not formally bound.

## **3. The pioneer phase: the first signs of interpretive paradigm circulation**

In order to better understand the central role assumed by the Constitutional Court during the post-segregationist era, it would be useful to highlight some 'genealogical' elements of the post-apartheid constitutional phenomenon.<sup>28</sup> The Court was established in 1995, in a somewhat unusual fashion, over

27 That these are two different circuits of interpretation has been accurately demonstrated by Markesinis, *supra* note 1. The author captures this difference by analysing the development of German jurisprudence (constitutional and administrative) and the use of interpretive parameters or norms outside the German legal system. The two circuits of interpretation are based upon different sources and function according to different legal mechanisms. One operates when applying norms of international private, public or European Union law, the other works on the basis of horizontal borrowings of *extra*-systemic parameters. The former thus is mostly governed by the rationale of positive law (the validity of the norm), whereas the latter operates in absence of an 'inherent link to [the] foreign law' called upon.

28 For further details on this hypothesis, see A. Lollini, *Constitutionalism and Transitional Justice in South Africa*, 2011.

the course of the constitution-making process that led to the creation of post-apartheid South Africa. The Court came into being while the 1993 Interim Constitution was in force and prior to the approval of the definitive Constitution by the *Constitutional Assembly* in 1996. Created during the shift from the interim constitutional system to the definitive one, the Court was invested by the norms of the 1993 Interim Constitution with a very delicate function in relation to the constitution-making process: to *certify* the compatibility of the definitive 1996 Constitution with the 34 Constitutional Principles previously agreed upon by a multiparty assembly made up of an equal number of representatives from each accredited political grouping.

In 1995, while waiting to receive the Constitution's definitive text from the Constitutional Assembly, the Court immediately began to exercise its role as *guardian* of the new rights codified in the Interim Constitution, which was a sign of the defeat of the segregationist system. In this context, ever since its establishment, the Court has issued extremely important decisions. In particular, the Court began the long and difficult job of *purging* the South African legal system of the innumerable norms that had been the structure of the legal and administrative system under apartheid. Moreover, these norms could not simply be repealed *in toto* during the interim phase because doing so could have led to an uncontrollable legal void. If the constitution-making process is considered not just as a process of codifying a constitutional text but as a radical break from the previous order, then the Constitutional Court, through its patient work of erasing traces of institutionalized segregation, played an active role in framing the new democratic state during the transition. For this reason, the 'discontinuity' with the previous regime is not simply the result of a single act (the writing down of the constitutional text) but a gradual objective to be reached with 'macro' and 'micro' constitution-making *procedures*.<sup>29</sup> The former is the redefinition of the constitutional order in its entirety whereas the latter is the Constitutional Court's jurisprudence aiming to eradicate some of the legal provisions under apartheid no longer compatible with the transitional constitutional system.

In light of this, in 1995-1996, the Constitutional Court immediately began to deal with the interpretation of the *Bill of Rights*, also considering the decisions of foreign constitutional judges. These decisions were used in a comparative perspective for working out 'revolutionary' court decisions.

The field of criminal law (both procedural and substantive) was the subject of the first decisions according to the new judicial review system of the 1993 Interim Constitution. In fact, the most violent and anti-democratic aspects of the phenomenology of apartheid power can be most clearly seen in the system of repression using instruments of criminal substantive and procedural law. Erasing apartheid, therefore, meant first of all reforming criminal law. The method of comparative constitutional law was used immediately in transforming the criminal system, taking advantage of interpreting the *Bill of Rights* in light of Section 35 of the 1993 Constitution and subsequently of previously cited Section 39 of the 1996 Constitution. Therefore, the comparative method was not used simply for resolving merely formal and marginal issues; the comparative method was used as an expedient for breaking up apartheid legislation in a constitutional perspective. The two symbolic cases of this first period of court activity are *Zuma and others v. State*<sup>30</sup> and *Makwanyane v. State*.<sup>31</sup>

I have chosen to analyse separately the Court's first decisions in which we can see the pioneer use of foreign interpretive models. In these court decisions, the methods of reasoning based on *extra-systemic* parameters seem 'unstable', constituting, in my opinion, a case study different from the consolidation phase of subsequent years (1997 to today).<sup>32</sup>

### **3.1. The Zuma case**

The *Zuma* case involved ruling unconstitutional Section 217(1)(b)(ii) of Criminal Procedure Act 51 of 1977, which governed the controversial issue of the right to silence and the authenticity of confessions of guilt obtained by deceit, intimidation or by forms of physical or psychological pressure.

29 See *ibid.* p. 87.

30 1995 (5) SALR 642 (CC).

31 1995 (3) SALR 391 (CC).

32 The criteria for citing foreign judgments used by the South African judges (in the notes or in the text of the decisions) have not been altered.



According to the criminal procedure code in force during apartheid, a confession of guilt could be taken even by police force members. The provisions in question contain elements that are traditionally absent in British *common law*.<sup>33</sup> In particular, the Court was called to rule on the constitutional justification of the automatic inversion of the burden of proof that the norm in question creates, which is something extremely harmful to the guarantees of the accused and to the principle of the presumption of innocence. In fact, it would be up to the person confessing to prove that the confessions obtained by police force members were done so with violence or deceit. In particular, the provision places on the accused the burden of proving that the confession recorded by the magistrate was not ‘free and voluntary’, placing an onus on the accused which must be discharged on a balance of probabilities. In other words, merely raising a doubt does not discharge the onus.

The applicant, Zuma, appeared to have confessed to the police that he was responsible for a homicide. Nevertheless, during the trial he retracted the confession claiming that it was obtained by violence; in support of his claim Zuma called two witnesses who confirmed his argument.

The trial court judge presiding over the case did not find the proof sufficient to support the defendant’s claims on the basis of probability. As a consequence, we can see that the inversion of the burden of proof on the confessor makes it difficult to demonstrate that a confession has been obtained through intimidation, creating a serious violation of Section 25 of the Interim Constitution.<sup>34</sup>

In the case in question, for the first time the Court had to deal with applying constitutional mechanisms triggering judicial review codified in the Interim Constitution and, consequently, with the problems of declaring jurisdiction. In the *Zuma* case we can see two distinct mechanisms triggering judicial review: the decentralized and concrete *ex post* model<sup>35</sup> and the mechanism of direct access to the Court in the interest of justice.<sup>36</sup>

The first problem was to establish whether the interpretation of the list of rights should be mostly literal or whether the need to protect rights not recognized by the previous order imposed a *broad* interpretation of the declarations so as to allow a gradual growth of the application and content of the fundamental rights. This step would be of particular symbolic and political importance because it would distinguish the post-apartheid constitutional system by vesting it with radically different qualities from the segregationist system.

Thus the Court asked itself the following questions: (1) does the *Bill of Rights* have to be broadly interpreted or literally? (2) Is the South African constitutional system already self-sufficient or is it necessary to look for guidelines from other constitutional systems? (3) In the latter situation, what has been the behaviour of the *ex-Commonwealth* countries that have constitutionalized and interpreted the principles of British common law in a post-colonial phase?

In order to decide whether Section 217’s provisions regarding confession reversed the burden of proof and unjustifiably limited Section 25 of the 1993 Constitution, for the first time the Court resorted to analysing foreign experiences. The Court pointed out how the same issue was dealt with by the US Supreme Court, by the Supreme Court of Canada and by the Strasbourg Court (‘and doubtless others’).<sup>37</sup>

The comparison begins with an analysis of how the US dealt with the constitutional legitimacy of presumptions producing a reversal of the burden of proof. The Court analysed *Tot v. United States*<sup>38</sup> (on

33 See Justice Kentridge in 1995 (5) SARB 4 (CC).

34 See Section 25 of the interim Constitution of South Africa, ‘Detained, arrested and accused persons’.

35 See Section 101(6) of the interim Constitution subsequently adopted by Section 167(4) and 172(2) of the 1996 Constitution.

36 The Court, in fact, accepted the petition of the Attorney General of the Natal Province (Tim McNally) who asked to participate in the dispute before the Court in the interest of resolving this delicate problem of law and procedure. According to the Attorney General, the uncertainty about the constitutionality of Section 217 created serious instability in many of the pending criminal trials. This constituted a criterion of *Interest of Justice*, which is a pre-requisite for directly accessing the judgment of constitutionality. The Court admitted the petition of the Attorney General, which had legal grounds in Section 100(2) of the Interim Constitution in combination with the reading of Rule 17(1)-(2) of the Constitutional Court. This constitutional provision was subsequently adopted in Section 167(6)(a)-(b) of the 1996 Constitution according to which: ‘National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court: a) to bring a matter directly to the Constitutional Court; or b) to appeal directly to the Constitutional Court from any other court’. For some (Webb, *supra* note 23, p. 211) the *Zuma* case is historically significant for the new South African constitutional system because the acceptance of the Court’s jurisdictional competence and of the direct appeal had the effect of showing the Court’s ‘existence’ by establishing its *primacy* on issues of such scope.

37 *Zuma v. State* 1995 (19) SALR (CC).

38 *Tot v. United States*, 319 US 463 (1949).

the unlawfulness of persons *convicted of violence* possessing firearms and ammunition); and *Leary v. United States*<sup>39</sup> (on possession of marijuana which would automatically presume smuggling). Also citing *County Court of Ulster County, New York et al. v. Allen et al.*, the South African judges figured out that in the US the constitutional legitimacy of statutory presumptions is determined: (1) based on a 'rational connection test' between fact and legal consequences; (2) in terms of the principle of a fair trial.

Analysis of two Canadian rulings follows: in the first, *Regina v. Big M. Drug Mart Ltd.* of 1985, the judges justify a broad interpretation of the *Bill of Rights* by introducing the criteria of *historical origins* (stated by the Canadian Court to be an interpretive parameter of the *Canadian Charter of Rights*).<sup>40</sup> The Canadian Supreme Court's decision sets out the general criteria and interpretive methods of the *Canadian Charter of Rights* according to which the fundamental freedoms in the constitutional text are to be interpreted *generously*, beyond the mere literal meaning (the so-called 'generous approach'). As a result, the Charter's objectives are to be taken into consideration, broadening the activity of the fundamental rights. With a second Canadian ruling, *Regina v. Oakes* of 1986,<sup>41</sup> the South African Court shows interest in how the Supreme Court of Canada determined the legitimacy of presumptions and of the reversal of the burden of proof.

The Johannesburg Court immediately introduced an aspect that would become a constant of its jurisprudence. In certain circumstances, the Canadian Supreme Court's interpretations are held to be plausible both for the persuasiveness of the reasoning and for the structural similarity between the *Canadian Charter of Rights and Freedom* and the South African *Bill of Rights*. In fact, both texts have a *limitation clause* on fundamental rights that can function as a counterweight to broad interpretation.<sup>42</sup>

The South African judges agreed that the comparison showed that inverting the burden of proof is not a trial mechanism forbidden a priori by constitutional systems; the new South African constitutional system is no exception. The problem then was to establish its limits by evaluating when the inversion could possibly jeopardize fundamental rights. For this reason, when the South African Court reflected on the compatibility of its legal system with the foreign systems drawn on for interpretive and argumentative solutions, it selected Canada as its main point of reference. In this case, the main reason is that the Canadian Constitution, like the South African one, possesses an explicit provision contemplating the criteria for limiting the rights codified in the *Charter of Rights*.

Further support for this approach is found in the Canadian Supreme Court decision *Regina v. Oakes* of 1986. Citing this decision the South African Court makes note of how constitutions expressly providing criteria that in certain circumstances can justify a limitation of the rights contained in the *Bill of Rights* impose an interpretive method on constitutional judges known as the '*two stage approach*'. The judge first must verify the actual violation of a specific constitutional right and then evaluate if the violation is justifiable in light of the limitation clause.

On the basis of this similarity, the Canadian Court's interpretive method is considered to be more 'compatible' with the South African constitutional system than the method used by the US Supreme Court

39 *Leary v. United States*, 395 US 6 (1969).

40 *Regina v. Big M. Drug Mart Ltd* [1985] 395 SCR (see Kentridge, supra note 33, Para. 15). With this judgment the Canadian Supreme Court establishes a method for interpreting the Charter called '*Generous Approach*'. Freed from a strictly literal interpretation, this approach aims at broadening the content of each freedom protected by the Charter. In this context reviving the historical origins of law becomes one of the instruments for interpreting the modern *Bill of Rights*. Previously, the South African judges had called upon two judgments: the passage written by Lord Wilberforce (*Privy Council*) in *Minister of Home Affairs (Bermuda) v. Fischer* [1980] AC 319 (PC) in which he declares that fundamental rights must be interpreted in a 'generous' way; and the Supreme Court of Namibia in *Minister of Defence (Namibia) v. Mwandighi* 1992 (2) SA 355, (Nm) 362, which established that a generous interpretation of fundamental rights must also take into consideration the country's legal history, traditions and customs. The South African Court adopted the criteria of broad interpretation and reviving *historical origins*. In this perspective, the judges declare that the right to silence, the guarantees of the accused, the invalidity of confessions obtained by intimidation and the presumption of innocence were principles recognized in full by the common law applied in the colonial territories (that today correspond with South Africa) starting in 1830. The segregationist system gradually erased these principles beginning in the second half of the twentieth century, a fact that would lead to the idea of *reviving* historical origins.

41 *Regina v. Oakes* [1986] 1 SRC 200; 1995 (5) SALR 642 (CC).

42 See Section 33 of the Interim Constitution of South Africa 1993 subsequently adopted by Section 36 (1)-(2) of the Constitution of South Africa 1996. South African constitutional doctrine, adapting itself to the Court's practice of comparison, had to proceed in the same direction. Regarding the limitation clause the following Articles are often analysed comparatively: Canada Constitution Act, 1982, Pt. I (*Canadian Charter of Rights and Freedoms*), Arts. 1, 6(4), 15(2); 25, 26, 35; and Arts. 18, 19 GG (*Grundgesetz German Basic Law*); Art. 8 of the Hungarian Constitution; Art. 33 of the Indian Constitution; Art. 22 of the Constitution of Namibia; Arts. 29-30 of the Constitution of Tanzania; African Charter of Human and Peoples' Rights, 9 June 1998, Arts. 27 and 29. See Webb, supra note 23, p. 221, note 88.

which, according to the South African judges, can make limitations on the scope of fundamental rights without being led by criteria expressed in the Constitution.<sup>43</sup> The South African Court cites numerous Canadian judgments reasserting the importance of the right to silence and of the presumption of innocence against norms placing the burden of proof on the accused.<sup>44</sup>

In this perspective, the inversion of the burden of proof created by Section 217 is considered to limit unjustifiably the rights enacted by Section 25 of the Interim Constitution thus making the criminal procedure norm unconstitutional.

### 3.2. *The Makwanyane case*

The interpretive methods for resolving the numerous questions raised by the *Zuma* case evolved in 1995 in the *Makwanyane* ruling on the unconstitutionality of capital punishment according to the interim constitutional system.

Immediately a landmark case, the court decision assumed historical value for three reasons: (1) the matter treated; (2) the considerable autonomy demonstrated by the Court both towards political powers and public opinion (in favour of keeping the death penalty);<sup>45</sup> and (3) the interpretive choices made. The last mentioned would direct future interpretations of the post-apartheid Constitution, instilling the new constitutional system with a markedly liberal-democratic slant.

This very complex judgment was written by the President of the Constitutional Court, Justice Chaskalson; the other judges expressed their agreement with this decision in separate opinions. Though the judges may have added some other considerations and details, they all agreed with Chaskalson's argumentation. At the core of the decision is the judgment of the constitutionality of capital punishment (Section 277(1)(a) Criminal Procedure Act 51 of 1977) in relation to Sections 8 (equality before the law), 9 (right to life), 10 (protection of human dignity) and 11(2) of the 1993 Constitution. The provisions of this last section establish the unlawfulness of cruel, inhuman or degrading treatment and punishment. Thus the Court had to evaluate whether the death penalty is a cruel and degrading treatment or whether it is a constitutionally legitimate limitation to the right to life.

Chaskalson's reasoning makes use of two types of parameters: the analysis of background work and documents of the constitution-making process (in particular, the documents produced by the *Multi*

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43 The comparison between the 'two stage approach' and the 'single stage approach' used by constitutional systems that do not have a limitation clause on fundamental rights (as in the US) is further developed by the South African Constitutional Court through a comparison with Hong Kong's *Bill of Rights*. A *Privy Council* decision (*HK v. Lee Kwong-Kut* [1993] AC 951 (PC)) is cited in which Lord Woolf exposes the substantial differences of the two interpretive methods. It is not surprising that the South African Constitutional Court looks to Hong Kong and to its methods of interpreting the *Bill of Rights*. The 1991 Hong Kong *Bill of Rights* was strongly influenced by the *Canadian Charter*. Here we can infer that the South African Court, sensing the ties with the Canadian model, is interested in systems that have been influenced by Canada's constitution-making experience. In the same *Zuma* judgment, the Court also cites *Lam Chi-Ming v. R* [1991] 2 AC 212 (PC) and *Wong Kam-Ming v. R* [1980] AC 247 at 261 (PC) both dealing with the illegitimacy of confessions improperly obtained; on the matter see J. Allan, 'A Bill of Rights for Hong Kong', 1991 *Public Law*, p. 175.; and Choudry, supra note 6, p. 822. Many studies also show how Hong Kong is familiar with comparative interpretive paradigms; see A. Byrnes, *Jumpstarting the Hong Kong Bill of Bill Rights in its Second Decade? The Relevance of International and Comparative Jurisprudence*, Paper presented at a conference: *A Decade of the Bill of Rights and the ICCPR in Hong Kong: Review and Prospects*, University of Hong Kong (12 January 2002).

44 Expressly cited are *R. v. Whyte* [1988] 2 SCR 481; *R. v. Downey* [1992] 2 SCR 499.

45 Throughout the case there was much discussion about the relationship between the Court and public opinion (that had actively participated in the drafting process of the new Constitution and seemed in favour of maintaining capital punishment). The very idea of creating a body in which judicial review is concentrated is part of the political idea of having a strong need to protect fundamental rights and the Constitution. Symbolically, the Court's headquarters were decorated with murals representing national unity. The judges wear green robes so as to be differentiated from ordinary judges. The Court's symbol is the African tree of justice, under which disputes were traditionally settled. The branches of this tree correspond with the South African flag. More important than the symbols, however, is the fact that the Court immediately won the people's trust. In this context, *Makwanyane* represents a break from seeking the approval of Black and White public opinion. Even though, as usual with the Court's commencement, many letters for and against the death penalty were addressed to the Court and read by the judges, the judges expressed themselves in complete autonomy on this very delicate issue. Many have claimed that the Court's decision was a minority stance considering the majority public opinion and thus in opposition to the principle of a majority democracy. This is also confirmed by the request, later denied, for a referendum on the death penalty. In this critical situation the hostility and mistrust of some towards judicial review manifested itself. The criticism is grounded in the idea that a few individuals who were not elected decided on such an important issue. According to others, the Court's power to control laws voted on by the legislature would be a clear violation of the separation of powers and the autonomy of the legislature's power. See Webb supra note 23, p. 233 (note 169); Choudry, supra note 6, p. 850; M. Zlotnick, 'The Death Penalty and the Public Opinion', 1996 *South African Journal on Human Rights* 12, pp. 70-78; P. M. Maduna, 'Death Penalty and Human Rights', 1996 *South African Journal on Human Rights* 12, pp. 193-213.

Party Negotiating Process during the drafting of the 1993 Interim Constitution and of the 34 constitutional principles)<sup>46</sup> and foreign interpretive paradigms.

In this context, the Court was called on for the first time to reflect thoroughly on the limits and the objectives of using *extra*-systemic jurisprudence. On this subject the President of the Constitutional Court states that: 'Comparative Bill of Rights jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of law. Although we are told by Section 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution (...). In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that has to be done with due regard to our legal system, our history and circumstances, and structure of our language of our Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.'<sup>47</sup>

The United States constitutional system is the first to be examined. The death penalty has been the subject of numerous US Supreme Court rulings that have confirmed its constitutionality.<sup>48</sup> The main judgment of the *Makwanyane* case points out that there is an underlying contradiction according to which, on the one hand, the US Constitution sanctions the unlawfulness of cruel and *unusual punishment*; on the other hand, it places no obstacle to inflicting capital punishment in terms of the guarantees of the accused (some doubts are expressed solely on the long stays on 'death row').

Justice Chaskalson is thus aware that capital punishment does not constitute cruel and degrading treatment in the US: 'the United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishment, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigations. Considerable expenses and interminable delays result from the exceptionally high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions. The difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred, but from which they have drawn different conclusions, *persuade me* [Justice Chaskalson] *that we should not follow this route*'.<sup>49</sup>

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46 Justice Chaskalson evaluated how other constitutional judges deal with the use of *Constitutional Background Materials*. The Constitutions of the United States, Germany, Canada and India are all cited. The constitutional judges of these systems make use of *historical background materials* for interpreting the constitutional text. The South African Court also notes that the European Court of Human Rights makes extensive use of them, as does the *UN Committee on Human Rights* in interpreting the 1966 Covenant (see 1995 (3) SALR 391 (CC) Para. 16). From the acts of constitutional negotiations it appears that the discussion on the death penalty's constitutionality was very heated. What emerges is a debate that, though not making a trenchant decision on the issue, looks upon the use of capital punishment while the regime was in force with great perplexity. In fact, between 1985 and 1988, 537 death sentences had been carried out. The Court reasons that since no resolution was made, the thorny issue had to be decided by the Constitutional Court in light of the lack of a parliamentary decision on the matter (Para. 25).

47 See 1995 (3) SALR 391 (CC) Paras. 37-39. In its argumentation the Court makes use of the Hungarian Constitutional Court's judgment 23/1990, *supra* note 19, Para. 31. The Court notices that where failed attempts have been made to declare the unconstitutionality of the death penalty, the underlying constitutions and international texts referred to either expressly permitted capital punishment or admitted that the right to life could in special cases be limited. The South African Court claims that the only successful case it encountered was the Hungarian Constitution. With the Constitution's silence on the subject, the Hungarian Court was able to declare the unconstitutionality of the death penalty (see 1995 (3) SALR 391 Para. 38). As a consequence, the Hungarian case is viewed as similar to the South African one (for further details see note 51, *infra*).

48 Two very well-known US Supreme Court rulings are quoted: *Furman v. Georgia*, 408 US (1972); *Gregg v. Georgia*, 428 US (1976). Based on the South African Court's legal reconstruction, the hypothesis of the unconstitutionality of the death penalty in the United States was created in relation to the Eighth Amendment, which prohibits any 'cruel and unusual punishment'. In these rulings, the underlying principle for the unconstitutionality of capital punishment in the eyes of the US Supreme Court is if it is inflicted in an arbitrary or discriminatory way. Justice Ackermann, in the *concurring opinion* of the *Makwanyane* case, mentions how in the US system there was much debate about the risks of arbitrariness and inequality that can happen in proceedings culminating in a death sentence. Attempting to avoid this, the US Supreme Court seems to take into consideration only the conditions of the Fifth and Fourteenth Amendments. Ackermann stresses that the interpretive choices of the US Supreme Court are not compatible with the post-segregationist system (see 1995 (3) SALR 391 Para. 154). Almost as a counterweight to the interpretation of the US Supreme Court, the President of the South African Constitutional Court cites the official reports of Amnesty International and underlines the importance of the fact that European states have abolished the death penalty as have the states bordering South Africa (Mozambique, Namibia and Angola) (see *ibid.*, Para. 33).

49 1995 (3) SALR 391 Para. 56 (emphasis added).

Thus the US interpretive paradigm is not considered to be compatible or useful for resolving the issue of the death penalty's unconstitutionality under the new democratic system.

Next, the 1949 Constitution of India and the Indian Supreme Court's jurisprudence on the matter are subject to comparison because the *amicus brief* of the South African Police<sup>50</sup> mentions it directly. In order to respond to the arguments made in the *amicus brief* the Court was obliged to consider Indian jurisprudence. The result is the same since the Indian Constitution, like the American one, contemplates the constitutional limitation of the right to life in terms of the procedures provided by the law (Article 21 of the Constitution of India).<sup>51</sup>

The principle of human dignity and the possibility of limiting the right to life are subject to further comparative analysis. After having observed that the United States and India are not 'satisfactory' points of reference, the Court discusses the situation in Canada and Germany.<sup>52</sup>

On a journey through court argumentation, rulings are sought that define the death penalty as a cruel and inhuman treatment damaging human dignity. A ruling in this direction is the Canadian Supreme Court case *Kindler v. Canada*,<sup>53</sup> in which the majority of the judges explicitly defines the death penalty as a cruel treatment damaging human dignity. The case hinged upon the constitutionality of the Ministry of Justice's authorization for extraditing a convict sentenced to death in the United States who had escaped to Canada. Though asserting the unconstitutionality of the death penalty, the Canadian Court in this problematic case decided on the basis of bilateral extradition agreements.<sup>54</sup>

The South African Court then compares the right to life of various constitutional texts. First the formal and material differences with the constitutions of the United States and India are reconfirmed; second an interesting comparison is made with the Constitution of Hungary. We still have the impression of a search for foreign constitutional systems that confirm a now clearly made decision.

In this context Justice Chaskalson gives vast importance to the already cited decision of the Hungarian Constitutional Court that declared the unconstitutionality of capital punishment. According to Article 54(1) of the Constitution of Hungary the rights to life and to human dignity are innate fundamental rights; no one can be *arbitrarily* deprived of them.

According to the Hungarian Court's reasoning (extensively cited), capital punishment implies such a tremendous limitation of those rights as to completely erase their scope. The aspect of the Hungarian system that captures the interest of the South African Court is the idea of the indissolubility of the rights to life and to dignity that creates the necessity of a joint interpretation. According to an approach that creates an axiological hierarchy of fundamental rights, these two rights have a different position from the rest of the other fundamental rights and actually are the 'source' of all other rights. Recognizing the legitimacy of capital punishment, reasons the Hungarian Court, would compromise the scope of the two rights from which all the others descend and wreak irreparable damage to the entire system of fundamental rights.

This interpretive model perfectly responds to the argumentative needs of the South African context; Justice Chaskalson does not proceed with an exhaustive comparison circumventing the controversial issue of *arbitrariness* confronted by the Hungarian Court. In fact, he claims that the right to life sanctioned by the post-apartheid Constitution contains even stronger protection than the one ensured by the Hungarian Constitution (which nevertheless allowed the constitutional judges to declare the death penalty unconstitutional). Section 9 of the 1993 Constitution does not lay down the parameter according

50 1995 (3) SALR 391 Paras. 70-79 analysing rulings of the Supreme Court of India in which, as in the United States, the court only verifies if capital punishment has been inflicted 'arbitrarily' (see e.g., *Gandhi v. Union of India* (1978) 2 SCR 621).

51 In *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, the Indian Supreme Court had to verify the constitutionality of Section 302 of the Indian Penal Code authorizing the death sentence (as a penalty for murder) with Sections 19(1) and 21 of the Indian Constitution.

52 As also noted by Marquesinis, *supra* note 1, p. 153, note 205, the ruling under examination resorts to numerous elements of German constitutional law: (a) the reference to legislative history as a means of interpretation; (b) the right to human dignity; (c) the limitation of fundamental rights; (d) Section. 33(1)(b) of the Interim Constitution 1993, that explain the so-called 'essential content' clause.

53 *Kindler v. Canada* [1991] 2 SCR 779. See also the *Bundesverfassungsgericht* [BVerfG] 45 (1977). See also the numerous German court decisions cited by Justice Ackermann in his *concurring opinion* in Para. 167.

54 On the legitimacy of measures for extradition to countries that punish persons with the death penalty, an important ruling of the Strasbourg Court, *Soering v. United Kingdom*, 1989 11 EHRR (ser. A/161) 439 is quoted. In a concurring opinion Judge de Meyer claims that extradition to the United States of persons who will be subject to capital punishment constitutes a violation of the right to life, see 1995 (3) SALR 391 Para. 81.

to which the right to life and to human dignity cannot be *arbitrarily* limited as does Article 54<sup>1</sup> of the Hungarian Constitution.<sup>55</sup> Even if the Hungarian Court had declared the constitutional illegitimacy of capital punishment, a non-arbitrary limitation would theoretically be possible. In this regard, Justice Chaskalson seems to neglect this element slightly. Must a criminal proceeding entirely respecting guarantees that concludes with a death sentence be equally considered an *arbitrary* violation of the right to life? Was this problem confronted by the Hungarian Court? We cannot know this from the South African ruling; it only extracted a section of argumentation, limiting itself to verifying later that the post-apartheid Constitution outlines an absolute vision of the right to life without mentioning the criterion of *arbitrariness*.

There is yet another obstacle to overcome; Section. 33 of the 1993 Constitution expressly prescribes the criteria for limiting the *Bill of Rights*: reasonability, necessity, justifiability ‘in an open and democratic society based on equality and freedom’ and without negating the ‘essential content’ of the right to be limited. Can the right to life fall under those rights that can be limited by the provisions of Section 33? For resolving the problem, once again the Canadian constitutional system is called on as a natural point of reference.

Justice Chaskalson makes reference to the previously cited Canadian Supreme Court decision (the *Oakes* case) in which the norm on the criteria for limiting the rights of the *Canadian Charter*<sup>56</sup> is interpreted. Undeniable similarities are shown between the Canadian and South African constitutional systems; thus the Canadian interpretive model is identified as a reassuring comparison. In fact, the South African judgment adopts the Canadian Court’s *proportionality test* for verifying the constitutional legitimacy of limiting one of the rights protected by the *Bill of Rights* in question in the *Oakes* case. The test is grounded in the classic criteria for judging the legitimacy of limiting a fundamental right: the limitation must not be ‘arbitrary’ or based on ‘*irrational considerations*’ and must reduce as little as possible the scope of the right to be balanced. There must also be proportionality between the objective pursued by limiting the right and the effects that are produced.<sup>57</sup>

In its conclusion the Court states its decision that capital punishment is unconstitutional: it adopts the Hungarian interpretation of the indissolubility of the rights to life and of human dignity, which are the axiological core of the fundamental rights system. Judged as degrading treatment as in Canada, capital punishment would irreparably compromise the right to life and dignity damaging the entire system of fundamental rights. The rights to life and dignity are a ‘core’ that cannot be limited because the whole system of fundamental rights hinges upon them. Furthermore, according to the proportionality test imported from Canada, the death penalty is a disproportionate punishment since the legal system also provides for a life sentence.

On the basis of *extra-legal evaluations* grounded in criminological studies, the judges express strong doubts about the death penalty’s possible efficacy as a deterrent and special prevention.

With convincing argumentation, the judges note how in South Africa the race issue, inequality and poverty are all factors that must be taken into consideration in evaluating the constitutionality of capital punishment. A very high percentage of death sentences concerned black persons belonging to completely marginalized social classes. They had hardly any possibility of asserting the constitutional right to legal defence and their criminal behaviour could not be separated from extremely difficult socio-economic living conditions (the causes of which were rooted in the previous regime).

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55 See 1995 (3) SARR 391 Paras. 83-85.

56 Constitutional Act, 1982 Pt. I (Canadian Charter of Rights and Freedoms), Art. 1: ‘The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

57 See the ‘proportionality test’ set out by the Canadian Court as cited by Justice Chaskalson in Para. 105. A brief comparison is made with the more detailed criteria of limitation and balancing between fundamental rights by the Federal Constitutional Tribunal of Germany and the Strasbourg Court (see Paras. 08-109); regarding the latter, mention is also made of giving national authorities a margin of appreciation: Para. 109. Due to the radical differences between the post-apartheid Constitution and the European system of protecting fundamental rights based on a multilateral treaty that does not modify the national sovereignty of the Member States, the European model is not considered a ‘safe guide’ for interpreting the constitutional mechanisms of balancing the *Bill of Rights*. Even without considering material differences, there are too many structural differences between the European Court of Human Rights and the South African Constitution. A thorough comparative study on *limitation clauses* of fundamental rights with particular reference to South Africa, Canada and the ECtHR system is G. Van Der Shyff, *Limitation of Rights*, 2005.

#### 4. The consolidation phase: topography of argumentative techniques based on *extra-systemic* elements

As can be shown from the analysis of 11 years of South African constitutional jurisprudence, the use of *extra-systemic* interpretive parameters follows these recurring argumentative models:

(1) *Probative importation*: foreign interpretations are cited as if they were ‘proof’ *against* (when a judge in a dissenting opinion provides a different interpretation from the main judgment to disprove it) or *for* (when a judge – even in a concurring opinion – provides converging foreign case studies in support of his hypothesis). This first argumentative pattern is grounded in the claim: ‘*they also think this way abroad*’. In order to buttress a certain interpretation, judges assert that it corresponds, falls in line or coincides with a foreign judge’s interpretation. The interpretation precedes the citation of foreign cases. Using *extra-systemic* parameters in this case adds rhetorical and evidentiary force to the interpretation. A second model falls under *probative importation*; it is similar to the first one but corresponds with the claim: ‘*considering that they think this way abroad ...*’ (that is, if this constitutional utterance has this meaning in other *pre-selected* systems), then ‘*... we also assign it with this same meaning*’. This formula differs from the previous one because it first identifies the foreign interpretive model to which it subsequently links the interpretation. In this case the phenomenon has even more problematic consequences: potentially infinite foreign interpretations or argumentations can contain parameters that can be used to distil the ‘meaning’ of a national constitutional norm or to derive argumentative models. If assigning meaning to an utterance usually hides a ‘limited creative procedure’ that sometimes relies on data outside positive law, here ‘creation’ goes much further. In fact, directly and automatically deriving the meaning of national normative utterances from *extra-systemic* parameters indirectly means incorporating a *pseudo-source*. In this case the judge’s point of view preceded by the claim ‘*considering that they think this way abroad ...*’ produces a *consequential* dynamic: automatically the interpretation of a specific constitutional utterance is derived from a foreign parameter through a procedure whereby an *extra-systemic* precedent *subsumes* a particular case.

(2) *Scanning the horizon*: foreign interpretations prepare (and direct) the argumentation. Before deciding, the judges scout out what other constitutional courts say about the disputed issue. The South African judges sometimes use this argumentative technique seeking to evaluate how a certain constitutional principle or certain legal issue has been interpreted in other foreign legal systems. The interpreter expresses himself in this way: ‘*before deciding, let us look at what other pre-selected constitutional courts say*’. Here this decisional approach is usually different for two reasons: on the one hand, the circulation of foreign hermeneutics serves a fact-finding purpose by supplying a plurality of comparative elements from which *compatible* and *effective* interpretive solutions can be extracted; on the other hand, more than two foreign references are taken into consideration.

(3) *Setting two extremes*: the judges build two poles between which the interpretation oscillates. The two extremes are foreign constitutional interpretations. It is a derivative of the aforementioned *horizon* model. Here comparative law helps to determine the two *opposing poles of interpretation* established by foreign constitutional courts. *Setting two extremes* limits the interpretation’s oscillation, which is subsequently chosen by the judge in the case in question.

(4) *The comparative distinguishing*: it encompasses both the *explicit negation* that drawing on foreign decisions is necessary in a specific case, and the refusal to accept that *foreign legal solutions* are compatible with the national constitutional system.

(5) The *combined* use of the argumentative models cited above: two clarifications should be made. First, the argumentative technique and the value assumed by the citation can vary greatly according to their location in the decision: (a) in the main text of the ruling (majority opinion); (b) in the concurring opinion; (c) in the dissenting opinion. In this last case, the citation of a foreign case is normally a ‘proof’

against the reasoning of the main decision. Second, judges can derive a *two extremes set-up* from a *horizon scan*.

Case analysis shows another crucial point that has yet to be developed by the South African judges. In some circumstances the borrowed interpretive solutions are subject to a ‘validity’ test. This test aims at evaluating the *systemic compatibility* of the foreign legal system (from which a specific interpretive solution is taken) with the South African one (and vice versa).

#### 4.1. Probative importation: arguing for or against a main thesis

The first argumentative technique identified I have defined as *probative importation*. This is the most controversial and problematic use of foreign interpretive paradigms. More than all the others, this strategy shows signs of manipulation (due to superficial comparisons), forms of *legitimatatio ex post* of interpretations already settled in the judges’ minds, borrowing foreign solutions for opposing the majority opinion and for being proof against a dissenting opinion or minority judgment.<sup>58</sup>

In the case *Phillips and others v. Director of Public Prosecutions and others*<sup>59</sup> the legitimacy of limiting the freedom of expression (Section 16 of the 1996 Constitution) and in particular the *freedom of artistic creativity* is discussed. This freedom appeared to be violated by the provisions of Section 160(d) of the Liquor Act 27 of 1989 on licences for selling liquor.

The norm obliged the holder of an on-consumption licence to refrain from selling liquor when there are performances on the premises that are ‘offensive, indecent or obscene’ or by persons ‘not clothed or not properly clothed’. Heavy penalties were due if the norm was violated. The Court had to evaluate the legitimacy of limiting a fundamental right that was extremely significant for the post-apartheid system. In addition, the Court also had to consider if that limitation was justified in light of the criteria laid down by the *limitation clause* of Section 36 of the Constitution 1996 (when the criteria are verified, as we have already seen, the limitation of the rights contained in the *Bill of Rights* is allowed). The Court declared Section 160(d) unconstitutional; the ‘obscene’ content of a performance is not a legitimate criterion for limiting freedom of expression in the form of a performance, even if it takes place where alcohol is served. Assigning meaning to the notion of ‘obscenity’ was fundamental for the judges. In fact, they use comparative analysis (in Justice Ngcobo’s dissenting opinion and in Justice Sachs’s concurring opinion) to see whether prohibiting ‘obscene’ performances in private venues open to the public is legitimate in other systems.

In the dissenting opinion, Ngcobo, who disagrees with the other judges’ decision and thus orients his reasoning *against* the judgment issued by the majority, looks for ‘proof’ that his argumentation is legitimate in a Canadian judgment: *Re Koumoudouros et al. and Municipality of Metropolitan Toronto*.<sup>60</sup> In this judgment the Canadian Justice Erbele (as cited by Ngcobo) affirms that the freedom of expression as set out by the Constitution of Canada also includes “‘artistic’ expression”; however, this does not apply to the freedom of artistic expression with obscene content for the purpose of selling a larger quantity of liquor. At the core of this judgment is the analysis that showing genitals is an activity falling under the category of obscenity that, coupled with the purpose of selling a larger quantity of alcohol, neutralizes the freedom of artistic expression. The South African judge falls in line with the Canadian judge’s argumentation claiming that the freedom of expression set out by the South African Constitution does not include, just like the Canadian one (in Justice Erbele’s interpretation), performances using the exhibition of genitals for selling a greater quantity of alcohol rather than for expressing artistic content.

The choice of this judgment, however, ends up being arbitrary (there could be numerous other interpretations, in Canada or in other constitutional systems to the contrary). The formula of the judge’s

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58 This type of situation motivated Justice Kriegler (in his concurring opinion in *Bernstein et al. v. Bester et al.*, 1996 (2) SA (CC)) to express strong doubts about the use of *extra-systemic* parameters. Kriegler puts forward three main arguments. In fact, they are quite sound, especially in the situation defined as ‘probative importation’: (a) the risk of dealing with superficial comparisons that lead the ‘importing’ judge to create misunderstandings; (b) all too often *extra-systemic* parameters are used as part of the internal dialogue (sometimes argument) between judges of the same court; (c) in some circumstances there are gaps in argumentation because the reason for using *extra-systemic* parameters is not explained.

59 2003 (3) SA 345 (CC).

60 The judgment cited is *Re Koumoudouros et al. and Municipality of Metropolitan Toronto* [1985] DLR 523.



claim is the following: 'I do not agree with the main interpretation and as proof of my thesis I call upon the interpretation of other foreign judges'.

Justice Sachs uses foreign jurisprudence and doctrine in the concurring opinion in a completely different way; he agrees with the majority but would like to expand the field of argumentation.

Sachs claims that the definition of obscenity is particularly controversial in other 'important' constitutional systems. Therefore, before proceeding with his reasoning, he considers it useful to present a brief panorama of how the same problem has been dealt with in Canada and the United States. First, Justice Sachs supplies other Canadian judgments that seriously reduce the seemingly radical value of the judgment cited by Justice Ngcobo.<sup>61</sup> Second, referring to numerous US Supreme Court decisions, he shows how the Court was deeply divided for a long time over an unequivocal notion of obscenity and how the issue was later defined as 'futile';<sup>62</sup> in the end the US court confirmed the legitimacy only of limitations confined to single contextual aspects of potentially 'obscene' performances without considering their complete prohibition to be legitimate.<sup>63</sup>

The argumentative formula is thus the following: 'I agree with the majority's interpretation, I do not use any argument in opposition, I would like to add others, I proceed with a limited acknowledgment (and perhaps an arbitrary one since no criteria are laid down for choosing the legal systems referred to) that confirms the issue's problematic nature also noticed by other prestigious constitutional judges'. Sachs's argumentative technique can also be read according to the model of setting two extremes because he creates two poles of interpretation by solely and explicitly citing Canada and the United States and places his hypothesis between them.

Sachs's reasoning based on foreign parameters, however, is weak; the parameters he invokes show that other legal systems ensure the lawfulness of performances with 'obscene' content (falling under the freedom of expression), but they do not answer the fundamental question of the case: is an obscene performance whose main purpose is the sale of liquor a manifestation of the freedom of expression? Can it be proved that performances including the display of genitals in a place where serving alcohol is authorized are really not for the purpose of artistic expression but for increasing the sale of liquor?

The problematic nature of *probative importation* clearly appears in a controversial judgment decided five against four and includes a separate concurring opinion with the minority: *Garreth Anver Prince v. President of the Cape Law Society et al.* of 25 January 2002.<sup>64</sup> The dispute considers a rather strange situation that poses legal problems dealt with by other foreign constitutional judges.

The appellant was a legal scholar with all the qualifications necessary for becoming an attorney but was denied enrolment in the Law Society because of two convictions for possessing cannabis. Even in the Constitutional Court the appellant defended himself by pleading that, since he belongs to the Rastafarian religion, the personal use of cannabis is required as a religious practice and thus is protected by freedom of religion. As we shall see, the use of foreign interpretive models in this case became a means for conducting an internal debate between the various judges' points of view; the citations are an argumentative tool as proof of the decisions assumed by the judges, which gives rise to the methodological problems inherent in manipulating foreign 'arguments' and the inconsistencies with previous interpretations.

South African law bans the use and possession of psychotropic substances except for medical reasons or scientific research. The decision had to determine whether that ban is too restrictive in relation to a 'bona fide religious purpose' and therefore an unjust limitation of religious freedom. The preliminary analysis of the principles involved traces a triangle between Sections 15 (*Freedom of religion, belief and opinion*), 31 (according to which the State protects and encourages *Cultural, religious and linguistic communities*) and 36, which lays down criteria for limiting rights, such as the previously mentioned ones, contained in the *Bill of Rights*.

Considering the axiological and material coordinates of the new post-apartheid system built on the political myth of the *Rainbow Nation* and the rich and complex composition of South Africa's political

61 See *Town Cinema Theatres Ltd v. The Queen* [1985] SCR 494; *R. v. Tremblay* [1993] SCR 932.

62 Justice Sachs cites a passage of US Justice Brennan from *Paris Adult I v. Slaton*, 413 US 49, 86 (1973).

63 Justice Rehnquist, in *Barnes v. Glen Theatre, Inc.*, 501 US 560, 572 (1991), claims that the provisions of Indiana state legislation forbidding dancers from wearing scanty clothing on stage introduce such 'narrowly tailored' limitations that they are not unconstitutional.

64 2001 (2) BCLR [Butterworth Constitutional Law Report, South Africa] 388 (CC) .

body, recognizing as much pluralism as possible is fundamental to the post-segregationist constitution-making agreement.

The central issue of the South African judgment is thus to verify if the absolute ban on the use of cannabis, in particular for 'liturgical or ceremonial use', is a limitation on the Rastafarian religious practice (not justifiable and unreasonable for an open and democratic society according to Section 36 of the 1996 Constitution).

The minority opinion opening the judgment stresses a wide interpretation of the freedom to practise one's 'religious belief' (even if illogical and irrational)<sup>65</sup> and to express, practice, teach and disseminate one's beliefs as long as no 'coercion or restraint' takes place. All of this is a reason for tolerating the use of cannabis in the particular circumstances. The majority opinion, however, is of the opposite point of view. In determining the limits of freedom in question the minority judges sealed their reasoning (hence according to a probative method or one supporting their reasoning) with a Canadian judgment: *R. v. Big M Drug Mart Ltd.*<sup>66</sup> This decision hinged on the constitutionality of the '*Loi sur le dimanche et observation du dimanche*' which the applicant (Drug Mart) was accused of breaking by unlawfully selling merchandise on Sunday. According to established interpretation, the purpose of this law was to compel 'the observance of Sunday as a religious holy day'. The prohibition of Sunday commercial activities clearly responded to the needs of protecting one denomination, and for this reason was evidently detrimental to the freedom of those who practise different religions or belong to different denominations and of those who do not follow any religion. Therefore, the Canadian Court considered this law to be an unjust limitation of the freedom of conscience and religion laid down by the Charter and more precisely not a 'reasonable limit demonstrably justifiable in a free and democratic society' (analogous to the South African one, this is the formulation of the constitutional criteria for limiting fundamental rights). The comparative method used by the minority judges creates the following decisional and argumentative model: the ban on commercial activities on Sunday in Canada and the absolute ban on using cannabis in South Africa are interchangeable or superimposable. The Canadian formula becomes an argumentative and evidentiary *extra*-systemic parameter injected into the South African legal system's field of interpretation.

Bearing in mind the limited health effects of the controlled use of cannabis and the lack of drug trafficking encouraged by Rastafarian liturgical use, the minority opinion holds that the limitation would be disproportionate to and invasive of the freedom of religious practice. The judges would have the legislature deal with the regulation of this particular situation.

Here the problematic nature of the comparative method appears in its true shape. In the minority decision, the judges use other *extra*-systemic parameters derived from US Supreme Court Justice Blackmun's dissenting opinion in the controversial (and in some senses quite similar) case *Employment Division, Department of Human Resources of Oregon, et al. v. Smith et al.*<sup>67</sup> The subject of this US Supreme Court case was the legitimacy of using the hallucinogenic cactus Peyote in the ceremonies of the *Native American Church*. In this judgment, the majority of American judges rejected the legitimacy of this practice stating that the exercise of religious freedom 'does not relieve an individual of the obligation to comply with a valid and neutral law of general application on the ground that the law proscribes (or prescribes) conduct that his or her religion proscribes (or prescribes)'.<sup>68</sup> The same exact conflict of interpretation reproduced itself within the South African Court: the minority of South African judges cited Blackmun's dissenting opinion (with which Brennan and Marshall concurred, inclined to tolerate limited use for established ceremonial and liturgical purposes), whereas the majority reinforced itself with the US majority opinion (that forbids all use of psychotropic substances).

Here it is interesting to note the inconsistencies that can emerge when using foreign interpretive models. First, in the last example the two cases, though similar, are not identical. Using hallucinogenic

65 See *ibid.* at Para. 42.

66 *Regina v. Big M. Drug Mart Ltd* [1985] 1 SCR 295.

67 *Employment Division, Department of Human Resources of Oregon, et al. v. Smith et al.*, 494 US 872, 911 (1990). The South African judges also appear to have followed the doctrine debate criticizing the judgment used by them by citing J.D. Gordon, 'Free Exercise on the Mountaintop', 1991 *California Law Review* 79, p. 91; M. McConnel, 'Free Exercise Revisionism and the Smith Decision', 1990 *University of Chicago Law Review* 57, p. 1109; and A. S. Green, 'The Political Balance of the Religion Clauses', 1993 *Yale Law Journal* 102, p. 1611.

68 *Employment Division v. Smith*, supra note 67, p. 878.

substances is not completely equal to using cannabis (for health effects and invasiveness of the practice). The case similarity is even more questionable in the first case cited (*Drug Mart*). Second, in the majority opinion the South African judges argue positively making use of a US Supreme Court ruling when the South African Court had stated that the American system and interpretations – though constantly examined because an important reference model – were not compatible with the South African system due to the many asymmetries between the two.<sup>69</sup>

In this case, the majority opinion shows a strong degree of contradiction because it is mostly grounded in the majority opinion of the US Supreme Court, according to which full recognition of religious freedom based on the First Amendment does not lead to the exemption for religious reasons from ‘civic obligations’ (such as paying taxes, provisions regarding health and public safety, obligatory vaccinations, norms on narcotics, labour rights, prohibition of child labour, inhuman and degrading treatment, etc.).

The argumentative technique of *probative importation* is also used for reinforcing (or legitimizing) the choice of interests or principles at play in a certain dispute made by constitutional judges (this is known as interpretive pre-orientation).

This is a notoriously important operation because it can be the basis for resolving the problem of constitutionality submitted to the judges. Therefore it is not difficult to imagine how the use of *extra-systemic* parameters as a *reinforcement* or justification of the judges’ choices in defining the topography of the case can become a means of *persuasion* regarding the efficacy of the choices made. This manner of importing foreign parameters was frequently found in the analysis of South African rulings as well.

An exemplary case is *Laugh It Off Promotion CC v. South African Breweries International* of 27 May 2005.<sup>70</sup> The appellant was the company *Laugh It Off Promotion*, which alters images or words of registered trademarks. In addition to the commercial scope of the company’s activity, the company seeks to develop a type of social and political criticism.<sup>71</sup> The South African judges identified the principles subject to the dispute based on these two elements. On the one hand, there is the issue of freedom of expression (Section 16(1) 1996 Constitution) and, on the other, the protection of intellectual property (from a sub-constitutional source, Section 34(1)(c) of the Trade Marks Act 194/1993).

Reinforcing (that is, probative) foreign parameters are used to justify the fact that intellectual property norms can be limited by freedom of expression. The technique clearly emerges in the following excerpt from the judge drafting the decision (Moseneke): ‘I have intimated earlier that section 34(1) (c) fails to be construed bearing in mind the entrenched free expression right under section 16. The importance of freedom of expression has been articulated and underscored by this and other courts in this country and indeed in other *open democracies* and by its inclusion in international law instruments. Suffice it to repeat that freedom of expression is a vital incidence of human dignity, equal worth and

69 See R.C. Blake, ‘The Frequent Irrelevance of US Judicial Decisions in South Africa: *National Coalition for Gay & Lesbian Equality v Minister of Justice*’, 1999 *South African Journal on Human Rights* 15, no. 2, pp. 192-199. This point is stressed in the separate but concurring minority opinion by Justice Sachs (Para. 155) who rightfully takes into consideration a larger number of comparative parameters in an attempt to find a balance and harmonization between opposing interests. Sachs’s approach is to pay attention to the fact that the *Rastafarian* religion would be one of those ‘discrete insular minorities’ whose protection is a problem of great interest not just for the South African Court but also for ‘courts abroad’ (Para. 157) and the United States in particular (whose jurisprudence is cited, *United States v. Carolene Products*, 304 US 144 (1938)); and established doctrine; see also L. Tribe, *American Constitutionalism* 1988, p. 582. Justice Sachs widens the comparison, citing a case quite similar to the American one decided by the *Bundesverwaltungsgericht* [Federal Administrative Court of Germany] (BVerwG 3). The German judges rejected the appeal of a *Rastafarian* practitioner to whom the authorities had denied the power of cultivating marijuana plants for ‘personal use’. If the legitimacy of the modest quantity of use and possession of marijuana was already the subject of a Constitutional Court ruling (BVerfG 90, 145 (185)), according to Justice Sachs in the Administrative Court ruling, the German judges had really debated on its purpose, stating that in reality the power to cultivate marijuana claimed by the appellant was more oriented towards the anti-prohibitionist campaign as opposed to an actual *Rastafarian* ceremonial need. Sachs appears to deduce from this (or at least his argumentative and rhetorical technique so articulates) that in the German context as well the need to use psychotropic substances for religious reasons would be a parameter to consider when evaluating the constitutionality of bans capable of harming some aspects of religious freedom.

70 2005(8) BCLR (CC).

71 In the case in question the appellants were convicted for violating trademark law due to a T-shirt (produced and sold by them) on which the famous slogan of a very popular beer in South Africa, ‘Black Label’, was substituted with ‘Black Labour’ while the colours and shape of the beer advertisement were unaltered. The clearly political purpose was to make the public aware of labour exploitation (with very low salaries) today still very widespread in South Africa (and which was one of the main features of apartheid).

freedom. It carries its own inherent worth and serves a collection of other intertwined constitutional ends in *open and democratic societies*.<sup>72</sup>

In order to *prove* or *reinforce* the choice to make the freedom of expression principle 'react' with measures regulating intellectual property, the Court cites a large number of decisions made by the Supreme Courts of New Zealand, Canada, the United States, Namibia and the Strasbourg Court.<sup>73</sup> The foreign cases cited tend to reinforce the pre-orientation that freedom of expression can place a limitation on intellectual property protection. In addition, they supply *extra-systemic* parameters according to which the previously mentioned fundamental freedom covers a central role in other 'open and democratic societies'. The doubt raised here is that in reality no clear comparison has been made but only an importation of these foreign rulings into the South African pool of interpretations. They are not analysed but simply placed as a reinforcement regarding the choice of principles at play. The 'audience' that the Court wants to 'persuade', if it should want to refute the pre-orientation, should begin by criticizing the pertinence of the cases presented so assertively by the Court.

#### 4.2. Scanning the horizon

Scanning the horizon is when the judges provide a comparative *survey* about how a particular constitutional principle or legal norm is interpreted or enforced in a number of pre-selected foreign legal systems. As I will try to show, this 'survey'-based argumentative technique is the one most often used. The Court uses this method to respond to the following needs: '*Compare to know*' in order to distil an interpretive solution to align with or for *reassuring oneself* about the interpretive choices adopted.

The case *Minister of Home Affairs v. National Institute for Crime Prevention and Re-Integration of Offenders (NICRO) and others*<sup>74</sup> is an eloquent example. The respondents, NICRO and two convicted offenders with a custodial sentence, contested the disqualification from voting laid down by the law for anyone with a criminal conviction. A question was raised about the constitutional legitimacy of Section 24(B)(1) of the law amending the Electoral Act 73/1998 in which all those serving a custodial sentence without the 'option of fine' were excluded from the right to vote. The new norm also deprived of voting rights: (1) those who have not been finally convicted; and (2) those who are prisoners because they have not paid the amount due for the conversion of imprisonment (in the case of South Africa, people convicted of minor offences but in a state of poverty).

The Government appeared in court affirming that restricting the right to vote of all criminal offenders was part of the policy for controlling public spending. The enjoyment of this right by criminal offenders indicated in points (1) and (2) would mean organizational expense for the electoral commission. The State preferred to allocate these resources for the advantage of those who, not having broken the law, suffer permanent or temporary problems that prevent them from going to the election registration offices or to the polls.

In a split decision with both concurring and dissenting opinions, the Court declared the illegitimacy of the exclusion to the detriment of the two previously mentioned categories of people in custody and without criticizing the Government's efforts in facilitating the right to vote.

For the judges who felt the need to acknowledge what happens in other constitutional systems, the legal problem was the legitimacy of limiting the right to vote to the detriment of those who have a criminal conviction. Justice Madala's effort in acknowledging the main national legislations on the matter is worth noting: in the paragraph entitled 'International practice in respect of the right to vote' of his dissenting opinion, Madala reviews the legislation of the United States, European countries, Australia and New Zealand, reaching the conclusion that though there is no uniformity on this issue most of these systems deprive prisoners in varying degrees of the right to vote.

In the main judgment the Court used the horizon argumentative technique. Justice Chaskalson, in fact, analysed in detail how the Canadian Supreme Court had dealt with a similar issue in *Sauvé v. Canada*, stating that this case illustrates the complexity of the issue very well.<sup>75</sup> Even if the South African

72 See 2005(8) BCLR (CC) at Para. 45.

73 See the list of cases cited in 2005(8) BCLR (CC) Para. 45, note 46.

74 2004 (5) BCLR 445 (CC).

75 In the Canadian constitutional system the limitation of a fundamental right (such as the right to vote) is legitimate only if that limitation

judges claim that the issue of constitutionality in question differs from *Sauvé v. Canada*, the reasoning of the Canadian court nevertheless was a valid instrument for analysing the issues implied by limiting prisoners' right to vote.<sup>76</sup>

The right to vote has considerable symbolic and material importance in the post-segregationist era and was a fundamental part of the constitution-making agreement. This agreement was essentially based on recognizing the Black majority's civil and political rights (with enjoyment of economic and social rights still to be realized). As a result, the widest possible enjoyment of rights connected to political citizenship had to be recognized<sup>77</sup> Therefore the particular situation of the prisoners in question was not compatible with the deprivation of a fundamental right, such as being part of the electorate. In this case the importation is strictly used for knowledge-expanding purposes. The Court does not fall in line with any foreign model; it uses the Canadian decision for verifying the topography of the principles involved. Similarly, the Court compares numerous national legislations, simply acknowledging the existence of multiple legislative solutions of the issue. The *rhetorically persuasive* effect of this practice is very powerful.

Another case using the horizon technique is *Buzani Dodo v. State*. The judgment of 5 April 2001 confirms the *order of unconstitutionality* issued by the *Eastern Cape High Court* on the basis of Section 172(2) of the 1996 Constitution, Sections 51(1) and 53(3)(a) of the new Criminal Law Amendment Act 105/1997. The provisions defined the criminal offences requiring a life sentence (Section 51(1) and the hypotheses where instead there are 'substantial and compelling circumstances').

The High Court judges contested the constitutionality of these provisions because they are damaging to the separation of powers. The norms under examination, in fact, were held to be damaging to the judiciary's autonomy which, according to the judges, would be overly bound by the sentencing parameters established *ex lege* and hence a conflict between branches of power.

If the legislative branch often showed mistrust of judicial review complaining about the violation of Parliament's sovereignty, in this dispute it is the ordinary judges' turn to report the damage to the judiciary's autonomy by the legislature's new statutory framework.

The Court's comparative analysis is in a chapter of the judgment entitled 'Foreign Jurisprudence'. The constitutional judges claim that numerous examples of 'open and democratic societies' delegate determining the penalty system to the legislature (Romano-Germanic systems implied); the United States and Canada are explicitly cited.<sup>78</sup> According to the South African judges, in the United States ever since 1910<sup>79</sup> the definition of punishments by the legislature is not considered to be a violation of the separation of powers as long as it is exercised within the limits of the Constitution; an excerpt from *Mistretta v. United States* is cited: 'a degree of overlapping, a duty of interdependence as well as independence the absence of which would preclude the establishment of a Nation capable of governing itself effectively'.<sup>80</sup>

In fact, the co-participation of the branches of authority in working out criminal norms is an effective form of *checks and balances*.<sup>81</sup> Moreover, the Eighth Amendment sets out the definition *ex lege* of the statutory framework for avoiding disproportionate penalties or 'cruel and unusual punishment'.<sup>82</sup>

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passes the *minimum impairment* test. The difficult legislative path of modifying Section 51(e) of the Electoral Act and the problematic examination of constitutionality by the Supreme Court (that decided only with a majority of 5 to 4 in *Sauvé v. Canada* (*Chief Electoral Officer*) [2002] 3 SCR 519, establishing the unconstitutionality of excluding prisoners from the right to vote) are used by the South African Court as a starting point for interpretation. The issues of the respective cases are very similar in terms of the elements of law, the principles and facts involved.

76 The South African Court must decide on the constitutional legitimacy of limiting the right to vote considering economic evaluations and political decisions regarding the allocation of funds for the actual enjoyment of the right to vote in which the prisoners are sacrificed for the benefit of citizens who cannot go to the polls or offices of electoral registration.

77 A similar case (once again related to prisoners' voting rights) *Arnold Keith August et al. v. Electoral Commission et al*, 1999 (3) SA (CC) had been decided previously by the Court in 1999. The judgment is much less detailed, but the judges had already begun to establish a *horizon scan* with the foreign systems more thoroughly analysed in the 2004 judgment.

78 See 2001 (5) BCLR 423 (CC); 2001 (3) SA 382 (CC) at Para. 27.

79 See *Weems v. United States*, 217 US (1910) in 2001 (3) SA 382 (CC) at Para. 28.

80 *Mistretta v. United States*, 488 US 361 (1989) in 2001 (3) SA 382 (CC) at Para. 28.

81 See *United States v. Brown*, 381 US 437, 443 (1965) in 2001 (3) SA 382 (CC) at Para. 28.

82 Many judgments are cited on this subject, among the more recent are: *Rummen v. Estelle*, 445 US (1980); and *Harmelin v. Michigan*, 501 US (1991).

The South African Court also notes how for the Canadian constitutional system, just like for the Supreme Court, the *ex lege* determination of punishment cannot be considered a violation of the separation of powers (Section 12 *Canadian Charter of Rights and Freedoms*).<sup>83</sup>

The Johannesburg judges extend the comparison to other systems: Australia, Germany, India, New Zealand and the United Kingdom. The comparative method is also interesting from a purely visual point of view. In a series of subsequent notes, the Court illustrates the general characteristics of these systems, pointing out that they often contain provisions much more invasive of the judiciary than what is laid down in Section 51(1) of the Criminal Law Amendment Act. The Court notes how in the Australian system it is not entirely a violation of the separation of powers when minimal obligatory punishments for specific criminal offences are specified, and how, on the contrary, it is up to the legislature to determine the applicable penalties. In terms of the German system, which is obviously radically different from common law systems, the South African Court examines the *Strafgesetzbuch* (StGB) whose 'Special Part' sets up the statutory framework for punishment directly established by law, as in Article 211 for homicide and Article 220(a) for genocide.

In terms of India and New Zealand once again the Court stresses how *sentencing* is guided by criteria established by the law. Similarly, the Court points out how the Criminal Justice Act 1991 (amended by the Criminal Justice Act 1993) of the United Kingdom contains 'the most comprehensive attempt to influence judicial sentencing policy'.<sup>84</sup>

The comparison is concluded with a reference to the Namibian High Court using the criteria of the '*grossly disproportionate test*' to determine if the statutory minimum of a punishment constitutes cruel, inhuman or degrading treatment or punishment according to Article 8(2)(b) of the Namibian Constitution.<sup>85</sup>

The Court, on the basis of its analysis, claims that: 'It has never, so far as I have been able to determine [Justice Ackermann writing], been decided in any of these jurisdictions that mere involvement by the legislature in the sentencing field conflicts with the separation of powers principle.' The conclusion states that the decision to reject the order of unconstitutionality issued by the High Court of Section 51(1) for violating Section 165(2), (3) and (4) of the 1996 Constitution (autonomy and independence of the judiciary) is in 'accord with the jurisprudence of leading democracies in the world'.<sup>86</sup>

The Court attempts to obtain a *horizon* from which to derive a standard of interpretation, even if in a way that is not really completely satisfactory, in the case *Islamic Unity Convention v. Independent Broadcasting Authority et al.* of 11 April 2002.<sup>87</sup>

The applicant was Radio 786, which was accused of expressing ideas criticizing the legitimacy of the foundation of the Israeli State and touching upon the negation of the Holocaust during its radio programme, called 'Zionism and Israel'. Following the report made by the *South African Jewish Board of Deputies* to the *Broadcasting Authority*, Radio 786 was charged with violating Clause 2 of the Code of Conduct for Broadcasting Services since the content of the transmission 'was likely to prejudice relations between sections of the population, i.e. Jews and other communities'.

Radio 786 responded by claiming that not only was Clause 2 not violated but that this would be unconstitutional in light of Section 16 of the Constitution (freedom of expression). In this situation the Court once again finds itself ruling on terrain familiar to many constitutional judges: the limits of freedom of expression.

In this perspective Justice Langa (who wrote the decision) endeavours to set up a *horizon* of interpretations. The pre-selected courts are: the Strasbourg Court (from which only three cases are cited, namely *United Communist Party of Turkey and Others v. Turkey*, the much studied *Repah Partisi v. Turkey* and *Handyside v. The United Kingdom*); the Supreme Court of Canada (citing the case *R. v. Zundel*);<sup>88</sup> and a general reference is made to decisions of the German Federal Constitutional Court.<sup>89</sup>

83 The South African Court at Para. 30 cites *R. v. Smith* [1988] 40 SCR 97; and *R. v. Latimer*, SCC, 1, file n. 26980 (18.1.2001).

84 All of this is in 2001 (3) SA 382 (CC) Para. 32.

85 Citation from *State v. Vries* 1996 12 BCLR 1666, 1676G and 1702J-1703A.

86 See 2001 (3) SA 382 (CC) Para. 50.

87 See 2002 (4) SA 294 (CC).

88 The South African judges explicitly refer to the minority opinion of Justice Cory in *R. v. Zundel* [1992] 2 SCR 193.

89 The technique here is a superficial and unsatisfactory reference to the issue's treatment in D. Curie, *The Constitution of the Federal*

From this horizon scan, which lacks some authoritative interpretations, the South African judges extract a principle according to which: ‘South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society (...). *Open and democratic societies* permit reasonable proscription of activity and expression that pose a *real and substantial threat* to such values and to the constitutional order itself’ (Paragraphs 28-29).<sup>90</sup>

It is obvious that the Court seeks a confirmation of its interpretation to strengthen the constitutional provisions on the freedom of expression according to which that freedom cannot be extended to: ‘propaganda for war; incitement of imminent violence; advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm’ (Section 16(2)).

Nevertheless, if the Constitution already lays down a limitation of the freedom of expression on the basis of a ‘real and substantial threat’ to the constitutional system and values, it seems that the Court wants to strengthen that provision by ascertaining that it is in line with international standards. In other words, the judges are not satisfied with the formal criteria in the constitutional text and want to *read* the provision in the context of interpretive practices of other important constitutional courts.

Consequently, the Johannesburg judges, with this poorly constructed horizon scan, look for a confirmation of the existence in other systems of an element that functions as a limit to the freedom of expression: this is identified in the concrete threat to the constitutional system and values that the unlimited exercise of the freedom of expression can create. The horizon method here seems to respond to the need for *reassurance*. The judges appear to look for confirmation that the limits constitutionally set down of such an important freedom for a system based on the break from an illiberal regime tend to be in line with those provided by other ‘authoritative’ systems.

The technique of the *horizon* is even more apparent in another case that includes delicate questions of foreign policy: *Mohamed et al. v. President of Republic of South Africa et al.* of 28 May 2001.<sup>91</sup>

The applicant, a Tanzanian citizen and illegal immigrant in South Africa, was arrested in a collaborative operation between the South African police and the FBI and extradited illegally in the United States. Here the appellant risked capital punishment because he was accused of participating in the 1998 terrorist attacks on the American embassy in Nairobi.

Even if the appellant was not a South African citizen, the Court wanted to reinforce the choice against the death penalty and the ban on extraditing to a country where the person extradited risks capital punishment without previous diplomatic assurance that, should he be so sentenced, the punishment will not be carried out.

Undoubtedly, the Court makes a great effort to construct a *horizon* for aligning South Africa with the interpretation standards of countries against capital punishment. The reasoning begins with an examination of British standards and those of ex-Commonwealth countries.<sup>92</sup> This is followed by the ‘pilgrimage’ to the constitutional ‘sanctuary’ of Canada with the analysis of *Minister of Justice v. Burns, Kindler v. Canada (Minister of Justice)*,<sup>93</sup> *Reference re Ng Extradition (Canada)*,<sup>94</sup> and *Halm v. Canada (Minister of Employment and Immigration) (TD)*. Lastly, the *horizon* includes an analysis of judgments of the Strasbourg Court on the issue.<sup>95</sup>

In the eyes of the South African judges, the standards of the countries chosen appear more or less homogenous. Countries against capital punishment do not provide for the extradition of an accused person who risks being sentenced to death in the country requesting extradition. Even in this situa-

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*Republic of Germany*, 1994, pp. 213-215. A curious fact is worth pointing out. The text cited in English on German constitutional law is exactly the same one among those that Marquesinis, *supra* note 1, identifies as the main means of spreading German constitutional law in the Anglo-Saxon world.

90 Emphasis added.

91 2001 (3) SA 893 (CC).

92 Citing *R. v. Brixton Prison (Governor) ex parte Solben* [1962] 3 All ER 641 (CA), 659F-660B and the British norms: Aliens Order (1953) SI 1571, amended by Immigration Act 1971, Section 3(5)(b) (see 2001 (2) SACR [South African Criminal Law Reports] 66 (CC) at Paras. 30-31).

93 [1991] 6 SCR 193.

94 [1991] 6 SCR 252.

95 The following are analysed: *Soering v. United Kingdom*; *Ahmed v. Austria*; *Chahal v. United Kingdom*. We must not forget that the South African Court had to confront other issues requiring the definition of other comparative scenarios. In particular the issue of ‘Consent to deportation or extradition’ compelled the judges to consider many foreign rulings from the United States, New Zealand, Canada and India (including the classic cases *Miranda v. Arizona* and *Escobar v. Illinois* of the US Supreme Court) see Paras. 62-67.

tion, it seems that the Court feels reassured by the results of its comparative analysis: 'South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution' (Paragraph 69). As a consequence, the Johannesburg judges bring their interpretation in line with other systems, confirming the illegitimacy of the provision for extradition. Furthermore, the South African court decides to send the text of the judgment to the *Federal Court for the Southern District of New York* (where the appellant would be tried) since the Court cannot order the South African Government to act by diplomacy with the American authorities as the Court has no right to control the executive's foreign policy actions.

A clear example of the *horizon* technique can be seen in *Ex Parte The President of the Republic v. in re: Constitutionality of Liquor Bill* of 11 November 1999.<sup>96</sup> The Court had to decide on the constitutionality of abstract, *ex ante* recourse by request of the President of the Republic (Section 84(2)(c)). Activated for the first time in South African constitutional history during the approval process of the *Liquor Bill*, *ex ante* judicial review raised strong political resistance. Before deciding on the legislative text's constitutionality, the Court had first to rule on the constitutionality of this type of referral.

In a judgment written by Justice Cameron, the Court uses foreign parameters for dealing with the issue of constitutionality of this type of referral. The Court analyses, using the admirable method of comparative law, the procedure in the United States, United Kingdom, Australia, New Zealand, Ireland, India and Canada, and mostly examining the mechanism of judicial review provided by the French Constitution of 1958. Observing what happens abroad does not serve the purpose here of assigning meaning to constitutional utterances (which, in this case, are mostly clear) but, once again, to show faith in the choices made by the constitution-making body. With this method of deciding the Court becomes aware of the active role which the Constitution imposes on it through the wide range of opportunities for activating judicial review. Claiming that 'comparable procedures do exist in other constitutions, though none is quite like our own' (Paragraph 7), the Johannesburg judges reassure themselves that the procedure provided by the Constitution has been experimented with by other legal systems for a long time and that the particularities of the South African Constitution are not some kind of risky venture.

In *Lawrie John Fraser v. Children's Court et al.* of 5 February 1997, a judgment written by Justice Mahomed with which all the other judges concurred, the Court studies the normative solutions and interpretive paradigms of countries that it defines as 'first-world' in search of solutions for evaluating the constitutional legitimacy of Section 18(4)(d) of the Children Care Act 74/1983 and indicating to Parliament the possible areas of legislative intervention.

The Court had to decide on the necessity of the biological father's consent to the adoption of his child, which was decided unilaterally by the mother. In this situation, the Court discussed the norms on parentage, changes in family structure that increasingly excludes marriage, and the problem strongly felt in South Africa of *gender inequalities* and the discrimination towards women and children.

Before stating its decision, the Court establishes a horizon scan including the legislation and jurisprudence of the United States, Canada, the United Kingdom and the Member States of the ECHR. The operative part of the judgment is preceded by a long paragraph entitled 'The effect of the foreign responses' (Paragraph 43). Before handing things over to Parliament, the Court states that: '(...) the legislative approaches adopted in "first-world" countries described in the preceding paragraphs *should be viewed with caution*.'<sup>97</sup> The socio-economic and historical factors that give rise to gender inequalities in South Africa are not the same as those in many of the "first world" countries described. The task facing the parliament is thus a challenging one' (Paragraph 44).

The judges claim that the father's consent to the adoption is usually necessary along with the mother's in a 'first-world' perspective. The Court then considers the *compatibility* of this principle derived from the comparative horizon. This solution, in fact, does not adapt well to the situation in South Africa, which has an extremely high birthrate due to acts of sexual violence and which has parental relations without stability and in situations of extreme poverty. After this comparison, the Court warns the Parliament of the consequences of introducing the obligation of the father's consent as provided abroad.

<sup>96</sup> 2000 (1) SA 732 (CC).

<sup>97</sup> See 1997 (2) SA 261 (CC) (emphasis added).



Stressing Parliament's difficult task of finding the right balance between interests, the Court shows that the *fact-finding comparison* was nevertheless very useful for obtaining current normative solutions and contextually demonstrating the national socio-economic particularities that determine suitable solutions for South Africa. The obligation of the father's consent to adoption could turn into a situation to the detriment of the mother (unable to take care of familial obligations) and for the offspring (born in extremely difficult family conditions).

#### 4.3. The mechanism of setting two extremes

With the argumentative technique of *setting two extremes*, the judges identify two or more foreign interpretive paradigms or argumentation models as if to confine the oscillation of their own interpretation. At times the interpretation of the South African Constitution is located between two margins, without excluding the possibility of aligning the interpretation with one of the two poles. In this case, the mechanism of setting two extremes changes into the probative method either for or against the main decision.

An example is Justice Madala's dissenting opinion in *Lawyers for Human Rights and Ann Francis Eveleth v. Minister of Home Affairs*.<sup>98</sup> The judge goes into some depth on a minor issue regarding the question of illegitimacy dealt with in the judgment (the illegitimacy of some provisions on illegal immigration and the possible arrest and temporary detainment of illegal aliens) but of great general importance: the content of the *right to standing*, that is, the possibility, according to Section 38 of the South African Constitution, of approaching a court (including the Constitutional Court) directly if a right in the *Bill of Rights* is infringed.

Justice Madala cites two very different interpretations: the first from Canada and the second from India. Madala claims that a tendency appears in Canadian jurisprudence of recognizing a certain 'discretion' in evaluating the *right to standing* on the basis of three criteria: (1) the action brought before the court raises a *serious legal question*; (2) the plaintiff has a *genuine interest in the resolution of the question*; (3) there is no other way that the issue may be brought to court.<sup>99</sup>

Justice Madala then demonstrates the opposite version of the *right to standing* according to the Indian system; *judicial redress* is allowed only for those who claim a violation of one of their rights by the State, public authorities or by another person.<sup>100</sup> Between the *relatively wide* Canadian interpretation of the *right to standing* and the much more restrictive Indian one, Madala recognizes, in the case in question, the right of all applicants to go to the Constitutional Court. Madala argues that the wide interpretation of Section 38 is to protect the more vulnerable sections of South Africa's society that suffered under the apartheid system by facilitating access to the judiciary for more effective protection of rights guaranteed by the Constitution.<sup>101</sup>

This technique can be seen in another case: *State v. Russel Mamabolo et al.* of 11 April 2001.<sup>102</sup> The dispute contemplates the constitutionality of the criminal offence of *scandalizing the Court* (part of the broader category of *contempt of Court*) in relation to Section 16 of the Constitution (freedom of expression).

The applicant was an important political exponent of the radical right who had been imprisoned for having indirectly criticized a judgment in a national daily.

Even though the Court judges these manifestations not to be part of the instances of *scandalizing the Court* (thus imprisonment for them is illegitimate), the judges are compelled to develop a long and complicated argumentation concerning the constitutional legitimacy of such instances. The judgment

98 *Lawyers for Human Rights and Ann Francis Eveleth v. Minister of Home Affairs* 2003 (8) BCLR, 891 (T).

99 Madala deduces these criteria from *Canada (Minister of Justice) v. Borowski* [1981] 2 SCR 575; and from *Canadian Council of Churches v. the Queen* [1992] SCC 18.

100 See Madala, *supra* note 99, Paras. 76-77, where he cites *S.P. Gupta & Others v. Union of India & Others* [1982] 2 SCR 365, 520.

101 In the main decision, the South African Court incidentally pointed out regarding Section 38 that the right to standing codified in it 'introduces a radical departure from common law in relation to standing. Indeed, the terms of the section [38] limit considerably the degree to which an analysis of the standing jurisprudence in other countries can be of real assistance'. This statement by the Court provokes some observations: (1) the horizon scan for making a comparison with foreign experiences undoubtedly seems to have taken root; (2) nevertheless, the Court seems to stress the diversity of Section 38's provisions only in terms of common law; (3) the Court makes an unconscious slip: the world of common law is the real reference for norms and jurisprudence and the Court does not investigate instead possible differences of Section 38 from civil law systems.

102 2001 (5) BCLR 449 (CC).

written by Justice Kriegler establishes the issue's two extremes: on the one hand, numerous *common law* systems that provide for this instance (United Kingdom, Canada, India, Australia, New Zealand, Hong Kong, Zimbabwe and Namibia)<sup>103</sup> and, on the other, the United States that, despite having the instance of *contempt of Court*, does not have the instance of *scandalizing the Court*, due to the dominating *freedom of expression* principle based on First Amendment interpretations.<sup>104</sup>

This decision is of great interest because we can see the penetration of *extra-systemic* parameters in the formation of disputes before the Court. In fact, the *amicus curiae* supporting the unconstitutionality of *scandalizing the Court* as a crime uses a positive probative method, citing the *R. v. Kopyto* case of the *Ontario Court of Appeal*.<sup>105</sup> In this judgment, it appears that in Canada as well they had discussed the need to introduce the interpretation of freedom of expression according to the American version. The *amicus* agrees with the majority opinion judges in the Canadian case who were in favour of introducing the famous American test of 'clear and present danger' for evaluating the legitimate cases of limiting freedom of expression.

But it is at this point that Justice Kriegler, having drawn the boundaries along the field of interpretive oscillation, proceeds with an interesting comparison. First, discussing the *amicus curiae's* argumentation, the judge declares himself in line with the minority opinion of *Kopyto*, stating: 'I respectfully share the misgivings expressed by Gubbay and Dubin (in minority) about the suitability of that test in a jurisdiction that does not have to apply the First Amendment nor enjoy the benefit of the extensive and complex jurisprudence so carefully constructed by the United States courts' (Paragraph 35). And: '(...) before one could subscribe to such importation of a foreign product, one needs to be persuaded, not only that it is significantly preferable in principle, but also that its perceived promise is likely to be substantiated in practice in our legal system and society it has been developed to serve. More pertinently, it would have to be established that the *clear and present danger test*, in the adapted form proposed or in some permutation, was consonant with our South African constitutional values system (...). I remain very much unpersuaded' (Paragraph 36).

Refusing the American interpretation (the opposite pole), Kriegler reasons by comparison: 'one should be slow to *engraft* such a test on to our law: the two [that is, the American system of limiting freedom of expression and the South African one] are inherently incompatible, because they *stem* from different common law origins and subsist in materially different constitutional regimes. The balance which our common law strikes between protection of an individual's reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States.<sup>106</sup> The difference is even more marked under the two constitutional regimes. The United States constitution stands as a monument to the vision and libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. Our Constitution is a wholly different kind of instrument (...) more explicit, more detailed, more balanced more carefully phrased and counterpoised, representing a multi disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for future governance of the country. (...) [The freedom of expression] for us is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. The First Amendment declaims an unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of limitations' (Paragraph 40).

Concluding that the South African interpretation of freedom of expression departs from the American model, the judges state: 'The Constitution proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom (...). What is clear is that freedom of expression does not enjoy superior status in our law' (Paragraph 41). Using the argumentative technique of setting two extremes, Justice Kriegler reasserts that he distances himself from the Canadian

103 See *ibid.*, Para. 20 in which at note 21 the Court cites the jurisprudence of these countries that would confirm the Court's thesis.

104 The South African judges fix the opposite pole using a famous US Supreme Court case: *Bridges v. California*, 314 US 252 (1941).

105 [1987] 47 OT 2d. 213. Although the Ontario Court of Appeal has a website with its jurisprudence *on line*, the database goes back only to 1999, which prevented the recovery of this court decision.

106 The Court establishes the US model of balancing in *The New York Times Co v. Sullivan* 376 US 254 (1964).

interpretation: ‘It is therefore in my view not wise to choose a re-tooled version of a minimalist test, that was originally crafted for the American system where minimal interference with a predominant constitutional right under the First Amendment was called for, and was then adapted by Canadian provincial courts (...).’

Freedom of expression must be balanced in accordance with the limits provided by Section 16(2). In conclusion, the instance in question is not unconstitutional, even if the Court deems the penalty system to be disproportionate.

#### 4.4. Comparative distinguishing: ‘The extra-systemic parameters adopted are not pertinent!’

In the case *Mashavha v. President of the RSA and Others*<sup>107</sup> two important facts arise from problematic consequences: (1) one of the parties appearing before the Constitutional Court introduces in its pleading a probative *extra-systemic* argument; (2) the Court does not regard the foreign cases cited as *pertinent*.

The question of constitutional legitimacy has to do with the Presidential Proclamation R7/1996, which assigned the administration of the welfare system set out by the Social Assistance Act 59/1992 to the Provincial governments.

The issue is of great importance partially because it required figuring out whether the Interim Constitution assigned welfare tasks to the State or the provinces and, as a result, the President of the Republic had the power to assign those matters to territorial agencies. It was also essential to evaluate the constitutionality of the norm that inevitably introduces an asymmetric system of enjoying rights to social assistance. Such a situation would seriously violate the principle of equality.

The Government of KwaZulu-Natal (KZN), a historical *enclave* of the Zulu people, strongly autonomist and a supporter of broad decentralization, opposed in court the order of unconstitutionality declared by the *High Court* concerning the Presidential Proclamation R7/1996. The *High Court*’s decision, while awaiting the Constitutional Court’s confirmation, returned the administration of the welfare system to the national sphere. The KZN in its pleading cites, with a rather superficial comparative analysis, the decentralized systems of administering social assistance in France, Poland, Denmark, Austria, Canada and India. In the judgment written by Justice van der Westhuizen, the Constitutional Court states that the inequalities caused by the segregationist system have created a context not easily *comparable* with the countries cited. As a consequence, although a thorough comparative analysis is not made, the system of decentralized social assistance in other systems is not held to be *compatible* with the modern socio-economic needs of South Africa.<sup>108</sup>

Two facts should be pointed out. The argumentative methods based on *extra-systemic* elements, as I have stressed elsewhere, not only belong to the Constitutional Court but have penetrated the proceedings before lower Courts: the use of foreign interpretive paradigms is by now a widespread procedural strategy in defence pleadings, in ordinary court case documents and in those of the *amici curiae*. In this context, the Court’s decision of ‘non pertinence’ proves to be slightly arbitrary, not the least because it is expressed in such an abrupt manner.

#### 4.5. Argumentation with multiple techniques based on extra-systemic parameters

It is not unusual to encounter judgments weaving together the various interpretive methods discussed here in the same argumentation. The following case is an example.

In the decision *Kaunda and others v. President of the Republic of South Africa and others*<sup>109</sup> 69 South African citizens were arrested in 2004 in Zimbabwe and Equatorial Guinea charged with being mercenaries involved in organizing a coup in Equatorial Guinea. In the proceedings before the South African Constitutional Court, after complicated trial events, the applicants claimed simply to be specialized security personnel employed by a South African company, *Military Technical Services* (MTS), hired for protecting mining sites in the Democratic Republic of the Congo from attacks by militarily organized ‘rebels’.

<sup>107</sup> *Mashavha v. President of the RSA and Others*, 2004 (3) BCLR 292 (T).

<sup>108</sup> *Ibid.*, Para. 51.

<sup>109</sup> 2004 (10) BCLR 1009 (CC).

The applicants arrested in Zimbabwe, afraid of being extradited to Equatorial Guinea where they would probably risk receiving the death penalty, applied to the South African *High Court* so that the judges would instruct the South African Government to provide diplomatic protection. In the petition to the *High Court* a request was made that the Government act so that the rights the applicants would enjoy in South Africa would also be respected in Zimbabwe and Equatorial Guinea, thereby avoiding the danger of receiving the death penalty.

The *High Court* rejected the request based on the impossibility of asserting the validity of South African constitutional principles outside its territory and of ordering the Government to make diplomatic decisions that are derived from political and governmental functions. The applicants immediately petitioned for an appeal before the Constitutional Court.

The problem that the Court had to resolve is whether the applicants can enjoy diplomatic protection. The Court held that the nature of their action, dealing entirely with private law, does not give rise to any relationship deserving diplomatic protection on the basis of international law.

The main judgment written by Justice Chaskalson analyses constitutional norms and domestic law<sup>110</sup> in order to verify whether there is a state obligation to intervene for the protection of South African citizens in foreign territory. The rights that the applicants feared would not be respected in Equatorial Guinea (right to life, right to dignity, right not to be subjected to inhuman, cruel and degrading treatment or the death penalty, right to a fair trial) are undoubtedly fundamental and inalienable rights of the South African constitutional system. The problem was whether they could also be respected outside South African territory (under a kind of extraterritorial functioning of the Constitution).

The main judgment denies this possibility but as a support or confirmation of its interpretive journey it makes use of *extra-systemic* parameters.

Once again the Supreme Court of Canada is chosen as the first 'dialogue partner'. The South African Court cites the Canadian Supreme Court decision *R. v. Cook*<sup>111</sup> claiming that the principle of equality of state sovereignty generally does not permit extraterritorial application of national laws. Justice Chaskalson declares that he shares the interpretation of the Canadian judges,<sup>112</sup> and here we are dealing with a *probative* citation.

Then there was the problem of the Government's obligation to act so that the constitutional rights of South African citizens are also respected for South African nationals abroad. In this case, the decision discusses whether there is an obligation for the Government to proceed diplomatically to plead with foreign governments for the application of the South African *Bill of Rights* to South African citizens. The main judgment does recognize the importance of guaranteeing all South African citizens the rights protected by the Constitution. Therefore, if all citizens are entitled to request guarantees from the State even abroad, the Government only has the obligation to examine the request; but, in terms of the Constitution and the autonomy of the Government's function, there is nothing automatic between requesting protection and the authorities' obligation to act for the protection of the constitutional rights of South African nationals abroad.

In this context, it is just not possible for a judge to order the executive branch to operate in a specific way regarding diplomatic relations with other states.

In order to reconstruct this complex issue, Justice Chaskalson begins with an analysis of the *Report of the International Law Commission on the work of its fifty-second session*<sup>113</sup> in which the *Special Reporter* evaluates similar cases decided in the United Kingdom, the Netherlands, Spain, Austria, Belgium and France in which the judges rejected analogous requests for diplomatic protection made by their respective nationals. In this phase of the argumentation, we can clearly see the technique of the *horizon*. Empowered

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110 Justices Ngcobo, O'Regan and Sachs concurred with separate opinions.

111 *R. v. Cook*, [1998] 2 SCR 597.

112 See *Kaunda v. President of the Republic of South Africa*, 2005 (4) SA 235 (CC) Para. 42. The South African judges cite other Canadian judgments reasserting that the principles of the Canadian *Charter* cannot impose equal standards of protection on other states and thus denying the extraterritorial functioning of the Constitution, such as: *Spencer v. The Queen* [1985] 2 SCR 278 and *Canada v. Schmidt* [1987] 2 SCR 500.

113 UN International Law Commission, *Report of the International Law Commission, Fifty-Second Session*, UN GAOR, 55<sup>th</sup> Sess., Supp. No. 10, at 292, UN Doc. A/55/10 (2000) in International Law Commission (Dugard), *First Report on Diplomatic Protection*, UN Doc. A/CN.4/506 (2000).

by the facts acquired from this analysis, Justice Chaskalson puts forth the interpretive hypothesis that the judge cannot order the executive branch to intervene diplomatically for the protection of its citizens in the territory of a state that does not recognize equal rights and protection according to the national constitutional system.

The main judgment uses Germany as an example for ‘reinforcing’ this approach. At this point the argumentation technique moves from *scanning the horizon* to a *probative importation* in the following manner. Justice Chaskalson states that Germany has a long tradition of recognizing the obligation of the State to provide diplomatic protection for its nationals in other states that do not recognize the enjoyment of the same rights; all of this, however, is to be exercised with the autonomous discretion of the Government. The main judgment cites a German court decision in which the judges limit the Government’s discretion in evaluating whether to intervene diplomatically in terms of the Constitution.<sup>114</sup>

Yet again with a probative technique in favour of the decision, Justice Chaskalson cites the example of the British *Court of Appeal* in the *Abbassi*<sup>115</sup> case where the judges decided on the legitimacy of the obligation to intervene diplomatically on behalf of British nationals in foreign territory who will be denied fundamental rights of the British legal system. And, as tradition has it, the *Foreign Office* is granted a broad discretionary power in evaluating the individual diplomatic situation, excluding all possibilities of the judges controlling this type of decision.<sup>116</sup>

The Johannesburg judges had to decide on the following points: (1) the request ordering the Government to ask for extradition of the applicants from Zimbabwe. The main decision responds that this is not possible because at present there is no criminal trial in South Africa against the applicants due to a lack of sufficient evidence; (2) the request to act for the protection of South African citizens against the imposition of the death penalty. For the majority of the judges it is objectively unreasonable to think that the charges for which the South African nationals were arrested in Zimbabwe could lead to capital punishment; this risk does exist for those arrested in Equatorial Guinea. The South African Government will act only if they are sentenced to capital punishment or, if so sentenced, there is the actual risk that the punishment will be carried out; (3) the request ordering the Government to ask for the extradition of the applicants from Equatorial Guinea. The reasoning used for Zimbabwe is repeated here. The extradition process requires the preliminary investigation by a trial in the country requesting the extradition and this was not the case when the issue was brought before the Court; (4) the request that the Government act so that the rights in Section 35 of the South African Constitution (fair trial and fair detention) are guaranteed in Zimbabwe and Equatorial Guinea.

The Court states that this point must be analysed carefully; numerous reports by governmental and non-governmental organizations (like Amnesty International) testify to the deplorable state of the Guinean legal system in which there is widespread abuse of fundamental rights, torture and summary execution.

The Court has to decide between two arguments: on the one hand, South Africa has no right to intrude upon a criminal trial in another state simply because the accused are South Africans (the extra-territorial functioning of the Constitution is in any case excluded); on the other hand, it must verify that it is not dealing with a possible violation of the fair trial principle.

Foreign interpretations (Canadian and American) are used *to ground* the main decision of the Court not to order the Government to interfere with the application of the law of another state: *Spencer v. Queen*,<sup>117</sup> *Canada v. Schmidt*<sup>118</sup> and the rather dated *Neely v. Henkel*.<sup>119</sup>

The formula in the main decision is the following: (1) no obligation exists for the Government to act for diplomatic protection upon the request of the parties; (2) no possibility exists for the judiciary to con-

114 See *Hess* BVerfG, 55, 349 in 2005 (4) SA 235 (CC) Para. 74.

115 *Abbassi and Another v. Secretary of State for Foreign and Commonwealth and Another* [2002] EWCA Civ. 1589 (cited in *Kaunda*, 2005 (4) SA 235 (CC) Para. 76).

116 In order to evaluate the scope of using *precedents* of non-South African judges, it is interesting to cite Para. 76 of the judgment under examination: ‘we were not referred to decisions of other national courts which suggest a higher intensity of review than that evinced by the German and English decisions. None are referred to by the Special Rapporteur, and I am not aware of any other decision that may be relevant to evaluating international practice’.

117 *Spencer v. Queen* [1985] 2 SCR 278.

118 *Canada v. Schmidt* [1987] 1 SCR 500.

119 *Neely v. Henkel* (No. 1) 180 US 109 (1901).

trol such a decision by the Government if not in the presence of an ‘unreasonable’ decision; (3) the extra-territorial functioning of the Constitution is not recognized; (4) the possibility of asking for extradition is excluded since there is no legal action being taken toward the applicants in South Africa.

Nevertheless, if a South African receives the death penalty abroad or there is a real danger that the fair trial principle will be violated, the Government will undoubtedly act diplomatically. Since there is no reason to presume the Government’s inactivity should these conditions become true in the future, the Court holds that the applicants’ action is premature.

The problem remains of evaluating how the Government can act concretely considering that international law limits the ability to move on this front. The South African judges find consolation in foreign practices stating that many Courts ‘are reluctant to intervene in such matters, even if, as in Germany, they have the power to do so.’<sup>120</sup> Once again on the basis of *Hess*, Justice Chaskalson cites the BVerfG which states: ‘the Federal Government enjoys wide discretion in deciding the question of whether and in what manner to grant protection [of German citizens] against foreign States’.

In this complex court decision we can see the judges’ tendency to move from a *horizon scan* to an assertive *probative* type of argumentation in line with the outlook of a limited group of constitutional judges. Since the judges are dealing with matters closely connected to diplomatic and foreign policy, the tendency to follow established practices of countries with a consolidated constitutional tradition seems irresistible.<sup>121</sup>

In the case *Carmichele v. Minister of Safety and Security and Minister of Constitutional Development* of 16 August 2001,<sup>122</sup> different argumentative techniques abound, namely, scanning the horizon, used for knowledge acquiring purposes, setting two extremes, used for guiding an interpretive stance, and probative importation, to rhetorically reinforce or legitimate the judgment. All of this is even more important since the court decision inserts itself into the complex context of the constitutional transition.

The applicant, the victim of sexual violence by an assailant who had been convicted several times for the same acts and was reported to the authorities for his dangerous behaviour, filed a legal action for damages against her attacker (released on bail for previous sexual violence) and also against public safety authorities, who did nothing to prevent the assault.

The *High Court* and the *Supreme Court of Appeal*, still applying common law developed under apartheid, did not recognize any responsibility of the public safety authorities.

The Court had to decide on whether to develop common law in light of the new constitutional principles, also for the purpose of completing the system’s transition. In the judgment written by Justices Ackermann and Goldstone the Court discusses if ‘the development of the common law in accordance with the new Constitution’ must simply take place through legislation (repealing and substituting normative texts) or also through jurisprudence. To resolve this problem the two judges refer to Canada with a statement by Justice Iacobucci asserting that the legislative branch within a constitutional system has a greater responsibility in developing the common law.<sup>123</sup> Although the Johannesburg judges imported an *extra-systemic* parameter derived from a Canadian judgment, they diverge from it. The Court confirms that within the South African system (as opposed to what tends to be more frequently confirmed elsewhere, that is, a substantial alignment with the Canadian judgments) even ordinary judges need to develop interpretations of the common law in the context of the new Constitution (particularly Section 39(2) of the Interim Constitution, in force when the facts occurred). Therefore, the adjustment of South African common law to the new constitutional system cannot take place exclusively through legislation; even the ordinary judiciary must play an active role in completing the transition of regimes.

Justices Ackermann and Goldstone then proceed to set two extremes to decide the issue of the dispute, that is, the existence of a liability of the public safety authorities for failing to offer protection. Two poles are set by the Johannesburg judges: the jurisprudence of the US Supreme Court<sup>124</sup> and the European

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120 See 2005 (4) SA 235 (CC) Para. 130.

121 A critical comment on this judgment is in S Peté & M. du Plessis, ‘South African Nationals Abroad and Their Right to Diplomatic Protection – Lessons From the “Mercenaries Case”’, 2006 *South African Journal on Human Rights* 22, pp. 438-473.

122 2001 (10) BCLR 995 (CC).

123 The case cited is *R v. Salituro* [1991] 3 SCR 654, 8 CRR (2d) 173.

124 The case cited is *De Shaney v. Winnebago County Department of Social Services*, 498 US 189 (1988).

Convention and the jurisprudence of the Strasbourg Court<sup>125</sup> on the issue of ‘hold[ing] authorities liable for a failure to take positive action to prevent harm’ (Paragraph 45).

Between the two poles, the Court aligns itself with the choices of the Strasbourg Court and, as reinforcement, with the *House of Lords*. In fact, the Court mentions as proof supporting its decision a *House of Lords* judgment reversing a preceding judgment in which the local security authorities were not held liable for negligence for not having ensured protection to a minor<sup>126</sup> and similar jurisprudence of the Strasbourg Court.<sup>127</sup>

The fundamental issue remains of how to develop South African common law. It really looks as though the Court has to take action in no-man’s-land; so another two extremes are set up again: the approach of British common law and, more compatible though determined by rather different formats, the rationale of the German constitutional system in civil matters (since the case in question pertains also to liability for damage).<sup>128</sup>

## 5. The system of ‘open and democratic societies’

The South African *Bill of Rights* contains a fundamental notion for understanding the phenomenon in question. The Constitution, in Sections 36 and 39, uses a rather interesting phrase, ‘open and democratic society’. There are two very important circumstances where the regulation of the use of fundamental rights depends on this notion: on the one hand, the limitation clause of fundamental rights (Section 36) can reduce those rights only if there is a *law of general application* that is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’;<sup>129</sup> on the other hand, in interpreting the *Bill of Rights* ‘the values of an open and democratic society’ must be promoted and therefore *foreign law* is called upon, as we have seen, for supporting the interpretation process of the *Bill of Rights*.

The idea of *open and democratic society* is thus a factor influencing the evaluation of the constitutionality of possible limits on fundamental rights and, simultaneously, the interpretation of those same rights. It is a criterion for developing the interpretation of a possible limitation of the *Bill of Rights*.<sup>130</sup>

The notion of an ‘open and democratic society’ endorsed by the Constitution is thus at the core of the interpretive practice under examination.

Analysis of jurisprudence shows that in many circumstances the Court’s use of this notion has gradually shaped a discursive mechanism that changes into another instrument for opening the South African constitutional system (in terms of being able to ‘consider foreign law’). The Johannesburg Court states, for example, that a specific jurisprudence solution is in line with those of other *open and democratic societies*, or that a certain principle is balanced in the same way in other systems that are held to be ‘open and democratic’.

The use of this constitutional phrase in court decisions follows or precedes the use of *extra*-systemic parameters. In other words, when the judge proceeds using the comparative method, he usually calls upon the notion of an open and democratic society. Therefore, it is not simply an essential axiological

125 Here Art. 2(1) is cited along with *Osman v. United Kingdom* (1998) 29 EHHR 245.

126 *Barret v. Enfield London Borough Council* [1999] 3 WLR 79.

127 *Z. and Others v. United Kingdom* of 10 May 2001, the South African judges state in a note that it is ‘unreported’ at the time of the drafting of the judgment.

128 See the comparative law information at note 57 (Para. 56) of the present judgment where the Court indicates British jurisprudence and many features of German positive law as comparative *extra*-systemic parameters.

129 As we have already seen, the limitation of fundamental rights in light of Section 36 must take into consideration the following supplementary parameters: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

130 Even though here we cannot go into a thorough analysis, it is worth stressing that the idea of a ‘democratic society’ is a phrase present in other texts regulating fundamental rights: Arts. 4, 8, 14, 21 and 22 of the International Covenant on Civil and Political Rights; Arts. 8, 9, 10 and 11 of the European Convention on Human Rights. Especially in reference to the latter, apart from the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and of association, there are also provisions on their limitation based on the following criteria: the parameters of limitation (phrased differently) must be measures ‘necessary in a democratic society’. It should also be pointed out that this notion is elaborated on in a detailed fashion within the Council of Europe; ‘democratic societies’ are those that basically respect the conditions for adhering to the organization (on this point see M. Balboni, *Il Consiglio d’Europa*, cited in L. S. Rossi, *Le organizzazioni internazionale come strumento di governo multilaterale*, 2006).

criterion to which the constitutional system must aspire; it is also a condition for specifying the systems that can be drawn from for *extra*-systemic parameters.<sup>131</sup>

This notion is a mechanism that makes the constitutional system relate to a legal dimension that is considerably larger and at the same time *open* (or not previously defined). The Constitution provides only one criterion for an ‘open and democratic society’: it must be grounded in respect for human dignity, equality and freedom. This is also the only criterion that permits importing parameters when limiting and interpreting fundamental rights.

It seems that the Constitution refers to a macro *system of open and democratic societies*, open ontologically, which South Africa claims to be a part of; the confines of the system can be narrowed or widened according to the constitutional judge’s decision to limit or increase the number of legal systems from which *extra*-systemic interpretive parameters are imported. The judge appears to define or re-define the system’s limits based on intuitive work that is rarely articulated.

As proof that the system of ‘open and democratic societies’ has changing dimensions and is thus essentially open, there are a rather large and not pre-determined number of foreign systems from which *extra*-systemic parameters are imported. In the various judgments analysed there are always diverse references to foreign constitutional systems. Some of them show up systematically (United States, Canada and Germany), but others are cited sporadically or in specific constitutional disputes (India, New Zealand, United Kingdom, Australia, France, etc.).

Another factor should be mentioned; it concerns another innovation demonstrated by the South African practice of interpretation, that is, the mechanism of putting the South African constitutional system in contact with the those that make up the system of open and democratic societies. The communication between the constitutional system and the macro one operates outside the classic positive rules of validity. The system of *open and democratic societies* is not the system of international public or private law (of which South Africa is a part through treaty norms). Directed externally and no longer just internally, the circular nature of the interpretive route does not work in the language of positive law. Even if it is true that the provision of Section 39 authorizes judges *to consider foreign law*, it has been interpreted, as we have seen, not as an obligation on the judges to work using the comparative method; moreover, the *extra*-systemic parameters are not *legally binding*. It seems that the constitutional norm offers the judges additional interpretation possibilities for reaching a fundamental, value-based objective: to promote the values of an open and democratic society.

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131 Here are some paradigmatic examples of the judges’ use of the notion of an ‘open and democratic society’ transformed in a clause for opening the system. In *The State v. Godfrey Baloyi et al.* 2000 (1) BCLR 86 (CC), the Court claims: ‘in open and democratic societies that have adversarial criminal justice systems similar to ours, the centrality of the right to a just criminal process has been strongly emphasised’ (see Para. 15). In fact, the citation of Canadian, American and British jurisprudence follows this statement. In *Arnold Keith August et al. v. The Electoral Commission et al.* 1999 (3) SA 191, the Court states that: ‘many open and democratic societies impose voting disabilities on some categories of prisoners’ (see Para. 31). Upon mentioning this notion, the Court then proceeds with comparing numerous systems such as France, Germany, Greece, Canada, New Zealand, Australia, Denmark, Israel, Sweden, Switzerland, Sri Lanka and the United Kingdom. In the case *Douglas Michael De Lange v. François J. Smuts No et al.*, 1998 (3) SA 785 (CC), the judges express themselves in the following way: ‘it is significant that the use of committal to prison as a means to enforce the disclosure of information in insolvency proceedings is not considered constitutionally or otherwise objectionable in other democratic societies based on human dignity, equality and freedom. This is the case, for example, in England, Australia, Canada, United States and Germany’ (see Para. 39). For every legal system mentioned, references to doctrine and jurisprudence are added in the notes. We can read again in the same court decision: ‘the power to commit an uncooperative witness to prison is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers. This principle has long been established in other democratic societies’ (see Paras. 61-62). *The State v. Samuel Manamela et al.* 2000 (5) BCLR 491 (CC), states that: ‘It is clear however that open and democratic societies permit the shifting of the burden of proof to the accused when it would not be disproportionately invasive of the right to silence and the presumption of innocence to do so’ (see Para. 31). In this case, the comparative analysis of open and democratic societies that the judges refer to does not immediately follow this statement. We can thus confirm that here the notion is used as *obiter dicta*. In *The State v. Abraham Liebrecht Coetzee et al.* 1997 (4) BCLR 437 (CC), the judges claim that: ‘it has not been contended that other open and democratic societies based on human dignity, equality and freedom have found it necessary to resort to such an unqualified presumption for the proper enforcement of the criminal law in relation to all offences of which a false representation is an element. I am not aware of, nor have we been referred to any examples in comparable jurisdictions, where a general provision in the same context is employed’ (see Para. 16). As in the other cases, the introduction of *extra*-systemic parameters follows the use of the notion of an open and democratic society. Here the judges are dealing with numerous American and Canadian Supreme Court decisions on ‘presumptions’. The notion of ‘open and democratic societies’ is used broadly both to justify resorting to *extra*-systemic parameters and to imbue the imported parameter with a particular heuristic power (because it comes from an open and democratic system). As we have seen, the notion of ‘open and democratic societies’ shows up frequently in the judgments made by the South African judges in the form of *obiter dicta* or more often as an actual segment of argumentation (interpretive or for balancing).



Putting the systems into contact with one another therefore happens through means not strictly pertaining to positive law (although in one way or another authorized by the Constitution). On the one hand, it is fuelled by the intuition of the judges; they simply seem to detect if a certain system is an open and democratic society founded on respect for human dignity, equality and freedom (from which *extra*-systemic parameters can be derived). On the other hand, it is based on using comparative law. The latter becomes a fact-finding instrument of translating *extra*-systemic parameters into the constitutional system.

The impression created by this is that the vague intuitive work of identifying the system from which *extra*-systemic parameters can be imported is influenced by a conceptual pre-orientation: drawing only from *open and democratic societies* reduces the risks of introducing 'negative' constitutionalism parameters. Dealing with systems based on the values of human dignity, equality and liberty, the judges reckon to introduce standards that are 'democratic' and therefore compatible with the scope and values that should guide constitutional interpretation.

Thus controlling the decisions based on this practice of reading the Constitution mostly takes place through the comparative method. The comparative method becomes an *internal* investigative instrument (directed toward the importing system, for evaluating the pertinence of *extra*-systemic parameters with the subject of the constitutional dispute) and an *external* one (directed toward the system from which the judges import, for evaluating if the judge who introduces an *extra*-systemic parameter has grasped the meaning and the function exerted by the parameter in its legal system of origin).

In this perspective, if this practice continues to establish itself, the comparative method will become the main logical and legal instrument for evaluating the consistency of the decision's reasoning.<sup>132</sup>

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<sup>132</sup> We can make one final observation, borrowing the idea of M. Cacciari, *L'arcipelago*, 1997. If it is true that horizontal communication between constitutional systems is developing outside international and supranational pact-based entities, then we could hypothesize that there is a movement from an international community in which legal systems are perceived as *islands* towards a set-up in which the *islands* are perceived as part of an *archipelago* (made up of distinct units but belonging to the same whole: *open and democratic societies*). In the archipelago, *inter-systemic* legal relations are no longer solely founded on 'authorizations' of positive (treaty) law, but they can also evolve from the comparative method.