

THE INFLUENCE OF FOREIGN JUDGMENTS ON THE DEVELOPMENT OF POST-APARTHEID CONSTITUTIONAL LAW IN SOUTH AFRICA: JUDICIAL LAW-MAKING IN ACTION?

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Theoretically, law is capable of dealing with every concrete situation that may arise, a fiction that must be maintained at all costs if the division between the judiciary and legislature is not to break down. In fact, *every system is incomplete in coverage, and the gaps have to be filled in as they are revealed, by judicial law-making.*¹

Abstract: Post-apartheid South African courts have wide law-making powers when interpreting common law, customary law and legislation. They have been empowered by a progressive Constitution that “embodies a new understanding of judge-made law that is more faithful to reality and charged with implications for South Africa’s constitutional project [Davis and Klare, “Transformative Constitutionalism and the Common and Customary Law” (2010) *South African Journal on Human Rights* 402]”. International and foreign laws have been of great value to the development of post-apartheid constitutional law, especially foreign case law. Empirical results reveal that the South African Constitutional Court has cited foreign cases more than 3,000 times in almost half of its decisions handed down from 1995 to 2017. This contribution analyses some of the data with a view to determine the influence those foreign cases had on the development of post-apartheid constitutional law in South Africa.

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1 HR Hahlo and Ellison Kahn, *The South African Legal System and Its Background* (Kenwyn: Juta, 1968) pp.304–305. Emphasis added.

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I. Introduction

South Africa's transition from an apartheid state to a constitutional democratic one in a period of 25 years is nothing short of a miracle.² The role comparative constitutional law played in achieving this amazing milestone is undeniable.³ In the process of actual constitution-making, South Africa drew noticeably upon foreign and international legal sources,⁴ both during the negotiations preceding the adoption of the transitional Constitution and later during the approval of the final Constitution.⁵ This trend continues in constitutional adjudication. Foreign and international judgments keep on influencing the development of post-apartheid constitutional law through case law, most notably that of the Constitutional Court.⁶

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- 2 For a historical account of the transition, see Stu Woolman and Jonathan Swanepoel, "Constitutional History" in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Kenwyn: Juta, 2nd ed, 2014) Chapter 2.
 - 3 Dennis M Davis, "Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience" (2003) 1 *International Journal of Constitutional Law* 181, 185–188; Jeremy Sarkin, "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" (1998) 1 *Journal of Constitutional Law* 176 examined the extent to which foreign and international law impacted on the drafting of the transitional Constitution (Constitution of the Republic of South Africa 200 of 1993 — the transitional Constitution).
 - 4 See Christa Rautenbach, "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)" in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Court Judges* (Portland: Hart Publishing, 2013) pp.185–209; Christa Rautenbach and Lourens du Plessis, "The Constitutional Court of South Africa" in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017) pp.560–603. The influence of German constitutional law is interesting considering the fact that the German language is largely unknown to the South African judiciary. There are a number of reasons for the popularity of German law, for example: scholarly exchanges between German and South African law academics; the involvement of German human rights and international law scholars as advisors during the constitution making process; and political parties making use of the expertise of German scholars during the negotiation processes in the 1990s. See Christa Rautenbach and Lourens du Plessis, "In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges" (2013) 14 *German Law Journal* 1539. Also see, Francois Venter, "Why Should the South African Constitutional Court Consider German Sources? Comment on du Plessis and Rautenbach" (2013) 14 *German Law Journal* 1579. Both articles are available at <http://www.germanlawjournal.com/volume-14-no-08/> (visited 10 October 2019).
 - 5 Constitution of the Republic of South Africa, 1996 (the Constitution). The Constitution was adopted in the Constitutional Assembly and certified by the Constitutional Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC). It did not come into existence in the same way as other legislation and is thus unnumbered.
 - 6 Although this article only deals with the empirical results pertaining to foreign law and not international law, it should be noted that the Constitutional Court have considered the judgments of supra-national courts, such as the European Court of Human Rights in a comparative way. See Rautenbach, "South Africa: Teaching an 'Old Dog' New Tricks?" (n.4) p.197.

Judicial law-making has always been a controversial issue, not only in South Africa but also elsewhere.⁷ Prior to the advent of new constitutional dispensation, the doctrines of parliamentary sovereignty and legislative supremacy that prevailed in South Africa curtailed the law-making role of the judiciary quite significantly, especially in the case of legislation. As pointed out in one of the pre-apartheid judgments, *Builders Ltd v Union Government (Minister of Finance)*, “if the provisions of a law are clear, we, as a Court, are not concerned with the propriety of the legislation or policy of the Legislature, our duty is to administer and interpret it as we find it”.⁸

Judicial approaches to common law were slightly different because “common law” is all legal rules not included in statutes.⁹ The view taken by the judiciary towards the development of common law is evident from early pronouncements in the courts, such as the well-known dictum in *Jajbhay v Cassim*:¹⁰

Now the Roman-Dutch law, which we must apply, is a living system capable of growth and development to allow adaptation to the increasing complexities and activities of modern civilised life. The instruments of that development are our own courts of law. In saying that of course I do not mean that it is permissible for a court of law to alter the law; its function is to elucidate, expound and apply the law. But it would be idle to deny that in the process of the exercise of those functions rules of law are slowly and beneficially evolved. That evolution, to be proper, must come from, and be in harmony with, sound first principles which are binding upon us.

The inability of the courts to meddle with apartheid legislation was not always taken graciously by the courts. A few examples exist where the judiciary applied legal gymnastics to rid themselves of the shackles during the apartheid era. However, various attempts by the judiciary to thwart discriminating legislation were stymied by a supreme legislator who prevented the courts from questioning the validity of duly enacted legislation, or who enacted new legislation foiling a judgment.

7 Annie Singh and Moreblessing Z Bhero, “Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of s. 39(2) of the Constitution” (2016) 19 *Potchefstroom Electronic Law Journal*, available at <https://journals.assaf.org.za/per/article/view/1504> (last visited 10 October 2019); Adam N Steinman “A Constitution for Judicial Lawmaking” (2004) 65 *University of Pittsburgh Law Review* 545, 547–596.

8 1928 AD 46, 56. Also followed in *Collins v Minister of the Interior* 1957 (1) SA 552 (A) 567.

9 Hahlo and Kahn, *The South African Legal System and Its Background* (n.1) pp.132–133 explain that the expression “common law” has at least three meanings. First, it refers to the law common to the whole of the country in contrast to laws that apply to certain groups only, for example, customary law that applies to traditional communities in contrast to the common law that applies to the whole of South Africa. Second, it refers to law that does not originate from legislation, ie, Roman-Dutch law of the seventeenth century that applied in the former province of Holland and which has been introduced into South Africa from 1652 onwards and, third, it refers refer to the Anglo-American system of law, such as English law. All three meanings have found resonance in South African law sources. Also see, Christa Rautenbach, “Legal Reform of Traditional Courts in South Africa: Exploring the Links between *uBuntu*, Restorative Justice and Therapeutic Jurisprudence” (2015) 2 *Journal of International and Comparative Law* 275, 276 note 1.

10 1939 AD 542.

The two consecutive judgments delivered in *Harris v Minister of the Interior* are well-known cases in point.¹¹ In 1951, the former government published the Separate Representation of Voters Act.¹² The aim of the Act was to make provision for separate representation of Europeans and non-Europeans on the common voter's roll.¹³ By non-European was meant "a person who is not a *white person* and who is not a *native* for the purposes of the Representation of Natives Act".¹⁴ A "white person" was defined in s.1 of the Separate Representation of Voters Act as:

a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person, who, although in appearance obviously a white person, is generally accepted as a non-European.¹⁵

In turn, a "native" was defined in terms of s.1 of the Representation of Natives Act (the Representation of Blacks Act) as anyone from a "aboriginal race or tribe of Africa", or the child of someone whose mother or father was a "native", or someone who wished to be regarded as a "native", or followed a traditional lifestyle, or spoke a "native" language or "associated" with natives.¹⁶ Since the Act already removed black voters from the common voters roll in 1936,¹⁷ it was obvious that the aim of the Separate Representation of Voters Act was to remove coloured voters from the roll as well. A number of coloured voters did not take this brazen attempt by government to separate them from European (or "white") voters lightly, and they took to the courts to attack the validity of the Separate Representation of Voters Act. The case came before the Cape Provincial Division,¹⁸

11 1952 (2) SA 428 (A) (first *Harris* case) and 1952 (4) SA 769 (A) (second *Harris* case).

12 Act No. 46 of 1951.

13 *Ibid.* At the time, s.35 of the South Africa Act (9 Edw VIII c 9), adopted by the British Parliament in 1909, prevented the exclusion or removal of any voters from the voters' roll based only on race. This provision could only be changed by a two-thirds majority. For a detailed discussion of the constitutional crises sparked by the promulgation of the Separate Representation of Voters Act, see George N Barrie, "The Constitutional Crisis of the 1950s Revisited" (2010) 4 *Journal of South African Law* 736. Also see Erwin N Griswold, "The 'Coloured Vote Case' in South Africa" (1952) 65 *Harvard Law Review* 1361.

14 Section 1 of the Separate Representation of Voters Act (emphasis added). The Representation of Natives Act 12 of 1936 (renamed the "Representation of Blacks Act 12 of 1936") already made provision for a separate voters roll for black people in 1936. The Act was repealed in 1959.

15 Section 1 of the Separate Representation of Voters Act.

16 In addition to s.1 of the Separate Representation of Voters Act, s.1 of the Population Registration Act 30 of 1950 classified all South Africans into one of three racial groups namely "black" (formerly "native"), "white" and "coloured" for purposes of population registration. A white person meant "a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a *coloured person*" (emphasis added). A "native" was described as a person who is "accepted as a member of any aboriginal race or tribe of Africa", and a "coloured" person included someone not belonging to the other two categories.

17 The Act made provision for a separate voters roll for black people under certain circumstances, and also regulated the representation of black people in government.

18 The judgment was never published and information on the decision of the Cape Provincial Division can be found in the first *Harris* case at 450B–450D.

which held that it was bound by the decision of *Ndlwana v Hofmeyr*,¹⁹ where the Appellate Division held that the South African parliament was the “supreme and sovereign lawmaking body” and that it had no power to pronounce on the validity of an Act of parliament, therefore, the application had to fail. On appeal in the first *Harris* case, the Court agreed with approach of the court *a quo* but held that it could deviate from the *Ndlwana* decision if it was clearly wrong.²⁰ Despite not having the support of a constitutional Bill of Rights which South Africa currently has,²¹ the Court followed a human rights approach to come to the conclusion that it could or rather should deviate from that decision, because contrary to the facts before it, the *Ndlwana* case “did not lead to the coming into existence of any rights accruing to, or obligations devolving on, private individuals”.²² As the Court could not separate the “good from the bad”, it declared the Separate Representation of Voters Act invalid in its entirety.²³

In a bold move that eerily resembles current attacks on the judiciary,²⁴ government enacted the High Court of Parliament Act²⁵ to establish a High Court of Parliament with power to review decisions of the Appellate Division,²⁶ obviously with the aim to circumvent the outcome of the first *Harris* case.²⁷ This blatant move to reintroduce the discriminatory Separate Representation of Voters Act was prevented by the second *Harris* case where it was held that the Act was invalid for non-compliance with the South Africa Act of 1909. The Court also found that the envisaged High Court of Parliament could not be regarded as a “court of law” as was clearly intended by the Act. Government followed suit by appointing more judges sympathetic to its cause and by increasing senate with government supporters to ensure a two-thirds majority which led to enough votes to validate the Separate

19 1937 AD 229.

20 First *Harris* case at 454B–454C.

21 See Constitution, Chapter 2.

22 First *Harris* case at 471H–472A.

23 *Ibid.*, 472D–472E.

24 See Herbert Kawadza, “Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?” (2018) 21 *Potchefstroom Electronic Law Journal* 1, available at <https://journals.assaf.org.za/index.php/per/article/view/1696> (visited 23 October 2019).

25 Act No. 35 of 1952.

26 Section 2 of the Act provided as follows:

... any judgment or order of the Appellate Division of the Supreme Court of South Africa, whether given or made before or after the commencement of this Act, whereby the said Appellate Division declared or declares invalid any provision of any Act of Parliament ... or whereby it declared or declares that any such Act is not an Act of the Parliament of the Union, or whereby it refused or refuses to give effect to any provision of such an Act or prohibited or prohibits any person from giving effect to any such provision or in any other manner by the *High Court of Parliament (hereinafter referred to as the Court)* which shall be a Court of Law constituted as hereinafter provided. (Emphasis added.)

Also see Erwin N Griswold, “The Demise of the High Court of Parliament in South Africa” (1953) 66 *Harvard Law Review* 864.

27 Barrie, “The Constitutional Crisis of the 1950s Revisited” (n.13) 737.

Representation of Voters Act.²⁸ In the attack that followed, the Appellate Division in *Collins v Minister of the Interior*,²⁹ stopped the momentum of the disgruntled voters by confirming that parliament had the power to reconstitute senate and that it (the Court) was not in a position to question the motives of parliament in doing so. Consequently, government succeeded in removing coloured voters from the general voters' roll and the rest is history.³⁰

The fact that South African high courts are now constitutionally endowed with the power to make decisions that binds organs of state, and may question the validity of legislation and common law rules, should indeed be celebrated.³¹ In order to prevent government from repeating its mistakes, two consecutive constitutions replaced parliamentary sovereignty or legislative supremacy with constitutional supremacy,³² and instituted an independent judiciary with the power to develop the law — common law, customary law and legislation — in line with constitutional values.³³ The judiciary is no longer precluded from enquiring into the validity or constitutionality of an Act of parliament, although the Constitutional Court has to make the final order *re* its invalidity.³⁴ The democratic values contained in both constitutions became the principles upon which the judiciary based their newfound law-making powers.³⁵ As the Court indicated in *Matiso v The Commanding Officer, Port Elizabeth Prison*,³⁶ first, the values in the Constitution are expressed in wide and general terms, and it is the responsibility of the courts to give specific content to them. Second, both common law and legislation must be developed to conform with constitutional values, and in doing so the judges invariably “create” or “make” law.³⁷ Davis and Klare³⁸ explain:

[T]he Constitution embodies a new understanding of judge-made law that is more faithful to reality and charged with implications for South Africa's

28 Parliament enacted the Senate Act 53 of 1955 that changed the composition of the Senate in such a way that the National Party could obtain a two-thirds majority, which paved the way for the re-enactment of the Separate Representation of Voters Act. It also amended the quorum of five judges to eleven when the validity of an act of parliament has to be considered in the Appellate Division. See s.12 of the repealed Appellate Division Quorum Act 53 of 1955.

29 1957 (1) SA 552 (A) 570G–570H.

30 The Separate Representation of Voters Act was repealed in 1968.

31 See ss.39 and 165–169 of the final Constitution.

32 See s.4 of the transitional Constitution and s.2 of the final Constitution.

33 See s.35 of the transitional Constitution and s.39 of the final Constitution.

34 In terms of ss.98 and 101 of the transitional Constitution and s.167 of the final Constitution.

35 See s.35 of the transitional Constitution and ss.1, 7, 39, 143 and 195 of the final Constitution.

36 1994 (3) BCLR 80 (SE) 87–88.

37 The judgment dealt with the provisions of the transitional Constitution but it remains relevant in the context of the final Constitution. For example, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [15] the Court accepted that the equality jurisprudence and analysis developed by the courts in relation to the equality clause in the transitional Constitution is similarly applicable to the equality provision in the final Constitution.

38 Dennis M Davis and Karl Klare, “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *South African Journal on Human Rights* 402, 409 (footnotes omitted).

constitutional project. The Constitution confers significant powers and responsibilities upon South African courts to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights. The power and obligation to develop the common law in this spirit is rooted in ss 39(2) and 8(3), which we call the development clauses.

A number of provisions in the final Constitution emphasise the newfound developmental function of the courts. They include:

- Section 8(3): “When applying a provision of the Bill of Rights to a natural or juristic person ..., a court — (a) in order to give effect to a right in the Bill, must apply, or *if necessary develop, the common law* to the extent that legislation does not give effect to that right; and (b) may *develop rules of the common law* to limit the right, provided that the limitation is in accordance with section 36(1)”.³⁹
- Section 39: “(1) When interpreting the Bill of Rights, a court, tribunal or forum — (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must consider international law*; and (c) *may consider foreign law*. (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”.⁴⁰
- Section 173: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to *develop the common law*, taking into account the interests of justice”.⁴¹

Section 39 is the only constitutional provision incorporating foreign and international law in the interpretation process. The South African courts have been using both, especially foreign judgments, as extra-textual aids to assist them in interpreting and developing the law, particularly constitutional law. This being said, it is important to note that the common law is no longer regarded as a body of law separate from the Constitution. As stated by Justice Chaskalson in *Pharmaceutical Manufacturers Association of SA: In Re Ex parte President of the RSA*:⁴²

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems

³⁹ Emphasis added. Section 36 makes provision for the limitation of rights under certain circumstances.

⁴⁰ Emphasis added.

⁴¹ Emphasis added. The scope and meaning of s.173 is dealt with in *Phillips v National Director of Public Prosecution* 2006 (2) BCLR 274 (CC) [46]–[52].

⁴² 2000 (2) SA 674 (CC) [44].

of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

At a glance this dictum seems to suggest that all legal matters are rooted in the Constitution and are thus always and inescapably of a constitutional nature.⁴³ In *Van der Walt v Metcash Trading Ltd*,⁴⁴ the Constitutional Court alluded to this fact when it observed:

Whether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt.

However, the question if there is or should be a distinction between constitutional and non-constitutional litigation will continue for as long as section 167(3)(b) of the Constitution sets out the jurisdiction of the Constitutional Court by distinguishing between “constitutional matters” and “any other matter” that “raises an arguable point of law of general public importance which ought to be considered” by the Constitutional Court.

It has been assumed that the Constitution has irreversibly changed judicial approaches to legal reasoning and interpretation⁴⁵ but there is another phenomenon that has also contributed to constitutional adjudication in South Africa, *viz.*: comparative judicialism.⁴⁶ The influence of foreign judgments on the development of constitutional law has been taken for granted but it can also be backed up by empirical results. Between 1995 and 2017, the Constitutional Court handed down about 705 judgments. Roughly 50 per cent of those judgments cited

43 This viewpoint was confirmed in *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) [35]: “Where a court develops the common law, the provisions of s. 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of rights”. Also see Rautenbach and du Plessis, “The Constitutional Court of South Africa” (n.4) pp.568–469.

44 2002 (4) SA (CC) [33].

45 Some authors, however, are “doubtful that the analytical tools that many judges acquired as law students during the apartheid era are adequate to accomplish the Constitution’s transformative project”. See Davis and Klare, “Transformative Constitutionalism and the Common and Customary Law” (n.38) 457. Luanda Hawthorne, “The Development Clause Section 39(2) of the Constitution and the Law of Contract” (2018) 81 *THRHR* 108, 109 also points out that the courts have been cautious to develop private law to prevent legal uncertainty.

46 This phenomenon is also referred to as “transjudicialism”, “transjudicial communication”, “constitutional dialogue”, “judicial globalisation”, “constitutional cross-fertilisation”, “transnational contextualisation”, “globalisation of judgment”, “globalisation of national courts”, “constitutional borrowing”, “constitutional comparativism” and “judicial comparativism”. See Rautenbach and du Plessis, “In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges” (n.4) 1539–1540.

foreign precedents more than 3,000 times.⁴⁷ Since 2010, I have been involved in two projects where we collected empirical data with regard to constitutional judgments. The first one involved the collection of data from 1995 to 2010, and included quantitative and qualitative data over 15 years. However, since the completion of the project, I have updated the data to include the results up to the end of 2017.⁴⁸ In second project, the general aim was to empirically compare constitutional reasoning approaches among judges of various jurisdictions in a sample of 40 constitutional cases.⁴⁹

Although this article focuses on the data collected in terms of the first project, some of the result obtained in the second project is also telling. It appears that the Constitutional Court found against a statutory provision or a common law rule in 30 out of 40 judgments analysed. The same research also reveals that the Constitutional Court used international law and especially foreign law quite extensively in doing so. In 24 of the 40 sample cases the judges referred to international law during the reasoning process, although in many of the cases mere lip service was paid to international law; it hardly influenced court opinions. Noteworthy, is the fact that 33 of the 40 sample cases considered foreign cases which illustrates the Constitutional Court's fondness of foreign law despite it not regarding itself bound by those foreign decisions.

Although both foreign and international sources of law are of importance for the development of post-apartheid constitutionalism in South Africa, this contribution deals mostly with the influence of foreign judgments on Constitutional Court decisions by analysing statistical results from 1995 to 2017. There are also circumstances where the Constitutional Court considered judgments of international or supranational courts in a comparative way. For example, it cited judgments of the European Court of Human Rights at least 149 times during the period 1995–2017.⁵⁰ It is difficult, however, to determine if these comparisons were

47 See table at Section III where the statistics are set out.

48 The empirical data from 1995 to 2017 and a description of the methodology, is accessible at <https://collections.nwu.ac.za/dbtw-wpd/textbases/law/constitutional-court-judgements.html> (visited 16 October 2019). A number of publications emanated from this research, viz. Rautenbach, "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)" (n.4); Christa Rautenbach, "The South African Constitutional Court's Use of Foreign Precedent in Matters of Religion: Without Fear or Favour?" (2015) 18 *Potchefstroom Electronic Law Journal* 1545, available at <https://journals.assaf.org.za/index.php/per/article/view/692> (visited 16 October 2019); Rautenbach and du Plessis, "In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges" (n.4).

49 The results were published in Jakab, Dyevre and Itzcovich (eds), *Comparative Constitutional Reasoning* (n.4). We compared 40 influential judgments of the South African Constitutional Court in accordance with a predetermined set of criteria. For a discussion of the results, see Rautenbach and du Plessis, "The Constitutional Court of South Africa" (n.4).

50 Other supra national courts include the International Court of Justice (15 times); the European Court of Justice (13 times); the UN Human Rights Committee (12 times); and the International Criminal Tribunal for Rwanda (6 times).

drawn in the context of international law or foreign law as prescribed by s.39(1)(b) or (1)(c) of the Constitution, respectively.

In the section that follows I deal briefly with the courts' constitutional mandate to consider foreign and international law before continuing with an analysis of the (possible) influences foreign cases have had to date on the development of constitutional law by the Constitutional Court. The following caveat applies. First, it would be impossible to discuss all the examples where foreign case law has influenced the jurisprudence of the Constitutional Court within the confines of this article. Justice Ackermann, writing on constitutional comparativism, has listed a number of instances where the Constitutional Court relied on foreign precedents to develop its constitutional jurisprudence since its inception up to 2005.⁵¹ The list might now be even longer. Second, other foreign sources such as legislation and textbooks are also considered by the judiciary but they will not be dealt with in this article.⁵² Last, though all courts in South Africa may follow a comparative approach when dealing with constitutional provisions, this contribution focuses only on statistical results pertaining to the South Africa Constitutional Court.

II. Foreign and International Judgments: The Constitutional Mandate

A source of law is normally something that “provides *authority* for judicial decisions”.⁵³ This is also the viewpoint taken by South African legal scholars.⁵⁴ Binding authority consists of legislation, judicial precedent, common law and custom.⁵⁵ Foreign and international law sources are generally not regarded as authoritative sources of South African law.⁵⁶ This fact has not prevented courts from

51 See discussion at Section II.

52 For example, contributions from German scholars have contributed to the seepage of German precedent into the Constitutional Court's jurisprudence. See Rautenbach, “South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)” (n.4) pp.200–201.

53 See Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/legal/source%20of%20law> (visited 23 October 2019). Emphasis added.

54 Louis Kotzé, Anél du Plessis and Jaco-Barnard-Naudé, “Sources of Law and Legal Authority” in Tracy Humby, Louis Kotzé and Anél du Plessis (eds), *Introduction to Law and Legal Skills* (Cape Town: Oxford University Press Southern Africa, 2012) pp.123–124.

55 Hahlo and Kahn, *The South African Legal System and Its Background* (n.1) p.140. Since 1994 customary law is also an authoritative source when applicable. See ss.39 and 211 of the Constitution. The requirements for custom to be regarded as law were set down in the well-known case of *Van Breda v Jacobs* 1921 AD 330. The question of applicability of customary law remains problematic, however. See Christa Rautenbach (ed), *The Introduction to Legal Pluralism in South Africa* (Durban: LexisNexis, 2018) pp.35–53.

56 International law is not a law of general application in South Africa. The procedures for its incorporation in South African law are prescribed in ss.231 (international agreements) and 232 (customary international law) of the Constitution. Thus, international law may include binding and non-binding law depending on the question of whether it has been ratified or not. In addition, s.39(1)(c) of the Constitution directs the courts to prefer legislative interpretation in line with international law.

examining foreign and international judgments, especially those that could help them to make sense of the unique demands of a new constitutional democracy. This comparative approach of the Constitutional Court was evident from the moment “go”. In *S v Makwanyane*,⁵⁷ its second judgment, the Court had to consider the constitutionality of the death sentence. Justice Chaskalson declared:

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how Courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention. They may also have to be considered because of their relevance to s 35(1) of the Constitution, which states: “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”.⁵⁸

... In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the European Commission on Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3.⁵⁹

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to

57 1995 (3) SA 391 (CC). The judgment was delivered when the transitional Constitution was still in operation. The *dictum* dealt with the predecessor of s.39(1)(b) and (1)(c) of the Constitution, namely s.35(1) of the transitional Constitution; however, as already explained the guidelines laid down by the Constitutional Court before the commencement of the final Constitution remain relevant. See *Hlophe v Constitutional Court of South Africa* [2009] 2 All SA 72 (W).

58 *S v Makwanyane* (n.57) [34]. Footnotes omitted. Section 35(1) provided as follows:

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.

59 *S v Makwanyane* (n.57) [35]. Footnotes omitted.

be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.⁶⁰

This friendly approach to everything foreign and international became one of the unique features of the Constitutional Court as will become evident during the discussion. According to du Plessis,⁶¹ s.39(1) of the final Constitution — the equivalent of s.35(1) of the transitional Constitution referred to in the quote — refers only to the consideration of foreign and international law in construing the Bill of Rights, but Justice Chaskalson made it clear that both are sources which are relevant to the interpretation of other constitutional provisions too. The fact that Justice Chaskalson — and other judges too⁶² — have overlooked important differences between foreign and international law for the purpose of constitutional interpretation is a bone of contention for du Plessis.⁶³ He points out that the consideration of foreign law when interpreting human rights is permissive⁶⁴ but international law must be considered.⁶⁵

[F]oreign law, in the domestic context, is *persuasively* normative while international law may well (but will not inevitably) be prescriptively normative. The fact that the latter may have the same, normative binding force as domestic law thus sets international law apart from foreign constitutional law—and that difference must be reckoned with in constitutional interpretation.⁶⁶

Du Plessis expresses the opinion that the judiciary's failure to appreciate the difference between foreign and international law in the context of comparative interpretation might be one of the reasons why there is a "persistent lack of engagement with international law and the Court's apparent preference for drawing upon case law in other jurisdictions".⁶⁷ His criticism is not without merit, however, the labelling of "international law" and "foreign law" with one and the same

60 *Ibid.*, [39]. Footnotes omitted.

61 Lourens du Plessis, "Interpretation" in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* (Kenwyn: Juta, 2nd ed, 2014) pp.32.1, 32.173–32.193. International law becomes part of South African law once it is ratified and incorporated by means of legislation. Self-executing treaties are an exception to this rule. See Erika de Wet, "The 'Friendly but Cautious' Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks" (2004–2005) 28 *Fordham International Law Journal* 1529, 1532–1533.

62 See *Sanderson v Attorney General, Eastern Cape* 1997 (12) BCLR 1675 (CC) [26].

63 Du Plessis, "Interpretation" (n.61) p.32.173.

64 See s.39(1)(c) of the final Constitution.

65 *Ibid.*

66 Du Plessis, "Interpretation" (n.61) p.32.173. Footnotes omitted.

67 *Ibid.*

“comparative research” tag has had a positive outcome, namely to draw attention to the existence of an inclusive transnational context “out there” with significant consequences in and for constitutional interpretation.⁶⁸

As the next section reveals, the non-regard of foreign and international law (except for binding international law) as authoritative sources has not dampened the Constitutional Court’s enthusiasm for considering them during the adjudication process, particularly foreign precedent. In the section that follows, I deal with a few case examples.

III. The influence of Foreign Judgments in the Making of Constitutional Law

Although the extent is not always evident, foreign case law, both from national jurisdictions and supranational courts, has played an important role in the development of constitutional law in post-apartheid South Africa.⁶⁹ It is true, however, that South African judges have always compared foreign judgments. They continue to do so, especially in the light of the mandate provided in s.39 of the Constitution. In the past the judiciary referenced foreign precedents of jurisdictions which historical links to South Africa.⁷⁰ The mixed nature of South Africa’s common law — Roman–Dutch law influenced by English law — necessitated a comparative legal approach with the purpose of finding, developing and making the common law, and South African judges were doing this — sometimes discreetly behind the scenes.⁷¹ The justification offered for this type of historical comparative interpretation was generally based on a relationship of subordination between the country borrowing and the country borrowed from, especially in the case of former colonial countries looking to the colonisers for judicial guidance by comparing foreign situations with domestic ones.⁷² However, even after independence the South African judiciary never hesitated to consider foreign case law; they did it

68 Rautenbach and du Plessis, “In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges” (n.4) 1553.

69 The South African judiciary often refers to the writings of foreign legal scholars during the reasoning process. Rautenbach and du Plessis, “In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges” (n.4) 1575–1576 refer to a few examples of German scholarly works which have been referred to by the Constitutional Court judges.

70 Justice Ackermann refers to this historical link between English and South African company law in *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) [115]:

South African Courts have considered English decisions to be authoritative (though of course not binding) in interpreting statutory provisions which are substantially the same, this being particularly the case in interpreting s 417 of the Companies Act and corresponding provisions.

71 See the discussion of Laurie WH Ackermann, “Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke” (2005–2006) 80 *Tulane Law Review* 169, 172–173.

72 See the explanation of A Lollini, “Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court” (2007) 3 *Utrecht Law Review* 60, 61–62.

often and without any wavering. The general viewpoint that s.39 of the Constitution was the main catalyst of the Constitutional Court's comparative law approach has been denied by Justice Ackermann himself:⁷³

I set out this comparative law background to counteract the possible misconception that the comparative law approach of the Constitutional Court has been due, in the main, to the provisions in the two Constitutions, alluded to in the main article, referring to the discretionary use of foreign law. I have not the slightest doubt that, because of the comparative law ethos in South Africa, the Court would have placed the same reliance on foreign law even had there been no such provision in the Constitutions.

In addition, Justice Ackermann issues a few warnings which must be taken heed of when a court adjudicates constitutional issues comparatively. He explains, first of all, the Court is not bound by foreign precedent:⁷⁴

[F]oreign law is not in any sense binding on the court that refers to it. There seems to be the fear that in referring to foreign law one is bowing to foreign authority and thereby endangering the national sovereignty of one's own legal system. This is manifestly not so. One may be seeking information, guidance, stimulation, clarification or even enlightenment, but never authority binding on one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, and solutions.

Second, it is wrong to assume that it is possible to determine a "single collective original intention on the part of persons enacting a constitution" because such an assumption is based on the subjective understanding of the interpreter and could lead to dangerous results.⁷⁵ Third, judges rarely interpret the material that they read for their judgments in the same manner, even if they use the same interpretative tools.⁷⁶ Finally, it should be remembered that a constitution is a living document which cannot be fossilised in a specific form. It needs to adapt to changing circumstances and this can be achieved by means of employing the same interpretative tools every time but with a different end result.⁷⁷

73 Ackermann, "Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke" (n.71) 175. He is of course referring to s.35 of the transitional Constitution and s.39 of the final Constitution.

74 Ackermann, Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke" (n.71) 183.

75 *Ibid.*, 178.

76 *Ibid.*

77 *Ibid.*, 178–179.

Despite the pitfalls inherent in comparative constitutional jurisprudence, the Constitutional Court's approach towards foreign law has been favourable, regardless of whether the guidance drawn from other jurisdictions is "positive or negative", as explained by Justice O'Regan in *Minister of Safety and Security*:⁷⁸

It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. ... It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.

Against this background, the Constitutional Court's citation of foreign case law from the time when it delivered its first judgment in 1995 to the end of 2017 is quite telling.⁷⁹ In total it has delivered 705 judgments. It appears that 334 of them, thus 47 per cent, cited foreign cases 3,060 times (see Table 1). That means an average of nine foreign case citations per judgment citing foreign cases.⁸⁰

What conclusions can be drawn from these numbers? For one, quantitatively they underline the general belief that foreign case law plays an important role in the judicial development of post-apartheid constitutional law, especially in the "early stages" of its development, where there was "no developed indigenous

78 2005 (9) BCLR 835 (CC) [35].

79 The empirical data from 1995 to 2010 are based on research project initially framed by the IACL Interest Group on Cross-Judicial Fertilization: The Use of Foreign Precedents by Constitutional Judges in 2007. The group's country reports gave rise to a publication titled, Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013). With the assistance of the library staff of the North-West University, we have developed a database where the results have been included. Despite the fact that the project has been concluded in 2010, I have continued to update the database. The data from 1995 to 2017 is available at <https://collections.nwu.ac.za/dbtw-wpd/textbases/law/constitutional-court-judgements.html>.

80 The statistics in this table differ slightly from the statistics provided in Rautenbach, "South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)" (n.4) p.194 because the database is continuously being updated.

jurisprudence in this branch of the law on which to draw”.⁸¹ In 1995 there were 643 foreign case citations. This is remarkable considering that only 14 judgments were delivered in that year of which 12 cited foreign cases. In 1996 the foreign case citations dropped more than 50 per cent to 302, whereas the number of judgments handed down almost doubled. Since 1996, except for 2002, when there were more than 200, the number of foreign case citations hovered between 66 and 165 per year. In 2017 there was a slight increase and 14 Constitutional Court judgments out of a total of 48 cited foreign case law 38 times.

Table 1: Constitutional Court (CC) Referring to Foreign Cases (FC)

Year	Total CC judgments	Total of CC judgments not citing FC	Total of CC judgments citing FC	Total FC citations
1995	14	2	12	643
1996	27	8	19	302
1997	19	4	15	387
1998	21	8	13	135
1999	19	8	11	126
2000	29	16	13	104
2001	26	17	9	120
2002	33	18	15	208
2003	26	17	9	59
2004	27	9	18	128
2005	23	12	11	129
2006	28	12	16	152
2007	25	12	13	83
2008	25	9	16	65
2009	33	13	20	46
2010	28	19	9	55
2011	38	23	15	83
2012	31	22	9	42
2013	51	30	21	27
2014	39	22	17	39
2015	40	22	18	65
2016	55	34	21	24
2017	48	34	14	38
TOTAL:	705	371	334	3060

81 *S v Makwanyane* (n.57) [37].

A few speculative reasons can be advanced for the decline in references to foreign precedents. The most probable one is that the Constitutional Court has developed its constitutional jurisprudence sufficiently in the 22 years under investigation to allow the further development of constitutional law through the doctrine of precedent (*stare decisis*); thus, by citing its own decisions. Another reason might be that most of the apartheid-era judges have retired.⁸² They came from a generation of judges with a passion for comparative legal reasoning, embedded in them by academic scholars who were equally passionate about comparative law methodology.⁸³ Comparative law, however, seems to have lost its prominence in many law schools when the LLB-degree was shortened to four years in the late 1990s. It seems ironic that judicial comparativism is in the decline in an era of globalisation where access to foreign case law is easier than ever before.

Nevertheless, despite the downward trend, there has been quite a large number of Constitutional Court cases, especially in the 10 years after apartheid, where foreign cases have proved instructive and helpful in the development of constitutional law. In a scholarly contribution, Justice Ackerman provides a list of cases in which the Constitutional Court's judgments were influenced by foreign judgments to varying degrees. Let's look at a few examples. The first judgment delivered in the context of the transitional Constitution, and also Constitutional Court's very first judgment, *S v Zuma*,⁸⁴ dealt with the constitutionality of a presumption relating to certain types of confessions in criminal law, where the onus is shifted to the confessor to prove that that the confession was not made freely and voluntarily, the so-called reverse onus clause.⁸⁵ Justice Kentridge cited foreign cases at least 32 times and found the Canadian jurisprudence on reverse onus "to be particularly helpful, not only because of their persuasive reasoning" but also because numerous Canadian cases had to deal with similar reverse clause provisions, and because the Canadian Charter has a limitation clause similar to that in the South African transitional Constitution.⁸⁶ Cognisant of the Canadian approach, the Court asked the question if the presumption that a confession made to a magistrate was indeed freely and voluntary, infringed the presumption of innocence.⁸⁷ In order to answer this question, Justice Kentridge, looked towards

82 The judges of the Constitutional Court are appointed for a maximum term of 15 years.

83 Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke*" (n.71) 174–175.

84 1995 (2) SA 642 (CC).

85 Normally, it had to be proven that a confession in a criminal case was made freely and voluntarily, but s.217(1)(b) of the Criminal Procedure Act 51 of 1977 reversed this onus if the confession was made to a magistrate, and it was presumed to be made freely and voluntarily.

86 *S v Zuma* (n.84) [21]–[25]. Section 33 of the transitional Constitution, which was replaced by s.36 in the final Constitution. In 1994 the limitation clause was a first for South Africa. It allowed for the limitation of a right by law of general application provided that such a limitation was reasonable and justifiable.

87 *S v Zuma* (n.84) [22].

Canadian law for guidance, and held it appropriate to apply the principles worked out by the Canadian Supreme Court:⁸⁸

In both Canada and South Africa the presumption of innocence is derived from the centuries-old principle of English law ... that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt. *Accordingly I consider that we may appropriately apply the principles worked out by the Canadian Supreme Court, in particular the first two principles stated by Cory J*⁸⁹

This type of borrowing from Canadian jurisprudence continued in Constitutional Court's second, well-known judgment, *Makwanyane*.⁹⁰ The Court dealt with the constitutionality of the death penalty in South Africa. It was heard before 11 judges. Each one of them delivered a separate judgment and all of them considered foreign cases. Judgments from 11 countries and three supranational courts were cited about 220 times. To date, this judgment holds the record for the most foreign case citations. The judgment was also one of the first cases where the Court followed foreign precedent to assist it with the interpretation of the limitation clause, a clause that had appeared for the first time in a South African constitution. Applying the two-stage test developed in the Canadian case of *R v Oakes*,⁹¹ the Constitutional Court held that the objective of the limitation must be important enough to warrant it, and that there must be proportionality between the limitation and its objective (the so-called proportionality test).⁹² In applying the three components of the

⁸⁸ *Ibid.*, [25].

⁸⁹ Emphasis added. The two principles that the Court referred to were formulated in the Canadian case of *R v Downey* 90 DLR (4th) 449, 461, viz.:

1. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
2. If by the provisions of a statutory presumption an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes section 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

⁹⁰ *S v Makwanyane* (n.57).

⁹¹ (1986) CRR 308. See *S v Makwanyane* (n.57) [105]–[106].

⁹² In *R v Oakes* (n.91), 337 the Court held that the proportionality test contains the following components:

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

proportionality test as identified by *R v Oakes*,⁹³ Justice Chaskalson came to the conclusion that:⁹⁴

Although there is a rational connection between capital punishment and the purpose for which it is prescribed, the elements of arbitrariness, unfairness and irrationality in the imposition of the penalty are factors that would have to be taken into account in the application of the first component of this test. As far as the second component is concerned, the fact that a severe punishment in the form of life imprisonment is available as an alternative sentence would be relevant to the question whether the death sentence impairs the right as little as possible. And, as I will show later, if all relevant considerations are taken into account, it is at least doubtful whether a sentence of capital punishment for murder *would satisfy the third component of the Oakes test.*

Although Justice Chaskalson did not say it in so many words, it is evident that the Canadian approach inspired him quite considerably, and was even followed by him. Canadian case law have dealt with similar issues in the past and their nuanced approaches to difficult issues have provided valuable guidance to South African judges who had to deal with these types of issues for the first time after the introduction of a value laden Constitution with a Bill of Rights.⁹⁵ From 1995 to 2017, the Constitutional Court has cited Canadian case law no less than 925 times, which is the most cited jurisdiction thus far with the United States coming second at a citation rate of 789 and the United Kingdom third at a rate of 495.

In yet another example where Canadian cases swayed the judgment of the Constitutional Court is *Ferreira*,⁹⁶ which also delivered in the context of the transitional Constitution. The Constitutional Court had to decide on the constitutionality of statutory provisions compelling the applicants to deliver self-incriminating evidence which could be used as evidence in a criminal trial, for example, to use in a search for other evidence which could be used against an accused.⁹⁷ During the course of its reasoning, the Court considered the approaches of other courts to self-incriminating questions. It considered foreign case law quite extensively (citing foreign cases 170 times) before deciding to follow the flexible approach adopted by Canadian courts, *viz.*: to disallow direct use of such evidence but to give judicial discretion to exclude derivative evidence if

93 *R v Oakes* (n.91).

94 *S v Makwanyane* (n.57) [105]–[106]. Emphasis added.

95 *S v Makwanyane* (n.57) [34].

96 *Ferreira v Levin; Vryenhoek v Powell* (n.70).

97 This was allowed in terms of the Companies Act 61 of 1973.

necessary to ensure a fair trial.⁹⁸ The Constitutional Court followed “at a basic analytical level” the Canadian case law, although, it did not do so directly.⁹⁹ Justice Ackermann explained that legal norms in a global community of judges are increasingly being regarded as universal and, because of their universality, it is possible to draw analogies between South African and foreign judgments to find the underlining reasoning “with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality”.¹⁰⁰

German cases, although much less cited than Canadian cases, is also a favourite of the Constitutional Court. In *Du Plessis v De Klerk*¹⁰¹ the Constitutional Court had to determine if the Bill of Rights in the transitional Constitution applied directly horizontal, in other words, directly to private relationships. Justice Kentridge delivered the main majority judgment and held that the Bill of Rights generally did not apply to relationships in the private sphere.¹⁰² He acknowledged the value of looking for guidance elsewhere to assist with the interpretation of the South African (transitional) Constitution. According to him, the example of Canadian and German law, where the doctrine of direct horizontal application was rejected, “seriously undermined the Defendants’ contention” that the Bill of Rights applies directly horizontal.¹⁰³ Justice Ackermann focused on the analogous relationship between German and South African constitutional law, which he regarded as a good enough reason to follow the German approach of direct vertical application.¹⁰⁴ As he explained:

Against this background, particularly having regard to the explicit wording of Art 1(3) of the GBL [German Basic Law], it behoves us to consider

98 *Ferreira v Levin; Vryenhoek v Powell* (n.70) [152]:

Although no statistical or other material was placed before us, it is quite apparent that the United States has vastly greater resources, in all respects and at all levels, than this country when it comes to the investigation and prosecution of crime, more particularly when regard is had to the particularly high crime rate, which one can take judicial notice of, currently prevalent in South Africa. This in my view gives added weight to the considerations of efficiency, economy of time and the most prudent use of scarce resources, highlighted by La Forest J in *Thomson Newspapers* and to which I have already referred, and supporting the adoption of a flexible approach in dealing with the admissibility of derivative evidence. The flexible approach is narrowly tailored to meet important State objectives flowing from the collapse and liquidation of companies and the resulting duties of liquidators to protect the interests of creditors and the public at large, while at the same time interfering as little as possible with the examinee’s right against self-incrimination. It is balanced and proportional and, in my view, fully justifiable in an open and democratic society based on freedom and equality. ...

99 Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke* (n.71) 188.

100 *Ferreira v Levin; Vryenhoek v Powell* (n.70) [72].

101 1996 (3) SA 850 (CC). The decision has been severely criticised by legal scholars. For example, see Stuart Woolman, “Application” in Stuart Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Kenwyn: Juta, 2nd ed, 2014) pp.31.4–31.5.

102 *Du Plessis v De Klerk* (n.101) [67].

103 *Ibid.*, [41].

104 *Ibid.*, [94], [112].

carefully why, on textual, teleological and policy grounds, German constitutional jurisprudence has rejected the direct application of the basic rights in the GBL to private legal relationships.¹⁰⁵

Both Justices Kentridge and Ackermann referred to the German notion of “Drittwirkung” (indirect horizontality).¹⁰⁶ According to Justice Ackermann it bore a resemblance to s.35(3) of the transitional Constitution, which enjoined the courts to “have due regard to the spirit, purport and objects of [the Bill of Rights]”.¹⁰⁷ Even here he is mindful of the similarities between s.35(3) and the “indirect horizontal application of the basic rights in the GBL [German Basic Law] in German Jurisprudence”, which, as he points out, “cannot simply be a coincidence”.¹⁰⁸ It seems as if this is no longer the position. The wording of the application clause¹⁰⁹ in the final Constitution is different from the one in the transitional one, leading legal scholars to believe that *Du Plessis v De Klerk* no longer applies and that the Bill of Rights applies directly to the rules of common law governing private disputes.¹¹⁰ The answer is however not clear-cut. In *Khumalo v Holomisa*,¹¹¹ the Constitutional Court had the opportunity to give its views on the direct application of the Bill of Rights to private disputes, but the only concession it made was that the Bill of Rights “may” apply directly to natural and juristic persons “to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.¹¹² Once it has been determined that a natural person or juristic person is bound by a particular provision of the Bill of Rights, s.8(3) further requires the Court to apply or develop the common law to give effect to the right or to limit it. The direct horizontal application of the Bill of Rights is thus a qualified one, which will not be used lightly by the courts. On the other hand, the indirect horizontal application of the Bill of Rights is required in terms of s.39(2)

105 *Ibid.*, [95].

106 *Ibid.*, [41], [94].

107 *Ibid.*, [103]–[106].

108 *Ibid.*, [106].

109 See s.8 of the Constitution:

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) *A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.* (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subs. (2) a court — (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s. 36 (1). (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person. (Emphasis added.)

110 The matter is far from resolved and the debates continue. For a detailed discussion, see Woolman, “Application” (n.101) pp.31.6–31.63.

111 2002 (8) BCLR 7771 (CC) [31]–[32].

112 In terms of s.8(2) of the Constitution.

of the Constitution: “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”. This provision ensures that the provisions of the Bill of Rights will at least have a “radiating effect” on the interpretation and application of legislation, common law and customary law.¹¹³

Foreign case law has also been frequently cited to support the Constitutional Court’s new approach to constitutional interpretation. Purposive interpretation has supplanted the literalism-cum-intentionalism approach to constitutional interpretation.¹¹⁴ Three Canadian cases again steal the spotlight, though they are not the only ones of relevance. In the period 1995–2017 the Constitutional Court cited *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*¹¹⁵ at least 47 times, *R v Big M Drug Mart Ltd*¹¹⁶ 31 times and *Egan v Canada*¹¹⁷ 19 times.¹¹⁸ The Canadian case of *Big M Drug Mart Ltd*¹¹⁹ can be used as one illustration. In 1995, it was referred to and followed in the very first judgment of the South African Constitutional Court in *Zuma*¹²⁰ where Justice Kentridge¹²¹ adopted the following approach of the Canadian case with regard to constitutional interpretation:¹²²

The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter’s protection.

113 Rautenbach and du Plessis, “In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges” (n.4) 1550.

114 See du Plessis, “Interpretation” (n.61) p.32.52.

115 [1990] 1 SCR 425.

116 [1985] 1 SCR 295.

117 (1995) 29 CRR (2nd) 79.

118 *Hlophé v Constitutional Court of South Africa* [2009] 2 All SA 72 (W).

119 *R v Big M Drug Mart Ltd* (n.116).

120 *S v Zuma* (n.84).

121 Justice Kentridge was an acting judge of the Constitutional Court from 1995 to 1996. During that time, he cited foreign cases 110 times in four judgments he was involved in.

122 *S v Zuma* (n.84) [15]. Emphasis added. This is also an example where the South African Constitutional Court cited a dissenting judgment of another court with approval.

Also in 1995, in *Makwanyane*,¹²³ Justice Chaskalson¹²⁴ agreed with Kentridge's adoption of the Canadian approach and said:

In *S v Zuma* ... this Court dealt with the approach to be adopted in the interpretation of the fundamental rights enshrined in chap 3 of the Constitution. It gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution.

In the same year, Justice Ackermann¹²⁵ in *Ferreira*,¹²⁶ followed in the footsteps of his two colleagues when he approved their purposive approach to constitutional interpretation based on the Canadian case, *Big M Drug Mart Ltd*. From 1995 to 1997, the *Big M Drug Mart Ltd* was cited 24 times. However, from 1998 to 2017, it was only cited seven times with the last mention of the case in 2007 in *Department of Land Affairs v Goedgelegen Tropical Fruit (Pty) Ltd*,¹²⁷ where Justice Moseneke¹²⁸ made it clear that the approach of the Canadian court is now firmly entrenched in South African jurisprudence.¹²⁹

This Court has reiterated that the Constitution must be interpreted purposively. Many pronouncements in this Court and other courts endeavour to encapsulate this purposive approach. Perhaps the most lucid dictum on purposive interpretation, which has been approved several times by this Court, is to be found in *R v Big M Drug Mart Ltd*

The decline in citation of specifically the *Big M Drug Mart Ltd* case is understandable; the Court no longer needs to cite it because its metamorphosis into South African law is complete.

The influence of Canadian case law such as the *Big M Drug Mart Ltd* case on South African constitutional law is one of the more obvious examples. It is not always easy to draw the same conclusion with regard to all foreign case law cited by the South African Constitutional Court. In order to analyse the influence of foreign case law on the judgments of the Constitutional Court judges, I have used the following methodology. Each foreign case citations from 1995 to 2017

123 *S v Makwanyane* (n.57) [9]. Footnotes and references omitted.

124 Justice Chaskalson was a judge of the Constitutional Court from 1994 to 2005. During this period he cited foreign cases 329 times.

125 Justice Ackermann was a judge of the Constitutional Court from 1994 to 2004. During this period he cited foreign cases 547 times.

126 *Ferreira v Levin; Vryenhoek v Powell* (n.70) [46].

127 2007 (6) SA 199 (CC).

128 Justice Moseneke served on the Constitutional Court bench from 2001 to 2016. He cited foreign cases 113 times during this period.

129 *Department of Land Affairs* (n.127) [51]. Footnotes and references omitted.

have been analysed and placed into one of three broad categories: argumentative (legal reasoning), “even there” and “*a contrario*”.¹³⁰ The first category — legal reasoning — refers to those foreign cases that were used during the reasoning or argumentative phase when the Constitutional Court judge was orientating him or herself. The influence of foreign case is not always clear. In most instances, the foreign case is referred to only in passing. According to the statistics, 2,884 of the foreign case citations fall in this category. This underlines the viewpoint that judges regard themselves free to look at foreign precedent during the adjudication process but feel in no way bound to follow it. In *K v Minister of Safety and Security*,¹³¹ Justice O’Regan¹³² explained this process as follows:

Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.

The second category refers to the use of foreign precedent to prove that “even there” a certain measure or approach was adopted that exists or should be adopted “even here”; just 153 foreign case citations fall within this category. The *Minister of Safety and Security*¹³³ case can be used as example where the Constitutional Court adopted a similar approach followed in a Canadian case. The Court had to decide if it should develop the common law in the light of the “spirit, purports and objects”¹³⁴ of the Constitution to make provision for vicarious liability of the state where a woman was raped by three off-duty police officers. In delivering the majority judgment, Justice O’Regan cited foreign case law 15 times. Her comparative review generally falls in the first category, but it seems that followed the approach of the Canadian courts if one considers the following quote:

This brief review illustrates that the problem of the vicarious liability of employers for sexual assaults committed by employees is one which is faced by legal systems in some other parts of the world. Courts have grappled with the need to identify the circumstances in which employers will be liable for such assaults. It is interesting to note that the approach in the United Kingdom, in terms of which the courts ask whether there is a

130 Rautenbach “South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995–2010)” (n.4) pp.193, 206–207.

131 2005 (9) BCLR 835 (CC) [35].

132 Justice O’Regan served on the Constitutional Court bench from 1994 to 2009. She cited foreign cases 241 times during this period.

133 *K v Minister of Safety and Security* (n.131).

134 Section 39(2) of the Constitution reads: “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”.

close link between the wrongful conduct of the employees and the business of the employer or the nature of the employment, is very similar to the test set in *Rabie* [*Minister of Police v Rabie* 1986 (1) SA 117 (A)]. The approach taken by the Canadian Supreme Court sets a similar objective test to be answered in the light of a range of factors. *There can be no doubt that the jurisprudence of these jurisdictions will be of value in considering the development and application of our own rules of vicarious liability.*¹³⁵

From this comparative review, we can see that the test set in *Rabie*, with its focus both on the subjective state of mind of the employees and the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, *is a test very similar to that employed in other jurisdictions.*¹³⁶

The third category refers to citations which were made as examples of foreign case law which should not be used to support the reasoning of the Constitutional Court judges, thus *a contrario*. Only 23 foreign case citations fall in this category. One Constitutional Court case that illustrates the *a contrario* principle is *Steenkamp v Provincial Tender Board of the Eastern Cape*.¹³⁷ The Constitutional Court had to deal with the question whether a tender board, which negligently allocated a tender and then set the contract aside, causing the tenderer to incur expenses, can be held delictually liable for the damages. The difference between South African law and other jurisdictions was pointed out by Justice Moseneke, who reasoned as follows:¹³⁸

In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful. *Unlike in other jurisdictions*, this does not mean that the government enjoys delictual immunity when performing its functions, but a negligent statutory breach and resultant loss are not always enough to impute delictual liability. Policy considerations of fairness and reasonableness have to be taken into account when imposing a duty of care and ultimately liability to make good harm suffered by a claimant.

A final observation that could be made is the jurisdictions which are being considered. The Constitutional Court has cited case law from 35 countries and 17 supra-national

135 *K v Minister of Safety and Security* (n.131) [44]. Emphasis added. This statement seems to fit the first category.

136 *Ibid.*, [45]. Emphasis added. This statement seems to fit the second category.

137 2007 3 SA 121 (CC).

138 *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 3 SA 121 (CC) [37]. Emphasis added and footnotes omitted.

courts in a comparative context. The top five positions are as follows: Canada (925 citations), the United States (789 citations), the United Kingdom (495 citations), European Court of Human Rights (149) and Germany (118 citations). On the African continent, the Court has cited, for example, Zimbabwe case law 88 times and Namibian case law 58 times. However, if one considers the three categories above, it seems that their influence is not determined by the number of times that they have been cited. Fifty-five of the Canadian and 41 of the UK case citations were followed (category 2), while only 19 of the United States and 8 of the European Court of Human Rights case citations were followed but none of the Germany cases.¹³⁹ The results illustrate that the Constitutional Court does not regard itself bound by the decisions or former colonial powers or those jurisdictions with links to the South African legal system. They consider foreign case law regardless if there is a link or not.

IV. Conclusion

Despite the high rate of foreign case citations the influence of foreign case law on the judgments of the South African Constitutional Court seems to be far less than the amount of citations. Most of the borrowing from foreign jurisdictions happened in the first few years after South Africa became a democracy in the early 1990s, and when the Court was still in its infancy. Comparative judicial reasoning by South African Constitutional Court judges seems to be less of a “systemic argument in law” as suggested by Canale¹⁴⁰ but more a way of considering what others are doing. As explained by Justice Moseneke, judges:

cherry pick all the time when [they] use authorities, foreign or domestic. ... The very process of adjudication implies a selection, and a reasoned and rational process to search for the truth by weeding out what’s irrelevant and finding what is cohesive and that best answers... the problem before [them].¹⁴¹

One of the meanings of cherry-pick is “to choose or take the best or most profitable of (a number of things), especially for one’s own benefit or gain”.¹⁴²

139 Although the *Du Plessis v De Klerk* (n.101) favoured German case law, there is nothing in it which indicated that it followed the German cases.

140 Damiano Canale, “Systematizing Comparative Reasoning in Legal Adjudication” (2015) 18 *Canadian Journal of Law and Jurisprudence* 5, 7.

141 Expressed during an interview with Ursula Bentele, “Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law” (2009) 37 *Georgia Journal of International and Comparative Law* 221, 239. She writes an illuminating critical analysis of the Constitutional Court’s use of foreign precedent based not only on the case law but also on the views of the justices expressed during interviews with them.

142 Collins Online Dictionary, available at <https://www.collinsdictionary.com/dictionary/english/cherry-pick> (last visited 30 October 2019).

Though Bentele maintains that this outlook could taint the reputation of the court by creating an impression that the judiciary makes “their selections based purely on their initial subjective conclusions of the matter”,¹⁴³ Justice Goldstone strongly denies this allegation. According to him such a remark is “demeaning to the judicial profession, suggesting that no judge with any intellectual honesty would engage in such a practice”.¹⁴⁴

Despite criticisms raised against the South African judiciary for citing numerous foreign precedents without a clear basis, it is clear that foreign precedents have contributed to the development of post-apartheid constitutional law by filling the gaps as “they are revealed”, especially in the area of constitutional interpretation and the development of human rights jurisprudence. The citation of foreign cases in the Constitutional Court is declining, but the doctrine of *stare decisis* ensures that they keep on influencing other South Africa judgments, although, it is not always possible to measure the extent of their influence.

Judges have always “made” law in South Africa, especially when they develop common law, and in doing so, they have been looking at what other courts do. As pointed out by Hahlo and Kahn,¹⁴⁵ “not to travel outside the borders of one’s own legal system leads to inbreeding and parochialism”. They refer to the example of television, which at the time of the publication of their book was not a reality in South Africa yet, to explain that its introduction into South Africa would bring difficult legal problems to the fore, for which solutions would have to be found in other countries.¹⁴⁶ As explained by them: “Any worthy system of law is prepared to be influenced by the reasoning on basic legal issues of another”.¹⁴⁷ There is no reason why this accommodating approach towards foreign precedent should not continue to persist in a dispensation where a democratic Constitution reigns supreme.

The South African judiciary always had law-making powers in terms of the common law. The Constitution did not take these powers away. To the contrary, ss.39(2) and 173 have confirmed the courts’ inherent power to develop the common law. Also, s.39(2) effectively ensures that the development of common law is a constitutional issue by compelling the courts to promote the “spirit, purport and objects of the Bill of Rights”. In order to promote the “spirit, purport and objects of the Bill of Rights”, the courts need to interpret the Bill of Rights, and in doing so, they “may consider foreign law”. If this is not a perfect example of what Hahlo and Kahn refers to in their iconic book as “gaps [that] have to be filled in as they are revealed, by judicial law-making”, I don’t know what else is.¹⁴⁸

143 Bentele, “Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law” (n.141) 239.

144 *Ibid.*, 240.

145 Hahlo and Kahn *The South African Legal System and Its Background* (n.1) p.322.

146 *Ibid.*, p.323.

147 *Ibid.*

148 See quote in the beginning of this article.