GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA RACE & GENDER STATISTICS AS AT 30 APRIL 2010

	White		Black		Coloured		Asian		
Bars	Male	Female	Male	Female	Male	Female	Male	Female	**Bar total**
Cape	291	66	5	4	30	21	4	3	424
Port Elizabeth	32	6	7	2	-	1	3	3	54
Grahamstown	19	3	1	-	2	-	1	-	26
Free State	47	7	4	1	-	-	-	-	59
Northern Cape	7	2	2	0	-	-	-	1	12
Johannesburg	446	123	108	35	3	5	35	17	772
Pretoria	334	76	53	15	-	-	3	7	488
Kwazulu Natal	123	25	19	6	5	4	65	31	278
North West	7	1	5	1	-	-	-	-	14
Transkei	1	-	22	-	-	1	-	-	24
Bhisho	4	1	9	1	1	-		-	16
Total	1311	310	235	65	41	32	111	62	2167

Endnotes

[1] http://www.lssa.org.za/Uploads/files/Legal%20Practice%20Bill%20Draft%202.pdf.

[2] Clause 7(1)(a). The Minister will similarly select a law teacher from nominations, and (mero motu) two further persons 'who in the opinion of the Minister are able to represent the interests of users of legal services', and a further two persons who in his opinion 'will represent the interests of government'.

[3] Clause 114(1).

[4] Clause 114(6)(a). How these provisions are to be reconciled with the requirements of the Labour Relations Act, 66 of 1995 and section 25 (the property clause) of the Constitution, 1996 is another issue.

[5] Clause 27(1).

[6] Clause 52(1).

[7] Clause 52(2).

[8] Clause 52(4).

[9] See Alan Watson *Legal Transplants: An approach to comparative law* (1974) 22.

[10] *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (1) SA 1 (CC).

[11] Van de Vijver *The Judicial Institution in Southern Africa: a comparative study* (2006) 129.

[12] Graham Botha 'Early Legal Practitioners of the Cape Colony' (1924) 16 *South African Law Journal* 255 at 256.

[13] HR Hahlo & Ellison Kahn *The Union of South Africa: Development of its Laws and Constitution* (Stephens & Sons, London, and Juta, South Africa, 1960) 202.

[14] Ibid 202, note 18.

[15] See generally *In re Rome* 1991 (3) SA 291 (A) at 306; *General Council of the Bar of SA v Van der Spuy* 1999 (1) SA 577 (T); *Society of Advocates of Natal v De Freitas (Natal Law Society Intervening)* 1997 (4) SA 1134 (N) for a historical survey.

[16] Submissions to the Truth and Reconciliation Commission by the General Council of the Bar of South Africa (unpublished, October 1997) vol 1 pp 2-3.

[17] Durban and Pietermaritzburg.

[18] Act 74 of 1964.

[19] Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) 5.

[20] 531 US 98 (2000).

[21] Bingham loc cit.

[22] Twice passed over for appointment as chief justice, Schreiner has been described as 'the greatest chief justice South Africa did not have' (Ellison Kahn 'Oliver Deneys Schreiner: A South African', in Kahn (ed) *Fiat Iustitia*: *Essays in Memory of Oliver Deneys Schreiner* (Juta & Co, 1983) 1). He played a leading role in the series of decisions by the Appellate Division in the 1950s related to the removal of the Coloured people from the voters' roll. The best account is probably Ian Loveland *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (Hart Publishing, Oxford and Portland, Oregon 1999) chapters 7-10

[23] OD Schreiner 'The Contribution of English Law to South African Law; and the Rule of Law in South Africa' *19th Hamlyn Lecture* (Stevens & Sons, London, and Juta, Cape Town, 1967) 86.

[24] *De Legibus et Consuetudinibus Angliae* 1.8.5.

[25] 1999 September *Consultus - SA Bar Journal* 4-5.

The role of comparative and public international law in domestic legal systems

By William Binchy, Emeritus Regius Professor at Trinity College, Dublin

In recent years there has been a torrent of discussion, by judges[1] and academics,[2] of the role of comparative and public international law in domestic legal systems. The debate has assumed a particular acerbity in the United States of America but it is one that proceeds, albeit with somewhat greater gentility, elsewhere throughout the world. By now the battlelines have been clearly drawn and the weaponry of the

combatants easy to identify. What I hope to do in my brief remarks is to examine the changing terrain, describe the opening salvoes and seek to predict the ultimate outcome of this war of words; for war it indeed is. There are important issues, of philosophy, ethics and global politics at stake in this seemingly contained conflict.

Let me begin with a brief, crude summary of the changing landscape, concentrating on constitutional law and human rights law. While of course private law involves crucially important questions relating to comparative law, the area of particular controversy is undoubtedly in the domain of public law.

In the past, constitutions were regarded as products of the historical, political, normative and cultural forces that shaped their particular society. While of course their structure and content were affected by wider global influences, such as the 'Glorious Revolution' of 1688 and the French and American revolutions, a national focus predominated. Some of these constitutions contained no Bill of Rights; those that did varied widely in terms of the identification and scope of those rights. Of course, Bills of Rights reflected the influences of global constitutional history but generally they did not seek to represent some unified global ethos.

Public international law was largely concerned with state practices and international treaties. The human being and human rights played only a tangential role.

Today, the position has been transformed.[3] The past two decades have witnessed constitution–making on a massive scale, as countries acquire independence or move to new democratic models of governance. Virtually all of these contain Bills of Rights. There is a huge common denominator in the rights recognised and protected, undoubtedly affected by the transformation of public international law over the longer period of six decades, reflecting the establishment of new global and regional orders based on human rights instruments and the flourishing of international criminal justice. A judge today who disdains interest in comparative law or public international law when adjudicating a constitutional issue is putatively neglecting his or her constitutional obligations. Those who argue that the judge's isolationism can nonetheless be justified find that the burden of proof rests on them.

What kind of a case can be made for such isolationism? The most obvious argument is that the task facing judges in constitutional interpretation is to interpret their own constitution rather than seek to advance some global unity of judicial outlook.[4] Constitutions, even those with a strongly internationalist bias, have a national rather than international *grundnorm*. They reflect the distinctive history of their country and its distinctive values and aspirations. The transformative character of South Africa's Constitution, for example, undoubtetdly represents a redemption from the injustice of the former apartheid regime. As Deputy Chief Justice Moseneke has observed, '[i]t is now well beyond contest that our Constitution has set itself the mission to transform society in the public and private spheres.'[5] Judges who, without constitutional authorisation,[6] import values from abroad – however worthy these values may appear and whatever level of consensus they may generate abroad, whether defined in terms of elite groups or wider social communities – may be regarded as acting *ultra vires* their role as authoritative interpreters of their own constitution with its distinctive framework of values.

In favour of judges' examining and citing foreign judgments, an array of arguments has been assembled. These include such obvious, and frankly banal, justifications as that foreign judgments may throw new light on an old problem or involve some novel judicial strategy of analysis, either generically – such as the concept of proportionality,[7] for example – or with regard to some discrete principle. A better argument is that using foreign judgments makes courts more able 'to interrogate, discover, and expose the factual and normative assumptions underpinning their own constitutions.'[8] Some advocates of judicial resort to foreign decisions speak the language of democratic global judicial dialogue and mutual respect.[9]

Sceptics of these arguments reply that there is no dispute that foreign judgments can assist in these ways but they contend that the good ideas emerging from a foreign court should have no privileged status over an academic treatise or paper. The sceptics point out that resort to foreign judgments goes well beyond looking for bright new ideas: what is involved is a movement towards an elaboration of a global system of constitutional values, in which courts of one country allow themselves to be influenced by the values of their judicial colleagues in other countries. From the standpoint of traditional constitutional theory, with a national *grundnorm*, the only values that are relevant to constitutional interpretation are those contained in the constitution of the particular country concerned. Externally-supported values are relevant only to the extent that the constitution authorises their consideration for inclusion.

At this point, the contemporary international landscape must be re-examined. There is a new order: global human rights instruments are based on normative and philosophical premises that envisage their universal application, not because of the contingency of national assent by way of treaty ratification, but by reason of what it is to be a human being, with innate dignity and equal rights. Of course these premises have been contested but, within the international legal order, they have axiomatic status. Customary international law has expanded somewhat, reflecting this human rights philosophy. Even in countries with continuing fidelity to a dualist approach, there have been significant breaches in the barriers protecting domestic legal systems from international penetration, aided notably by the Bangalore Principles[10] and the increasing judicial disposition to hold the state executive arm to the requirement of acting consistently with international obligations freely assumed by the state but not incorporated into domestic law. Many recent constitutions have been drafted so as to harmonise with the values, even the language, of international human rights instruments.

The changes at a regional level have been substantial. In Europe they have been truly seismic. With the expansion of the area of operations of the European Convention on Human Rights and the establishment of the European Charter on Human Rights, coupled with the domestic incorporation of the Convention into national legal systems, the constitutional jurisprudence of European states has been transformed. Even if the courts of some states such as Germany and Italy have continued to assert the independence of their constitutional orders, the reality is that there has been a huge intermingling of the Convention and national constitutional jurisprudence. That intermingling has inevitably, in turn, encouraged courts to examine the judgments of foreign courts. In the process, while the Convention may represent the *raison d'etre* for such examination, inevitably a wider process of comparative constitutional law is taking place.

If, therefore, we accept that the internationalist perspective is in the ascendent and that courts will as a matter of course be examining human rights instruments and foreign judgments, what principles should guide them? If counsel cite decisions invoking human dignity, or condemning inhuman or degrading treatment, from the Supreme Courts of India, Ireland and the United States of America, for example, is each decision worthy of equal respect? Does the identity of the particular state have any relevance?

Courts are circumspect in their answers to such questions. If they wish to distance themselves from a decision from a particular country,

they can simply decline to cite it or can distinguish it on the basis that that country's constitution or its social, political and economic environment is too different to make the decision useful. What courts are reluctant to do is articulate a league table in which decisions from certain countries are preferred to those of other countries. Yet, even in the absence of articulation, the league table emerges from the actuality of citation practice. We know that Canadian decisions are far more influential internationally than the political or economic power of that country might have suggested. Why should this be so? Dean Frederick Schauer of Harvard has observed:

'One reason for this is that Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier. On issues of freedom of speech, freedom of the press, and equality, for example, the United States is seen as representing an extreme position, whether it be in the degree of its legal protectioon of press misbehaviour, in the degree of its protection of racist and other forms of hateful speech, or in its unwillingness to treat race-based affirmative action as explicitly constitutionally permissible. People can of course argue about whether the United States is right or wrong, internally, to take these positions, positions which much of the rest of the wolrd sees as extreme, but that is not the point here. Rather, it is the twofold point that, first, ideas that are seen as close to an emerging international consensus are likely to be more influential internationally, and, second, that nations seeking to have more international legal influence may at times, recognising the first point, create their laws in order to maximize the likelihood of this extraterritorial influence. Canada appears to be a plausible example of both of these, and the influence of Canadian constitutional ideas in many parts of the world appears to be partly a function of the extent to which Canada has the virtue of not being the United States, but also a function of the extent to which following Canada, or at least being influenced by Canada (as in South Africa, for example), is seen as a wise route towards harmonization with emerging international norms.' [11]

I have to say that, if this analysis is correct, it is surely a matter which requires courts to be more frank about what they are doing than they have been up to now. The idea that courts are consciously engaging in the generation of an international consensus, with a pragmatically selected middle ground, backed by strategic citations designed to further than consensus, adds strength to the belief that courts are involving themselves in global political goals, however worthy those political goals may be. Some welcome this development on the basis that it is enhancing respect for human rights and the rule of law at a global level.[12] Others criticise it as going beyond courts' national constitutional mandate.

Let us turn to a deeper question but one that surely must be addressed by courts when examining constitutional issues involving human rights: What is the philosophical foundation for human rights theory? Is it natural law? The consensus of an identified social group? Some political norm or pragmatic policy? Whatever answer is given to this question is important in giving direction to the seemingly more mundane matter of the use by a court of foreign caselaw. Assuming that Professor Schauer is correct, and that courts choose and use foreign decisions in order to provide ballast for an international consensus, the practice could find justification if human rights theory is founded on pragmatic political and social policies; but it is inconsistent with a natural law foundation, which concerns itself with identifying the social and legal structures and principles that enhance human flourishing.

It is a source of concern that the first great global human rights instrument, the Universal Declaration of Human Rights, rested on foundations of philosophical sand. The world's leading thinkers from the disciplines of philosophy and religion subscribed to a series of propositions with great emotive power in the knowledge, and with the acceptance, that they would not attempt to come to an agreement on a coherent philosophical or normative foundation for the Declaration . As one of them, Jacques Maritain, observed, ' We agree about the rights but on condition no one asks us why.'[13]

The absence of any agreed philosophical foundation to this instrument (and indeed all other global human rights instruments) places courts in a quandary. If their own constitution has some philosophical foundation – natural law or natural rights, perhaps – should they have regard to this important fact when considering the relevance of judgments from other countries with constitutions based on a dififerent philosophical foundation? More problematically, how should courts interpret the international human rights instruments in the absence of such philosophically coherent foundation?

I suggest that whatever may be the best answer to questions in this area, the matter is of some importance, warranting overt consideration by the courts. No such frankness is evident. Instead, we are driven to the kind of speculation in which Professor Schauer has engaged. It is unfortunate that we can only make tentative guesses at how the question should be resolved.

The scholarly debate[14] on the subject reveals a clear gulf between those who argue that human rights theory has to have credible foundations if it is to command respect and those who take a more pragmatic approach, eschewing the search for foundations. Thus, Professor Robert Schapiro of Emory University proposes:

'With regard to those who affirm human rights, one could emphasize areas of agreement about the scope of rights and avoid areas of dispute about the nature of ultimate foundations. With regard to those who deny human rights, one could provide a positive example of a human rights culture and tell stories promoting fellow feeling.'[15]

This striking lack of agreement among scholars as to the foundations of human rights surely cannot be treated with silence by courts. Judges, in contrast to scholars, take decisions which impact on human lives: these decisions may result, starkly, in death or incarceration or, more positively, in the protection of lives and the advancement of liberty. If judges are to deliberate on those profound questions with no rudder to guide them, this is a matter for frank acknowledgement rather than suppression.

One increasingly finds advocacy by courts of the adoption of a particular position on the basis that it commands a consensus, or is supported by the growing trend, of decisions in foreign courts. This appeal to a kind of majoritarianism has been criticised on two principal counts. First, the very justification of rights discourse, whether in international human rights instruments or in national constitutions, is that rights are not simply the product of majoritarian benefaction but have a normative basis not dependent on the contingency of the majority views of any particular societal group, whether at state or global level. Secondly, there is something curious about cases where a court invokes a *foreign* majority to trump the views of the majority in that court's own country.[16] Of course, many of those who deny that human rights have a coherent philosophical foundation will cleave to an international consensus, as constitutive of the rights in question; but if this is why courts engage in the process, it would be helpful for them to say so.

As against these arguments, judicial resort to an international consensus can be defended on a number of grounds. First, it is plain that values, or at least the application of values to facts, can change over time. This is perhaps most obvious in relation to the infliction of physical violence: there is far greater opposition now, in judicial circles

and, probably less so, in the wider community, to corporal punishment, in prison, schools or houses. Domestic violence is today anathema. Opposition to the death penalty strengthens every year. There does seem merit in courts' monitoring international progress in these areas and taking some account of it. Moreover, as I have mentioned, for those who despair of finding any foundational justification for human rights, an international consensus offers a credible, workable alternative.

Let us consider in this context the concept of human dignity. Human dignity pervades the global and regional human rights instruments and national constitutions, in Africa and elsewhere[17]. The centrality of the concept of dignity to the jurisprudence of the Constitutional Court of South Africa is known throughout the world.[18] Yet the concept, if not entirely equivocal, has quite different normative associations in different constitutions. In South Africa it is redolent of societal solidarity, captured by the concept of *ubuntu*. To deny a person's dignity is to reject him or her from integral and equal membership of the community. In the United States of America, by way of contrast, dignity is associated with individualistic values counterposed with the interventions, even benevolent and socially inspired, of the State. In the United States, dignity opens the door to the exercise of autonomous choice; in Germany it serves in some respects to place limits on autonomy.

In order to examine these differences it is necessary to be familiar with the philosophical, political and cultural history of the country in question. To endorse foreign judicial invocations of dignity without such awareness is to run the risk of importing quite inappropriate legal transplants.

Let me now turn to consider another concept that is widely used in comparative constitutional jurisprudence: that of civilised standards.

The 'civilised standards' rationale for referring to foreign judgments when interpreting one's own constitution is based on the idea that certain provisions found in many constitutions – notably the prohibition on ' cruel, degrading or inhuman treatment' (or some similar phrase) – contain a normative test which is not fixed in stone at some definitive moment (such as the date of promulgation of the particular constitution) but, rather, finds its meaning in contemporary standards within certain sectors of humankind. As I have mentioned, judicial resort to foreign decisions may assist in identifying a contemporary international consensus, but here we ask whether the consensus should be limited only to the courts of ' civilised' states. It seems very odd, and frankly distasteful, to frame the question thus. Yet courts in Africa and in many other countries elsewhere seem content to do so.

In *Catholic Commission for Justice and Peace in Zimbabwe*[19], a decision of the Supreme Court of Zimbabwe, Gubbay CJ said that, in determining whether punishment was inhuman or degrading, the court had to make a value judgment, taking into account ' not only ... the emerging consensus of values in the civilized international community (of which this country is a part) ... but of contemporary norms operative in Zimbabwe and the sensitivities of its people.'[20] In *Makwanyane v State*[21] Kentridge AJ observed that there was

'ample evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies ... [W]hat is clear to my mind is that in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it.'

In Namibian constitutional jurisprudence one finds some interesting and understandable tensions between the need to refer to nationally endorsed values and the normative perspective at an international level. *S. v Tcoeib*[22] is a Namibian High Court decision upholding the constitutional validity of sentences of life imprisonment. In *Tcoeib* O'Linn J summed up the effect of earlier case law[23] on Article 8 as follows:

'(a) When the court must decide whether or not a law providing for a particular punishment is cruel, inhuman or degrading and thus in conflict with Article 8 of the Namibian Constitution and whether such law and such punishment is therefore unconstitutional and forbidden, the Court must have regard to the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution, as well as the consensus of values or "emerging consensus of values" in the 'civilised international community'.

What is to be regarded as 'the civilised international community' is, however, subject to further definition.

(b) The resultant value judgment which the court must make, must be objectively articulated and identified, regard being had to the aforesaid norms, etc., of the Namibian people and the aforesaid consensus of values in the international community.

(c) Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people.....'

On appeal to the Supreme Court, Mahomed CJ referred to jurisprudence of the German Constitutional Court and European Court of Human Rights. Noting that certain issues relating to life sentences remained for consideration, the Chief Justice commented:

'Suffice it for me to say that if and when such issues are properly raised in the future they will have to be addressed by having regard to the international jurisprudence but ultimately, by the proper interpretation of the relevant provisions of the Namibian Constitution and the applicable statutes ...' [24]

Some tough questions can be asked about the practice of referring to the standards of ' the civilised international community' . The word ' civilised' has historically disturbing connotations: it was invoked by colonial powers over centuries as a justification for the desecration they inflicted on people with less military resources than theirs. In setting up a disjunction between 'civilized' and 'uncivilized' peoples or nations, the colonial powers rationalised the infliction of terrible injustice and discrimination, the effects of which remain with us today.

If that language is abhorrent, is there nonetheless something to be said in favour of courts, when interpreting their own constitutions, adopting some critical normative test determined by reference to some subset of humanity whose values should be privileged? When framed in that way, the question is shorn of rhetoric and invites a certain frankness in its resolution. Are there some people, some countries, some courts, as opposed to others around the world, whose values on controversial issues should be given weight by a court when interpreting its own constitution?

Courts clearly think that there are. Unfortunately they have been reluctant to articulate the criteria for determining which foreign courts or politics deserve such privileged status. Having a democratic structure appears to be a necessary[25], but not a sufficient, requirement. Speaking broadly, subscription to liberal values is likely to enhance the claim for privilege.[26] Beyond this, one is left to speculate as to the applicable criteria.[27] It may be that some courts engage in selective

citation of foreign judgments when they are seen to assist a conclusion already reached by independent analysis or intuition. If there is any truth in this suspicion, perhaps those courts would be well advised to reflect further on the propriety of the practice.

Concluding observations

Let me conclude with the following brief observations. It is surely healthy for courts to be open to the considered views of their judicial colleagues throughout the world. They are also to be encouraged to immerse themselves in the jurisprudence of international human rights, which offers hope for so many people throughout the world.

The difficult questions which I have identified relate to normative and philosophical matters. What is the philosophical foundation of human rights? If there is none, or if there is no agreement on the question, how should a court proceed when examining foreign decisions and international human rights instruments? What regard should a court pay to an international normative consensus? And, in seeking to identify that consensus, should a court distinguish between countries on the basis of the 'civilised' character of their society or judicial elite?

These are frankly embarrassing questions for courts to have to address but their failure to confront them openly leaves those who are not judges in a state of incoherence and uncertainty as they try to unravel the true motivations of their courts.

Endnotes

[1] See, eg, the Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with US Supreme Court Justices Antonia Scalia and Stephen Breyer, co-sponsored by the US Association of Constitutional Law and Washington College of Law, 13 January 2005, available as a podcast and audio on the Internet (www.ucslaw.org/node/3909). See also Antonia Scalia 'Keynote Address at the American Enterprise Institute Conference: Outsourcing of American Law' 21 February 2006 (http://www.aei.org/event/1256).

[2] See, eg, Sujit Choudhry ed. *The Migration of Constitutional Ideas* (2006), Yeazell 'When and How U.S. Courts Should Cite Foreign Law' 26 *Const. Commentary* 59 (2009), Sitaraman 'The Use and Abuse of Foreign Law in Constitutional Interpretation' 32 *Harvard J of L & Public Policy* 653 (2009), Alford 'In Search of a Theory of Constitutional Comparativism' 52 *UCLAL. Rev.* 639 (2005), Law 'Globalization and the Future of Constitutional Rights' 102 *Nw. U L Rev.* 1277 (2008), Jackson 'Constitutional Comparisons: Convergence, Resistance, Engagement' 119 *Harvard L. Rev.* 109 (2005), Tushnet 'The Inevitable Globalization of Constitutional La.' 49 *Va J of Int'l L.* 985 (2009), Lollini 'Legal Argumentation based on Foreign Law: An Example from Case Law on the South African Constitutional Court' 3 *Utrecht L. Rev.* 60 (2007), Bentele 'Mining for Gold: The Constitutional Court of South Africa's Experience with Comparative Constitutional Law' (http://ssrn.com/abstract=1169642), Nikas 'Rethinking the Use of Foreign Law and Public Consensus: The U.S. Supreme Court's Inconsistent Methods for Defining Constitutional Rights' 13 *Lewis & Clark L. Rev.* 1007 (2009), Basnet 'A Critical Approach to the Study of Constitutional Migration' [2008] *Cambridge Student L. Rev.* 40, Schor 'Mapping Comparative Judicial Review' 7 *Washington U. Global Studies L. Rev.* 257 (2008), Kersch 'The New Legal Transnationalism, the Globalized Judiciary, and the Rules of Law' 4 *Washington U. Global Studies L. Rev.* 345 (2005).

[3] For an account of the developing relevance of human rights to international law, see Ian Brownlie *Principles of Public International Law* 7th ed. (2008) Chapter 25. See also Rhona Smith *Textbook on International Human Rights* 4th ed. (2010) Chapters 1-4, McCorquodale, 'The Individual and the International Legal System' Chapter 10 of Malcolm Evans ed. *International Law* 2nd ed. (2006).

[4] Cf *Thomson v Oklahoma*, 487 US 815, at 868, fn 4 (*per* Scalia J, dissenting, 1988):

'We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather "so implicit in the concept of ordered liberty" that is occupies a place not merely in our mores but, text permitting, in our Constitution as well… But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.'

[5] Deputy Chief Justice Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' 20 *Stellenbosch L. Rev.* 3 (2009). See also his paper 'Transformative Adjudication' 18 *S. African J. of Human Rts* 309 (2002).

[6] I appreciate that such authorisation may be implicit rather than expressed and that there is a genuine issue as to the extent of implicit authorisation which cannot be silenced by *a priori* resort to the constitution as *grundnorm*.

[7] For debate on the merits of the use of this concept in the adjudication of fundamental rights, see Tsakyrakis 'Proportionality: An Assault on Human Rights?' 7 *Int'l J. of Constitutional L.* 468 (2009), Khosia 'Proportionality: An Assault on Human Rights?: A Reply' 8 *Int'l J. of Constitutional L.* 298 (2010), Tsakyrakis 'Proportionality: An Assault on Human Rights?: A Rejoinder to Madhar' 10 *Int'l J. of Constitutional L.* 307 (2010).

[8] Shankar 'The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa' 2 *Drexel L. Rev.* 373 at 375 (2010).

[9] Eg L'Heureux-Dubé 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' 34 *Tulsa L.J.* 15 (1998). See also Slaughter 'A Brave New Judicial World' Chapter 10 of Michael Ignatieff ed. *American Exceptionalism and Human Rights* (2005), Slaughter ' A Global Community of Courts' 44 *Harvard J. of Int'l L.* 191 (2003), Slaughter 'Judicial Globalization' 40 *Virginia J. of Int'l L.* 1103 (2000), McCrudden 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' 20 *Oxford J. of Legal Studies* 499 (2000).

[10] See the Justice Michael Kirby 'Implementing the Bangalore Principles of Human Rights Law' 106 *S. African L.J.* 484 (1989), Kirby 'Domestic Courts and International Human Rights Law – The Ongoing Judicial Conversation' 6 *Utrecht L. Rev.* 168 (2010), Waters 'Creeping Monism: The Judicial Trend towards Interpretive Incorporation of Human Rights Treaties' 107 *Columbia L. Rev.* 628 (2007).

[11] Schauer *The Politics and Incentives of Legal Transplantation* (CID Working Paper No 44, 2000), pp 13-14. Cf. Gardbaum 'The Myth and the Reality of American Constitutional Exceptionalism' 107 *Michigan L. Rev.* 391 (2008).

[12] See Kumm 'The Cosmopolitan Turn in Constitutionalism' in Jeffrey Dunoff & Joel Trachtman eds. *Constitutionalism, International Law, and Global Governance* (2009), Soltan 'The Project of Law, Moderation, and the Global Constitution' 25 *Maryland J.of Int'l L.* 230 (2010).

[13] Mary Ann Glendon *A World Made Anew* (2001), 77. See further Woodcock 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights' 8 *J. Hist. Int'l* 245 (2006).

[14] See Alan Gewirth *Human Rights: Essays on Justification and Application* (1982), Rorty 'Human Rights, Rationality and Sentimentality' in Susan Hurley & Stephen Shute eds *On Human Rights*: *The 1993 Oxford Amnesty Lectures* (1993) 112, Michael Perry *The Idea of Human Rights: Four Inquiries* (1998), Freeman 'The Problem of Secularism in Human Rights Theory' 26 *Human Rts. Q.* 375 (2004), Davis 'Human Rights – A Re-examination' 97 *S. African L.J.* 94 (1980), Murphy 'Ideological Interpretation of Human Rights' 21 *De Paul L. Rev.* 286 (1971), Donnelly 'Human Rights as Natural Rights' 4 *Human Rts. Q.* 391 (1982), Haule 'Some Reflections on the Foundations of Human Rights – Are Human Rights an Alternative to Moral Values?' 10 *Max Planck Y.B.U.N.L.* 367 (2006), Ritter '"Human Rights": Would You Recognize One If You Saw One? A Philosophical Hearing of International Rights Talk' 27 *Cal. W. Int'l L.J.* 265 (1997).

[15] Schapiro 'The Consequences of Human Rights Foundationalism' 54 *Emory L J* 171 at 185 (2005).

[16] See Blumenson 'Constitutional Kabuki: Fidelity and Optimism in the Foreign Law Debate' 43 *Suffolk U L Rev* 136 at 140 (2009).

[17] See McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' 19 *European J. of Int'l L.* 655 (2008), David Kretzmer & Eckart Klein eds *The Concept of Human Dignity in Human Rights Discourse* (2002), Davis 'Responsive Constitutionalism and the Idea of Dignity' 11 *U. Pa. J. of Constitutional L.* 1373 (2009).

[18] See Chaskalson 'Dignity and Justice for All' 24 *Maryland J. of Int'l L.* 24 (2009), Botha 'Human Dignity in Comparative Perspective' 20 *Stellenbosch L. Rev.* 171 (2009), O'Connell 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' 6 *Int'l J. of Constitutional L.* 267 (2008).

[19] 1993 (4) SA 239 at 248 (Zimbabwe Supreme Court).

[20] Other African courts have also asserted that their country is part of the civilised international community: see eg *Ex parte: Attorney General Namibia: In re Corporal Punishment by Organs of State*, 1991 NR 178 at 188 (Namibian Supreme Ct, per Mahomed AJA), *Attorney General v Kigula and 417 others* [2009] UGSC 6 (Uganda Supreme Ct. *per* Odoki CJ), *Ndlovu v Macheme* [2008] BWHC 293 (Botswana High Ct, Dingake J), *In Re: Adoption of Children Act (Cap. 26:01); In re: David Banda* [2008] MWHC 3 (Malawi

High Ct, Nyirenda J), *Attorney General v Swissbourg Diamond Mines (Pty) Ltd.*, 1991-1996 LLR 27 at 33 (Lesotho CA, *per* Mahomed P).

[21] [1995] ZACC 3, para. 198.

[22] 1993 (1) SACR 274 (Nm).

[23] *In re Ex parte Attorney General, Corporal Punishment by Organs of State* ,*supra*, some differences of approach to the propriety of referring to foreign caselaw were apparent in the judgments of Mahomed AJA and Berker CJ.

[24] 1999 NR 24 at 37.

[25] Cf McCrudden, *o.cit* fn. 21, *supra*, at 517.

[26] In this context it is interesting to note that the Uganda Supreme Court in *Attorney General v Susan Kigula and 417 Others* [2009] UGSC 6 (21 January 2009) defended the entitlement of the United States of America to claim to have 'evolved standards of decency' (echoing *Trop v Dulles* 356 US 86 (1958)), in spite of the fact that some States of the Union retain the death penalty: 'We cannot say that those states in the United States of America, or indeed anywhere else in the world who retain the death penalty, have not evolved standards of decency. Each situation must be examined on its own merits and in its context.'

[27] A bold, if controversial, set of guidelines is offered by Glensey 'Which Countries Count?: Lawrence & Texas and the Section of Foreign Persuasive Authority' 45 *Va. J. of Int'l L.* 357 (2005).

The role of comparative and public international law

in domestic legal systems: a South African perspective

By Justice Dikgang Moseneke, Deputy Chief Justice of South Africa

Introduction

I am delighted to be here and thank the organisers of this conference for this kind invitation. I have been asked to make a contribution to the discourse on the rule of law by examining the role of comparative and public international law in domestic legal systems. I indeed look forward to the remarks of Prof. Binchy of Trinity College, Dublin on the same topic. I must at the outset manage your expectations by letting you know that I shall be talking about the impact of comparative and public international law on only one domestic legal system, and that is our own in South Africa. Being a sitting justice I can hardly escape a considerable measure of pre-occupation with how our newly found constitutional injunctions on foreign and international law have found space in the adjudication process.

I will seek to explore how international norms colour constitutional adjudication within our domestic or national tribunals. It does not take much to appreciate that in theory and in practice the response of national jurisdictions to international rules of law varies from state to state. However, as a general matter national courts opt for parochialism. They are not always at ease with transnational legal norms which may at times be seen as being at odds with strongly held notions of national sovereignty. This is so even in a world where regional and indeed global notions of law are becoming increasingly dominant. Yet many national courts are slow at acknowledging international standards or judicial opinions from other parts of the world. They stubbornly prefer to pander to municipal standards consistent with traditional notions of national sovereignty. This they do even in the face of evolving or established international law norms. This is more so in relation to public international law and to constitutional law in particular.

This global convergence of constitutional law standards is rather well made in an article in the Oxford Journal:[1]

'Constitutional law is being globalised. It is becoming a shared enterprise that transcends the borders of the nation state. Around the globe, Supreme Court justices convene in conferences, enter into dialogue with each other through their judicial opinions and draw on each others' work. In addition, constitutional law in many countries has increasingly converged on the same template. This template …includes a robust form of judicial review and a two-stage system of protecting rights consisting of a rights protection clause and a standard-based doctrine for the adjudication of rights conflicts, namely proportionality. Now the spread of proportionality across legal systems has been particularly rapid and has provided a common grammar for global constitutionalism …'

Monism and dualism

A convenient starting point for a discussion of the impact of public international law on our constitutional arrangements is the theory that teaches that there are two broad approaches on how international law binds domestic jurisdictions. These are monism and dualism. Monism teaches that law is indivisible; that all law, whether of domestic or international origin, is one and that international law is thus incorporated directly into municipal law without a need for a specific act of adoption. Dualism, on the other hand, sees municipal law as an incident of national sovereignty and regards it as distinct and self standing from international law in scope and application. On this approach, international law may apply only if and to the extent that it is incorporated by some overt legislative act into municipal law.[2] On this approach, absent an overt act of domestication, international rules would not have the power of municipal law.

Yet this theoretical dichotomy is rarely absolute. It is undermined by the daily and rapid movement of ideas, people, capital, commerce and indeed conflict. The boundary between national and global concerns has, in a large measure, become blurred. In the words of Justice Albie Sachs, one of my former colleagues at the Constitutional Court:

'[b]oth violence and international norms on human rights have become globalised. Formerly rigid systems of sovereignty became porous as the enemies and the friends of the rule of law show equal and opposite disregard for state boundaries. Judges in national

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