

## In the Name of Comparative Constitutional Jurisprudence: The Consideration of German Precedents by South African Constitutional Court Judges

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### A. Introductory Remarks

Judges involved in constitutional adjudication often engage in comparative analyses of foreign cases.<sup>1</sup> The judges of South Africa's Constitutional Court [hereinafter Constitutional Court] do so, too.<sup>2</sup> The phenomenon has been given many names such as “transjudicialism,”<sup>3</sup> “transjudicial communication,”<sup>4</sup> “constitutionalist dialogue,”<sup>5</sup> “judicial globalization,”<sup>6</sup> “constitutional cross-fertilization,”<sup>7</sup> “transnational contextualization,”<sup>8</sup>

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This contribution is based partly on empirical data collected by the first author during the period 1995–2011. To access the data, see Christa Rautenbach, *Use of Foreign Law*, NORTH-WEST UNIVERSITY, <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>.

<sup>1</sup> See generally BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* (2006); Adrienne Stone, *Comparativism in Constitutional Interpretation*, 1 N.Z. L. REV. 45, 45 (2009).

<sup>2</sup> From its establishment in 1994 until the end of 2011 the Constitutional Court has handed down 437 judgments. More than half of these judgments, a total of 223, have considered foreign case law. What is remarkable is that in these cases in the region of 3047 foreign cases have been cited. See Christa Rautenbach, *Use of Foreign Law*, NORTH-WEST UNIVERSITY, <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>.

<sup>3</sup> Darlene S. Wood, *In Defense of Transjudicialism*, 44 DUQ. L. REV. 93, 93 (2005).

<sup>4</sup> Ryan C Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32 LAW & SOC. INQUIRY 791, 791 (2007) (book review); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 101 (1994).

<sup>5</sup> Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalist Dialogue*, 80 TUL. L. REV. 203, 203 (2005).

<sup>6</sup> Hannah L. Buxbaum, *From Empire to Globalization ... and Back? A Post-Colonial View of Transjudicialism*, 11 IND. J. GLOBAL LEGAL STUD. 183, 183 (2004).

“globalization of judgment,”<sup>9</sup> “globalization of national courts,”<sup>10</sup> “constitutional borrowing,”<sup>11</sup> “constitutional comparativism,”<sup>12</sup> and “judicial comparativism.”<sup>13</sup> All these terms have merit, especially within their appropriate context, but for the purposes of this contribution we will use the term “comparative constitutional jurisprudence” to name the phenomenon we wish to describe and discuss. First, in the South African context, the terms “dialogue,” “cross-fertilization,” and “globalization” do not reflect the true nature of the exercises in drawing comparisons in the South African Constitutional Court. These terms imply a reciprocal dialogue between two or more courts from different jurisdictions. It is evident, however, that the South African Constitutional Court has been considering far more foreign jurisprudence than any non-South African constitutional court has been considering South African jurisprudence—in other words, this has largely been a case of one-way traffic.<sup>14</sup> *S v. Makwanyane*,<sup>15</sup> in many ways the inaugural decision of the Constitutional Court, contains 220 foreign case citations from 11 countries and three supranational courts. To our knowledge no other foreign court can boast a comparable statistic.

“Borrowing,” in the second place, is an equally unsatisfactory term in the South African context. To borrow is to obtain temporary possession or use of something, usually after having been granted permission from someone else who has the lawful possession of that

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<sup>7</sup> *Id.* at 184.

<sup>8</sup> Lourens M. Du Plessis, *Interpretation*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 32.171 (Stuart Woolman, Michael Bishop & Jason Brickhill eds., 2012).

<sup>9</sup> Reem Bahdi, *Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 GEO. WASH. INT’L L. REV. 555, 555 (2002).

<sup>10</sup> Myra J. Tawfik, *No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law*, 32 QUEEN’S L.J. 573 (2007).

<sup>11</sup> Nelson Tebbe & Robert L Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010); Dennis M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Construction of Comparative Influence: The South African Experience*, 1 INT’L J. CONST. L. 181 (2003).

<sup>12</sup> Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169 (2005).

<sup>13</sup> David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249 (2007).

<sup>14</sup> See discussion *infra* Part C. For the statistics from 1998 to 2010, 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 THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 185 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

<sup>15</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) (finding the death penalty to be unconstitutional in South Africa).

thing.<sup>16</sup> The judge referring to or following foreign precedent has no intention of asking permission to use the legal principle so referred to or followed, but will simply incorporate it into the South African law if it is found to be useful. If a judge, after considering a foreign case, decides to adopt an approach similar to that followed in the said case, this is an instance of judicial reasoning. A classic example is once again to be found in *S v. Makwanyane*,<sup>17</sup> where former Justice Chaskalson<sup>18</sup> applied the test as formulated in the Canadian case *R v. Oakes*<sup>19</sup> to determine whether or not a limitation of rights was reasonable. Another example is the once controversial decision of *Du Plessis v. De Klerk*,<sup>20</sup> where Justice Kentridge<sup>21</sup> referred to the German notion of "Drittwirkung" to conclude that the constitutional norms and principles of the transitional Constitution<sup>22</sup> could only indirectly apply in private law matters.<sup>23</sup>

Finally, the prefix "trans-" as in "transjudicialism" and "transnational" also implies the involvement of more than one court or judicial system, which does not reflect the true state of affairs in a South African context. Statistically speaking, the South African Constitutional Court judges consider foreign law far more frequently than any of their counterparts worldwide.<sup>24</sup> We therefore prefer the expression "comparative constitutional

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<sup>16</sup> The word "borrowing" is a noun describing the action of borrowing something. Its corresponding verb is "to borrow" which means amongst others "take and use (something belonging to someone else) with the intention of returning it." See OXFORD DICTIONARY OF ENGLISH (Catherine Soanes & Angus Stevenson eds., 2005), under the lemmas "borrowing" and "borrow".

<sup>17</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) paras. 106–07 (S. Afr.).

<sup>18</sup> Justice Chaskalson was President of the Constitutional Court of South Africa from 1994–2001 and Chief Justice of the Republic of South Africa (2001–2005). He graduated from the University of the Witwatersrand with a B Com (1952) and LLB (*cum laude*) (1954). See *Judges: Justice Arthur Chaskalson (1931–2012)*; Chief Justice of South Africa (2001–2005), CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicearthurchaskalson/index1.html> (last visited June 25, 2013).

<sup>19</sup> *R v. Oakes*, [1986] S.C.R. 103, 135–36. Canadian cases are popular and have been cited quite often by the Constitutional Court. Between 1998 and 2011 there were 879 citations of Canadian cases.

<sup>20</sup> *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) para. 41 (S. Afr.).

<sup>21</sup> Justice Kentridge has been an acting judge of the Constitutional Court since 1995 and obtained the BA degree (1941) at the University of the Witwatersrand. See *Judges: Justice Kentridge*, CONSTITUTIONAL COURT OF SOUTH AFRICA, <http://www.constitutionalcourt.org.za/site/judges/justicekentridge/index1.html> (last visited June 25, 2013).

<sup>22</sup> See generally S. AFR. (INTERIM) CONST., 1993.

<sup>23</sup> The judgment was delivered when the transitional Constitution was still in operation, and it is now generally accepted that the new Constitution applies directly to the private law. For a more thorough discussion, see generally Stu Woolman, *Application*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 31.3–31.161 (Stu Woolman, Michael Bishop & Jason Brickhill eds., 2012).

<sup>24</sup> See discussion *infra* Part C.

jurisprudence” which best—albeit not perfectly—describes the comparativism which the South African Constitutional Court practices.

In this contribution the readiness of the South African Constitutional Court to consider foreign case law in general, and some of the judges’ fascination with German case law in particular, are first described and discussed, beginning with a brief sketch of the historical context within which comparative constitutional jurisprudence has been taking place. The emphasis is on the possible influence of German case law on the development of constitutionalism in South Africa. The second part of our discussion focuses on the inferences to be drawn from the results of an empirical investigation—quantitative and qualitative—again concentrating on the Constitutional Court’s use of German precedent and the impact, if any, of the latter on the former’s decisions, before we conclude with a few general remarks.

## B. Juridico-historical and Constitutional Context

### 1. *Historical Origins of South African Law and Their Relevance for the Interaction Between South African and German Legal Scholarship*<sup>25</sup>

Over a period of more than three and a half centuries, since 1652, South Africa’s official legal system developed as a hybrid of Romano-Germanic civil law and English common law, thus leaving South Africa as one of the few countries in the world where Roman-Dutch law has—at least partly—survived till this day. Another country is Sri Lanka. The “mixed” nature of latter-day South African law is a product of a mixed colonial history, with Dutch influence dominant between 1652 and 1806 and English hegemony prevailing until well into the twentieth century. The mighty British Empire, however, never used its leverage to abolish Roman-Dutch law in South Africa—which has now survived for almost two centuries after its demise in its country of origin.<sup>26</sup> The common-law phenomenon of *stare decisis* introduced by the English has been the key to the survival and growth of the, civil-law oriented, Roman-Dutch law in South Africa. The case-law version of Roman-Dutch law shows an often marked English influence because a number of judges participating in its formation were trained in English law. In addition, English law simply took over in areas most closely related to the exercise of political power (constitutional and administrative

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<sup>25</sup> See generally Lourens Marthinus du Plessis, *German Verfassungsrecht under the Southern Cross. Observations on South African-German Interaction in Constitutional Scholarship in Recent History with Particular Reference to Constitution-Making in South Africa* in VERFASSUNGEN – ZWISCHEN RECHT UND POLITIK. FESTSCHRIFT ZUM 70. GEBURTSTAG FÜR HANS-PETER SCHNEIDER 524, 524–26 (Friedhelm Hufen ed., 2008).

<sup>26</sup> Although there were plenty of efforts to unify and codify the law of the Netherlands, the first successful attempt was the code adopted as the *Burgerlijk Wetboek* of 1838, which was influenced by the Code Napoleon. The code was adopted many times over the years, most notably in 1947 and 1992. See Gerrit Meijer, *The influence of the Code Civil in the Netherlands*, 14 EUR. J.L. & ECON. 228 (2002).

law), the administration of justice (the law of criminal and civil procedure and evidence) and business and industry (company law, bills of exchange, and insolvency law).

Since the advent of constitutional democracy in South Africa on 27 April 1994, indigenous and customary African law has increasingly been stirred into the blend of what today is “South African law.” Indigenous law has, of course, always been there, even before 1652, but under colonial and apartheid rule in South Africa, it played second fiddle to Roman-Dutch and English common law. Its scope as law was mostly restricted to matters personal and familial, small-scale community matters, and whatever status it enjoyed was by the grace of the common law.<sup>27</sup>

Traditionally, exchanges between South African and German jurists remained restricted to contact and co-operation between legal scholars.<sup>28</sup> These exchanges were triggered and facilitated by the shared civil-law traits in their respective legal systems, which are traceable to ancient as well as “learned” medieval Roman law. In some circles, cordial academic fellow-feeling emerged from ideological and dogmatic affinities. A so-called purist movement among South African jurists<sup>29</sup>—with its heyday roughly between the late 1930s and middle 1980s—preached and promoted in class, but eventually also in courtrooms, exemplified an adherence to pure, civil-law-like Roman-Dutch law, untainted by English legal influence and unperverted by English-minded judges’ (mis)understanding of it.<sup>30</sup> The purists also bore the torch of “principled legal thinking,” understood to be of learned Roman-law extraction and therefore shared a heritage with civil-law legal systems. This accounts for the purists’ heartfelt empathy with the German historical school and nineteenth century pandectism, which shaped key facets of the private-law theory, taught, mainly but not exclusively, at Afrikaans-speaking law faculties in South Africa even to this day.<sup>31</sup>

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<sup>27</sup> See generally Gardiol J. van Niekerk, *Legal Pluralism*, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA 3–7, 9–12 (Christa Rautenbach, Jan C. Bekker & Nazeem M.I. Goolam eds., 2010).

<sup>28</sup> Lourens du Plessis, *Learned Staatsrecht From the Heartland of the Rechtsstaat: Observations On the Significance of South African-German Interaction in Constitutional Scholarship*, 8 POTCHEFSTROOM ELEC. L.J. 76, 78 (2005).

<sup>29</sup> See LOURENS DU PLESSIS, AN INTRODUCTION TO LAW 57–63 (1999); Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 33–64, 60–64 (Reinhard Zimmermann & Daniel Visser eds., 1996).

<sup>30</sup> See DU PLESSIS, *supra* note 29, at 57–63.

<sup>31</sup> For insightful discussions of this influence, see J.W.G. van der Walt, *Skerwe uit “die” Geschiede van die Leerstuk van Subjektiewe Regte*, in 31 TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 521, 626 (1993); André J van der Walt, *Personal Rights and Limited Real Rights: An Historical Overview and Analysis of Contemporary Problems Related to the Registrability of Rights*, 55 J. CONTEMP. ROMAN-DUTCH L. 170 (1992).

Conventional interaction between South African and German legal scholars remained restricted to the various private-law disciplines,<sup>32</sup> criminal law,<sup>33</sup> legal history, Roman law (as an academic discipline) and perhaps legal philosophy, and legal theory.<sup>34</sup> Conspicuously underrepresented on the affinity list was “political” public law, that is, constitutional and administrative law which, in apartheid South Africa, as has been previously intimated, was much more English than Roman-Dutch—as was criminal and civil law of procedure and various branches of commercial law. Constitutional and political reform was, at any rate, not a foremost concern of most prominent purist legal scholars in South Africa. The handful of pioneers concerned with such reform made do with comparative guidance from the constitutional law of the United States of America—the oldest “living” example of a modern-day constitutional democracy.<sup>35</sup>

In the lively debates foreshadowing, accompanying, and assessing the first tottering steps of constitutional democracy in South Africa during the early 1990s, legal and constitutional comparison were, as will be shown, the order of the day. Moreover, among the jurisdictions sourced for comparative examples, Germany and Canada suddenly shot to the forefront. A number of South African scholars writing about various aspects of South African’s transition to democracy professed an indebtedness to German sources, but not because these sources breathe a spirit of principled purism.<sup>36</sup> Considerable attention was devoted to post-World War II German expertise and experience.<sup>37</sup> In the process of actual constitution-making—both during the negotiations preceding the adoption of a transitional Constitution in 1993 and later in the Constitutional Assembly, where the final 1996 Constitution<sup>38</sup> took shape—a “German presence,” eventually manifesting itself in both end products, was tangible.

## *II. German Influences on South African (Constitutional) Law*

There is no single explanation for the considerable German influence on constitution-making and the inception of constitutional democracy in South Africa. As was pointed out, conventional academic affinities between legal scholars from the two countries do not

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<sup>32</sup> Excluding formal private law, which was influenced by English law.

<sup>33</sup> Excluding criminal procedure, which was influenced by English law.

<sup>34</sup> With both private and public international law eventually also creeping into the picture.

<sup>35</sup> See du Plessis, *supra* note 28, at 78.

<sup>36</sup> *Id.* at 79.

<sup>37</sup> See, e.g., Dennis Davis, Matthew Chaskalson & Johan de Waal, *Democracy and Constitutionalism: The Role of Constitutional Interpretation*, in *RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* 1–130 (David van Wyk, John Dugard, Bertus de Villiers & Dennis Davis eds., 1994).

<sup>38</sup> See generally *S. Afr. CONST.*, 1996.

quite account for this phenomenon, but are not wholly unrelated to it either. Purist South African jurists, and not always just them, bought into a legal theoretical paradigm associated (also) with the “principled legal thinking” of German *Begriffsjurisprudenz*,<sup>39</sup> conceiving of law as a self-contained, rational system of general norms. Legal problems are thought to be solved when, through deductive reasoning, a concrete situation is subsumed under a norm appropriate to the exigencies of that type of occurrence. The state is the source of law and law, in its turn, allegedly rests on an independent foundation of reason and logic. Courts are autonomous institutions applying the law in a systematic, even mechanistic, way as if it were a system of fixed, and predictable, rules. The “is” and the “ought” of law are markedly distinct, as are “law” and “morality,” and “law” and “politics.”

South African public law scholars with knowledge of German constitutional scholarship know that German public lawyers engaging with the German Basic Law (*Grundgesetz*) are overwhelmingly not of the positivistic disposition just described. *Begriffsjurisprudenz* has, as a matter of fact, shed much of its currency over a wide spectrum of legal disciplines. The Basic Law, in particular, is understood to perceive of fundamental rights as anterior to the state, and “the state’s law” as subject to the objective order of values enshrined in the Basic Law. Law and morality, and law and politics, can therefore not be separated. However, to quote Donald Kommers:

[T]he approach to judicial reasoning in *Begriffsjurisprudenz* has outlasted positivism and has had a lasting influence throughout Europe, including Germany. . . . German constitutional scholars no less than the justices of the Federal Constitutional Court have made significant attempts to build a theory of judicial decision based on reason and logic.<sup>40</sup>

There may be truth in this claim. German constitutional-law scholars, probably on the strength of the logic and reasonableness of theory, are less tentative than their South African counterparts in expressing their views on *the law*, including the Basic Law, *as it stands*. By contrast, the disinclination of South African constitutionalists readily to commit themselves when interrogated about what the law and the Constitution “say” possibly evidences a common-law wariness not to pre-empt judicial pronouncement, for the time-being, on a particular issue.

While past interfaces between principled German and South African legal scholars cannot adequately explain the recent, and present, affinity between constitutionalists from the two countries, there are other historical—including cultural and even ideological, but also down-to-earth logistical—phenomena that go a longer way in providing an explanation.

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<sup>39</sup> For a succinct depiction of this style of thinking, see DONALD P KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 40–41 (1997).

<sup>40</sup> *Id.* at 40.

In the heyday of apartheid, many white, and especially Afrikaans speaking, South Africans identified spiritually and culturally, or at least felt very comfortable, with the “Germanic” traits of the German *Volksgesit*. German used to be the third language of preference in many Afrikaans-medium secondary schools,<sup>41</sup> German scholarship was held in high esteem, and Germany was the destination of first choice for many especially Afrikaans-speaking doctoral and post-doctoral students (in law particularly). As apartheid South Africa faced increasing academic isolation, most German institutions involved in academic exchange, universities as well as funding organizations such as the Alexander von Humboldt Foundation, continued “to provide and keep open channels for comparative research to South African jurists”<sup>42</sup> irrespective of race, color, gender, or creed (it was said) as well as, controversially so, political and institutional affiliation. Free access to the German academic world, amid increasing academic isolation elsewhere, resulted in “many South African jurists” relying “less heavily on Anglo-American law for comparative analysis” as well as a markedly “positive influence by German law on South African law reform.”<sup>43</sup> Some of these jurists, especially the constitutional, human-rights and international-law scholars, became involved as technical advisers in constitution-making in South Africa during the 1990s,<sup>44</sup> and their previously established ties with German experts then stood them—and the constitution-making process—in good stead.

Some of the parties negotiating a Constitution for a democratic South Africa made use of the services of expert, technical advisers and among these there were a number of Germans, especially German professors of constitutional and human-rights law. There were also political affinities between some of the parties and their advisers. The African National Congress’ (ANC) main adviser was, for instance, a prominent member of the German SPD, the social-democratic ANC’s kindred soul in Germany.

What destiny had in store for both the South African and German nations, especially during the latter half of the twentieth century, also served to forge an affectionate sense of understanding between them, marked dissimilarities notwithstanding. Germany is an example of a relatively young, post-World War II, democracy from whose experience a new South Africa in the making stood to learn a lot. The constitutions of the vast majority of African states as well as, for instance, the *Canadian Charter of Rights and Freedoms* of

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<sup>41</sup> With Afrikaans as the first and English as the second language, these being the then two official South African languages.

<sup>42</sup> André Rabie, Schalk van der Merwe & J.M.T. Labuschagne, *The Contribution of the Alexander von Humboldt Foundation to the Development of the South African Legal System and Literature*, 56 J. CONTEMP. ROMAN-DUTCH L. 608, 622 (1993).

<sup>43</sup> *Id.*

<sup>44</sup> See du Plessis, *supra* note 28, at 83.



course also date from the post-World War II era. However, the German and South African experiences, put next to each other, stand out because of the matchless sense of urgency which permeated constitution-making and the establishment of constitutional democracy in both cases. The last step of constitutional significance in the German transition to full democracy, the *Wiedervereinigung*, preceded the first step in the South African transition—the commencement of the transitional Constitution and the first democratic elections—by a mere three-and-a-half years, and both moves were bolstered, or *occasioned*, some might say, by the same historical event, namely the decline of Communist hegemony in the Eastern Block. Without compromising the modesty becoming citizens of these countries, which could, still, have been in tatters, South Africans and Germans can furthermore celebrate appreciable achievements along the road of constitutionalism so far—achievements that continue to add to the usefulness of comparing the German and South African constitutional projects.

The clearest and most direct evidence of German influence on South African constitutional and human rights law are the provisions, or elements of provisions, of German origin<sup>45</sup> that somehow found their way into the South African constitutional text. There is a sense in which the 1996 final Constitution evinces a stronger German character than the 1993 transitional Constitution. Section 1 of the South African Constitution arguably fulfills a role similar to Article 20 of the German Basic Law, albeit not in similar terms, namely to found and characterize the kind of state for which it provides. Section 1 of the South African Constitution provides as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.<sup>46</sup>

In comparison, article 20 of the German Basic Law provides as follows:

- (1) Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.

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<sup>45</sup> Johan de Waal, *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights*, 11 S. AFR. J. ON HUM. RTS. 1 (1995).

<sup>46</sup> S. AFR. CONST., 1996, ch. 1, § 1.

- (2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.
- (3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.
- (4) Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist.<sup>47</sup>

Of the pentarchy, *Parteienstaat*, *Rechtsstaat*, *Streitbare Demokratie*, *Sozialstaat*, and *Bundesstaat* envisaged in Article 20 of the Basic Law, at least the first three are also designated in terms of section 1 of the 1996 South African Constitution to shape the nature of the South African polity: what section 1(d) prescribes is certainly a party state and a competitive democracy, while “rule of law” in section 1(c) is the English common law way of saying “Rechtsstaat,” though the two are not identical twins.<sup>48</sup> It is not said in section 1 that South Africa is a social state, but it is implied elsewhere in the Constitution, for example, (1) in section 7(2), which enjoins the state to “promote and fulfill” the rights in the Bill of Rights, (2) in the authorization of affirmative action in section 9(2), (3) in the entrenchment of socio-economic entitlements, albeit restrained, in sections 26 and 27, amongst others, and (4) in the jurisprudence of the Constitutional Court too.<sup>49</sup> It is no secret that for several mostly historical reasons the majority of the South Africans at the helm of constitution-making and subsequently of government do not cherish federalist sentiments akin to those of most Germans. It is therefore not surprising that section 1 does

<sup>47</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 20 (Ger.). Translation:

(1) The federal Republic of Germany is a democratic and social federal state. (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

See *Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ, <http://www.gesetze-im-internet.de/gg/index.html> (Christian Tomuschat & Donald P. Kommers trans., last visited June 25, 2013).

<sup>48</sup> See, for example, the discussion of the Constitutional Court’s jurisprudence on the rule of law in 1 IAIN CURRIE & JOHAN DE WAAL, *THE NEW CONSTITUTIONAL & ADMINISTRATIVE LAW* 75–81 (2001).

<sup>49</sup> For an example of South Africa as a social state in the jurisprudence of the Constitutional Court, see *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) at para. 20 (S. Afr.); see also *generally Treatment Action Campaign v. Minister of Health (No 1)* 2002 (5) SA 721 (CC) (S. Afr.).

not describe South Africa as a federal state. At the same time South Africa is not anti-federal and it can best be described as a *co-operative* as opposed to a *competitive* federation.<sup>50</sup> A principle that in Germany is meant to counteract the fragmentation of the federation is invoked in South Africa to impel co-operation among the various spheres<sup>51</sup> of government. This principle is *Bundestreue*, a constitutional and linguistic neologism which, in Chapter 3 of the South African Constitution, goes by the name of “co-operative government.”

Anyone familiar with the German Basic Law and the foundational prominence it affords human dignity will be struck by the statement in section 1(a) of the South African Constitution that human dignity, together with the achievement of equality and the advancement of human rights and freedoms, is one of the founding values of the Republic of South Africa as “one, sovereign, democratic state.” References to human dignity also occur in other pivotal provisions of the South African Bill of Rights:

- Section 7(1) states that the Bill of Rights (Chapter 2 of the Constitution) “affirms the democratic values of human dignity, equality and freedom.”
- The general limitation clause, section 36, requires limitations of rights entrenched in the Bill of Rights to comply with the threshold of the extent to which the proposed limitation “is reasonable in an open and democratic society based on human dignity, equality and freedom” (section 36(1) – amongst others).
- In section 39(1)(a), judicial authorities interpreting the Bill of Rights are enjoined “to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

The occurrence, and recurrence, of the triumvirate “human dignity, equality and freedom” in the text of the 1996 Constitution bears testimony to where we in South Africa came from when we first established a democracy— precisely what Article 1 of the Basic Law does with respect to Germany’s unique story. Comparable sections in the transitional Constitution referred to freedom and equality, but not dignity.

Section 39(2) of the South African Constitution enjoins the judiciary, “[w]hen interpreting any legislation and when developing the common law or customary law” to “promote the spirit, purport and objects of the Bill of Rights.” At the 1993 multi-party constitutional negotiations—from which the transitional Constitution emerged—there was a strong

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<sup>50</sup> See, e.g., CURRIE & DE WAAL, *supra* note 48, at 119–24. In *Doctors for Life International v. Speaker of the National Assembly* 2006 (6) SA 416 (CC) at paras. 80–82, the South African Constitutional Court nevertheless argued that the South African and German federal systems coincide in vital respects.

<sup>51</sup> The South African Constitution speaks of “spheres” rather than “levels” or “tiers” of government in relation to the division of power between national, provincial and local government, thereby lending precedence to the notion of co-operation rather than hierarchy.

sentiment against direct horizontal application of the Bill of Rights.<sup>52</sup> After an intense and lively debate in which the German notions of *mittelbare* and *unmittelbare Drittwirkung* featured prominently, a compromise was reached and subsequently written into sections 7(1) and (2) of the transitional Constitution, leaving room for a restrictive understanding of the operation of the Bill of Rights, excluding its direct horizontal effect. This was also how the section was eventually construed in the then landmark Constitutional Court judgment of *Du Plessis v. De Klerk*.<sup>53</sup> Part of the package of the section 7 deal was the inclusion of the predecessor to section 39(2) of the 1996 Constitution—namely section 35(3)—in the transitional Constitution, to try to ensure that the provisions of the Bill of Rights would at least have some “radiating effect” on the interpretation and application of non-constitutional law. The wording of the two provisions is very similar. That is, however, not the case with sections 7(1) and (2) of the transitional Constitution, and their successors in the 1996 Constitution, sections 8(1)-(3). The latter provisions authorize the direct horizontal application of “[a] provision of the Bill of Rights . . . 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.” This is taken to authorize a directly horizontal application of the Bill of Rights.

Three provisions of German origin in the transitional Constitution were eventually excluded from the 1996 Constitution. Two of them, sections 35(2) and 232(3), prescribed an interpretive procedure known in the German context as *verfassungskonforme Auslegung*, for the interpretation of the Bill of Rights and the Constitution as a whole, and existing law under the Constitution respectively. The omission of these provisions from the 1996 Constitution has not precluded judicial reliance on the interpretive procedure they previously prescribed,<sup>54</sup> and *verfassungskonforme Auslegung* is still very much part of South African constitutional law as it stands.

The *Wesensgehaltgarantie*, which is more directly and exclusively from Germany, was included in the general limitation clause—section 33(1)(b)) in the transitional Bill of Rights. Like their German counterparts, South African constitutional scholars and lawyers struggled to get to the heart of the essential content of rights, and what added to the misery was the fact that a provision with a singular history was taken over and the history giving rise to it was then ignored when the provision found its way into the transitional Bill of Rights. Not a single tear has been shed over the demise of this provision.

### *III. The Constitutional Court: Establishment and Powers*

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<sup>52</sup> The second author was directly involved in the multi-party negotiations during the writing of the transitional Constitution and has personal knowledge of these facts.

<sup>53</sup> This judgment teems with references to German constitutional-law sources. See, e.g., *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) paras. 33, 36, 39, 40-42, 58, 60, 63, 92, 94, 99, 103-06, 112, 121,143,147, 162, 164, 173 (S. Afr.).

<sup>54</sup> See, e.g., *Govender v. Minister of Safety and Security* 2001 (4) SA 273 (SCA) para. 10 (S. Afr.).

The South African Constitutional Court is a creature of the Constitution,<sup>55</sup> section 2 of which proclaims the supremacy of the Constitution and also states that law or conduct inconsistent with it is invalid. The supreme Constitution itself provides for a judiciary duly equipped to be an active and effective guardian of constitutional supremacy. Thus section 1(c) of the Constitution elevates the “[s]upremacy of the Constitution and the rule of law” to two of the values on which the Republic of South Africa is founded. Any amendment of section 1 will require a 75% majority in the National Assembly, the one house of parliament, and the support of six out of the nine provinces in the National Council of Provinces, the other house of parliament.<sup>56</sup>

According to section 165(5) of the Constitution “[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies.” Section 165 furthermore prescribes, in a peremptory vein, dos and don’ts that legislative and executive organs of state must observe to protect and promote the independence of the courts. As confirmation of their independence, courts of law are said not to be organs of state.<sup>57</sup> Section 173 of the Constitution entrenches higher courts’ “inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.”

Section 172(1)(a) provides in a most powerful manner for the judicial review of any law or conduct which, if found to be inconsistent with the Constitution, *must* be declared invalid to the extent of such inconsistency. A declaration of invalidity is thus the default option when law or conduct is found to be unconstitutional, but the potential severity of this option is restrained by an alternative provided for in section 172(1)(b), namely a judicial discretion to make any order that is just and equitable. Subsection (b) itself mentions two possible examples of such a type of order, namely one limiting the retrospective effect of a declaration of invalidity, which normally takes effect from the moment the impugned law or conduct was thought to have taken effect, or one suspending the effect of the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect. In time the courts, and the Constitutional Court in particular, have come to rely on section 172(1)(b) to order either the severance of unconstitutional elements from impugned legislation or the reading of corrective measures into the said legislation—in both instances so as to render it constitutional and immunize it against invalidation.

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<sup>55</sup> See S. AFR. (INTERIM) CONST., 1993, § 98; S. AFR. CONST., 1996, §§ 166(a), 167.

<sup>56</sup> See S. AFR. CONST., 1996, § 74(1). On the founding values in general, see discussion *supra* Part B.II.

<sup>57</sup> See S. AFR. CONST., 1996, § 239.

In the judicial hierarchy the Constitutional Court is South Africa's highest court, and thus final court of appeal, in constitutional matters. It also has certain powers that no other courts have, and must confirm other courts' declarations of invalidity of legislation and the conduct of the president.<sup>58</sup> It may, however, deal with constitutional matters only.<sup>59</sup>

A feature of the South African Constitution is its relatively large number of, operational, provisions expressly and tacitly offering interpretative guidance. Section 39(1)(a), which requires judicial interpreters of the Bill of Rights to promote certain values, and section 39(2), which requires them to promote the spirit, purport and objects of the Bill of Rights when they interpret legislation or develop the common and customary law, were referred to before.<sup>60</sup> Two further provisions of section 39 that are of great significance are section 39(1)(b), stating that a judicial interpreter of the Bill of Rights *must* consider international law, and section 39(1)(c), providing that the said interpreter *may* consider foreign law.

Justice Chaskalson in *S v. Makwanyane* sounds the following cautionary words with reference to the essentially similar predecessors of these two provisions in the transitional Constitution:

In dealing with comparative law we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to 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.<sup>61</sup>

Similar sentiments have been sounded repeatedly in the post-*Makwanyane* case law. The public international and foreign law from which, in terms of sections 39(1)(b) and (c) of the Constitution, assistance may be derived in constitutional interpretation, is in no way binding on any court. What Justice Chaskalson fails to say, however, is that a court may indeed be bound to follow certain precepts of international law because it is required to do so by constitutional provisions other than sections 39(1)(b)—for instance sections 231-233 of the Constitution. Justice Chaskalson's failure to consider this possibility creates the mistaken impression that, as transnational forces in constitutional interpretation, international and foreign law can be equated and conflated. In *Sanderson v. Attorney-General, Eastern Cape* Justice Krieger observed that "[b]oth the interim and the final

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<sup>58</sup> See *id.* § 167(5).

<sup>59</sup> See *id.* § 167(2)(b).

<sup>60</sup> See discussion *supra* Part B.II.

<sup>61</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 39 (S. Afr.) (internal citations omitted).

Constitutions . . . indicate that comparative research is either mandatory or advisable.”<sup>62</sup> In the scheme of section 39(1)(b) and (c) of the 1996 Constitution only comparative research is advisable while consideration of international law is mandatory. By labeling “public international law”<sup>63</sup> and “foreign law”<sup>64</sup> with one and the same “comparative research” tag, Justice Kriegler also makes the mistake of equating and conflating them. This type of mistake has, however, had one positive consequence, namely to draw attention to the existence of an inclusive transnational context “out there” with significant consequences in and for constitutional interpretation.

Transnational orientation or contextualization, the stronger process, can briefly be explained as follows. The constitutionalization of international law as well as the internationalization of constitutional law are manifestations of a globalization of public law, and have rendered the strict boundaries between domestic constitutional law, foreign constitutional law and international law permeable.<sup>65</sup> However, the recognition of, and duly reckoning with, their intrinsic relatedness and the consequences of the vibrant interaction between them is still a far cry from doing away with appropriate acknowledgement of the distinctiveness of each. In constitutional interpretation in South Africa the distinction between, and reliance on, international and foreign law are best upheld primarily because the Constitution requires that international and foreign law are to be considered in different ways when interpreting the Bill of Rights: the former *must* be considered (section 39(1)(b)) while the latter *may* be considered (section 39(1)(b)). On the basis of Justice Chaskalson’s dictum in *S v. Makwanyane*,<sup>66</sup> both international and foreign law may also be considered in the interpretation of the rest of the Constitution. However, the written constitutional text (sections 39(1)(b) and (c) in particular), as well as the case law amplifying it, still does not anticipate all possibilities. Foreign law, in the domestic context, can never have more than persuasive force, while some international law may well be as binding or prescriptive as domestic law. This sets international and foreign law apart, and has to be reckoned with, in constitutional interpretation, and as a matter of fact in the interpretation and application of all law.

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<sup>62</sup> *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para. 26 (S. Afr.).

<sup>63</sup> Referred to in section 35(1) of the transitional (and in section 39(1)(b) of the 1996) Constitution. See S. Afr. (INTERIM) CONST., 1993, § 35(1); S. Afr. CONST., 1996, § 39(1)(b).

<sup>64</sup> Referred to in section 35(1) of the transitional (and in section 39(1)(c) of the 1996) Constitution. See S. Afr. (INTERIM) CONST., 1993, § 35(1); S. Afr. CONST., 1996, § 39(1)(c).

<sup>65</sup> See generally Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts* 42 DER STAAT 61, 61–75 (2003); see also Anne Peters, *The Globalization of State Constitutions*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 251–308 (Janne Nijman & André Nollkaemper eds., 2007).

<sup>66</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 34 (S. Afr.) (“[The international and foreign authorities] may also have to be considered because of their relevance to section [sic] 35(1) of the Constitution . . .”).

That both international and foreign law can and do have effect in constitutional interpretation is a manifestation of legal, particularly public-law, globalization, emphasizing that a national Constitution is also embedded in a transnational reality beyond the geographic and the legally and constitutionally defined precincts of the jurisdiction whose supreme law it is. Dealing with international and foreign law in constitutional interpretation thus amounts to a generic reading procedure that may aptly be depicted as *transnational contextualization*. The one manifestation of such contextualization is reckoning with international law as a binding and/or persuasive force

Section 39 contains operational provisions dealing with the construction and implementation of the Bill of Rights and other law. These are by no means the only constitutional provisions with interpretive consequences. Other operational provisions such as the limitation clause, section 36, and the application clause, section 8, have a direct impact on questions of interpretive and implemental significance. Comparative constitutional jurisprudence is not just about looking at and comparing the wording of other constitutions, but also about assessing their implementation by competent authorities. The South African Constitutional Court has, for instance, sought expertise from its German counterpart, the *Bundesverfassungsgericht*, on statutory interpretation in conformity with the Constitution, how to construe human dignity both as a constitutional value and as a fundamental right, and on issues regarding the application of the Bill of Rights, the limitation of rights, co-operative government, and the vertical and horizontal division of power.<sup>67</sup>

### C. The Constitutional Court's Citation of German Cases: An Empirical Survey<sup>68</sup>

#### I. Consideration of German Cases by the Constitutional Court

South African judges face a number of challenges when considering German precedent. The most notable challenge is to work with judgments published in the German language, which is a foreign language in South Africa. Very few of the judges are actually conversant with the German language. Thus Justice Kriegler states:

[German] is not an easy language, and it's certainly not technically an easy language. And there are writing styles, techniques, [and] mannerisms in legal writing in German, quite apart from always putting the verb in the wrong place. And people blindly concurred with Laurie [Ackermann]'s judgments. I couldn't do that; if I can't get to the guts of what it's about, if I don't

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<sup>67</sup> See discussion *infra* Part C.

<sup>68</sup> For the statistics on which Part C relies, see Christa Rautenbach, *Use of Foreign Law*, NORTH-WEST UNIVERSITY, <https://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm>.



understand what they are really saying, what is built on that, I can't go along with it.<sup>69</sup>

In *Du Plessis v. de Klerk*, however, Justice Kentridge does consider German law, although he does so using mainly secondary sources not written in German.<sup>70</sup> He seems to be comfortable using translations or interpretations of German case law, but mistrusts the judgments of his colleagues.

Another challenge the use of German cases presents is that the unique character of the German and South African legal systems may lead to complicated situations if there is a mere adoption of German legal principles without paying proper attention to their particular context. However, this challenge should not prevent the judiciary from seeking guidance elsewhere. As Justice Kentridge pointed out:

It is nonetheless illuminating to examine the solutions arrived at by the courts of other countries. The Court was referred to judgments of the courts of the United States, Canada, Germany and Ireland. I would not presume to attempt a detailed description, or even a summary, of the relevant law of those countries, but in each case some broad features are apparent to the outside observer. A comparative examination shows at once that there is no universal answer to the problem of vertical or horizontal application of a Bill of Rights.<sup>71</sup>

The fact that our judges are schooled in South African law and are not necessarily abreast with the intricacies of German law presents another challenge. This was also pointed out by Justice Kriegler in *Du Plessis v. De Klerk*:

I find it unnecessary to engage in a debate with my colleagues on the merits or demerits of the approaches adopted by the courts in the United States, Canada or Germany. That pleases me, for I have enough difficulty with our

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<sup>69</sup> Ursula Bentele, *Mining for Gold: the Constitutional Court of South Africa's Experience with Comparative Constitutional Law*, 37 GA. J. INT'L & COMP. L. 219, 242–43 (2009) (quoting Justice Kriegler in an interview for the article).

<sup>70</sup> See *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at para. 39 (S. Afr.) (“The German jurisprudence on this subject is not by any means easy to summarise, especially for one who does not read German. There are, however useful, accounts of the German approach in some of the South African literature, as also in the work of Justice Barak, which I have mentioned above.”) (internal citation omitted). “I have also had the benefit of reading an extensive article entitled ‘Free Speech and Private Law in German Constitutional Theory’ by Professor Peter E. Quint, to which I am much indebted.” *Id.*

<sup>71</sup> *Id.* at para. 33.

Constitution not to want to become embroiled in the intricacies of the state action doctrine, *Drittwirkung* and the like.<sup>72</sup>

Our empirical survey from 1995 to 2011, however, shows that in spite of these difficulties the Constitutional Court has been quite active in considering foreign precedent. The survey follows both a quantitative and qualitative approach by counting and evaluating explicit citations of foreign precedents in general and German precedents in particular. The qualitative approach entails the collection of empirical information such as the number of foreign precedents cited per year, per judge, per foreign case and per country, as well as by categorizing the type of issue dealt with under the headings “human rights issues,” “institutional issues” or “other issues.” The quantitative approach makes use of formal and substantive factors to determine the actual or potential influence of the foreign precedents on South African Constitutional Court judges. Formal indicators include the following: whether the judge considering a foreign case delivered a majority/dissenting/separate judgment; whether reference to the foreign case was merely a reference or a quotation signaling approval; whether the reference was made to the majority or to a dissenting judgment in the foreign case; and whether the foreign case was referred to in the text or footnote of the South African case. The substantive indicators require an analysis of the judges’ legal reasoning, and in performing this analysis three categories were used, namely the reasoning (or argumentative) approach,<sup>73</sup> the “even there” approach,<sup>74</sup> and the “*a contrario*” approach.<sup>75</sup>

It is important to point out that the term “citations” in this contribution does not necessarily refer to the number of foreign precedents considered but to the number of times a judge referred to a foreign precedent. In other words, it is the number of foreign case citations with reference to each constitutional court judgment and not to the number of foreign cases cited that counts. We are also quite aware of the shortcomings and pitfalls of reliance on statistics as a method of drawing inferences.<sup>76</sup> However, the data we have

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<sup>72</sup> *Id.* at para. 147.

<sup>73</sup> Citations used at the very first stage of the process when reasoning must be oriented. In this context, citations of foreign precedents may be useful to illustrate the range of potential choices or consequences. During this stage the influence of a particular foreign precedent is not always clear. In most instances the judges merely refer to the foreign precedents in passing. This phase can also be described as the “inspirational” phase. See Bryde, *supra* note 5, at 213–14.

<sup>74</sup> Citations used with the purpose of proving that “even there” a certain measure was adopted, which the court intends to adopt “even here.” This phase can also be described as the “legal argument” phase. See Bryde, *supra* note 5, at 214–19.

<sup>75</sup> Citations used as an example not to be followed (*a contrario*) in order to set aside some of the potential interpretative readings.

<sup>76</sup> See Paul W Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASS’N 945 (1986); Biljana Popović, *The Potentials and Limitations of Statistics as a Scientific Method of Inference*, 2 GODIŠNJAK ZA PSIHLOGIJU 57 (2003);

collected gives rise to significant observations concerning the Constitutional Court's propensity to cite German cases. From its first judgments in 1995 until the end of 2011 the Court handed down a total number of 429 judgments. More than half of these judgments (54%) cited foreign case law, thus giving us a total of 224 judgments. These judgments cited, give or take a few, 3047 foreign cases, 118 of which were German cases. This makes Germany the fourth most cited jurisdiction, only to be outdone by Canada (879 citations), the United States of America (757 citations) and the United Kingdom (494 citations). A perusal of the statistics also reveals that the number of German case citations has declined since 1995. In its first year of operation the Constitutional Court cited forty-five German cases.<sup>77</sup> In 1996 it cited twenty-nine German cases and from 1997 to 2011 the number of citations never surpassed seven per year, except in 2002, when the Court cited eleven German cases. There are many explanations for the decline in German citations, which we discuss below.

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Tom Siegfried, *Odds Are, It's Wrong: Science Fails to Face the Shortcomings of Statistics*, 177 *SOC'Y FOR SCI. & THE PUB.* 26 (2010).

<sup>77</sup> More than half of these cases, twenty-eight to be more precise, were cited in the second judgment delivered by the Constitutional Court, namely *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.). See *supra* Figure 2.

*Figure 1: Constitutional Court Judgments Referring to Foreign Cases in General and German Cases in Particular*

Year	Total judgments	NOT referring to foreign cases		Referring to foreign cases		German case citations
		Total	%	Total	%	
1995	14	2	14	12	86	45
1996	27	8	30	19	70	29
1997	19	4	21	15	79	3
1998	21	8	38	13	62	5
1999	19	8	42	11	58	2
2000	29	16	55	13	45	1
2001	26	17	65	9	35	2
2002	32	16	50	16	50	11
2003	26	17	65	9	35	0
2004	22	9	41	13	59	6
2005	22	12	55	10	45	7
2006	26	12	46	14	54	3
2007	25	12	48	13	52	2
2008	25	9	36	16	64	0
2009	33	13	39	20	61	0
2010	28	19	68	9	32	0
2011	35	23	66	12	34	2
<b>TOTAL:</b>	<b>429</b>	<b>205</b>	<b>46%</b>	<b>224</b>	<b>54%</b>	<b>118</b>

*II. The Cases*

The first judgment of the Constitutional Court which considered German precedent is *S v. Makwanyane*.<sup>78</sup> Even though it was the second judgment of the Court, it is regarded as one of its most important and far-reaching decisions for its abolition of the death penalty in South Africa and its wide ranging consideration of key issues of constitutional interpretation. The Court handed down a unanimous judgment, but each of the judges also handed down his or her own concurring judgment. Given the international dimensions of the death penalty, each judge considered foreign precedent in his or her individual judgment. In total *Makwanyane* yielded 220 foreign case citations from eleven countries and three supranational courts.<sup>79</sup> German cases were cited twenty-eight times. To date these numbers have not been equaled—let alone exceeded.

Justice Chaskalson was responsible for the most foreign case citations, namely 124. His reasoning in support of the use of foreign precedent is twofold: it “shows how courts of other jurisdictions have dealt with” the death penalty and the Constitution requires South African courts to consider foreign precedents.<sup>80</sup> Although he is in favor of comparative constitutional jurisprudence, he cautions against the unbridled use of foreign precedent. As stated by Justice Chaskalson:

Comparative “bill of rights” jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by *section 35(1)* that we “may” have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter Three of our Constitution. This has already been pointed out in a number of decisions of the Provincial and Local Divisions of the Supreme Court, and is implicit in the injunction given to

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<sup>78</sup> See *S v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

<sup>79</sup> Some of the foreign cases were referred to more than once, bringing the total citations of foreign cases up to 220.

<sup>80</sup> Justice Chaskalson refers here to section 35(1) of the transitional Constitution, which 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*.

*S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 34 (quoting S. AFR. (INTERIM) CONST., 1993, § 35(1)) (emphasis added).

the Courts in *section 35(1)*, which in permissive terms allows the Courts to “have regard to” such law. There is no injunction to do more than this.<sup>81</sup>

Justice Chaskalson nonetheless considers German case law on two occasions in the course of his judgment. First, when he discusses the issue of whether or not legislative history may be taken into consideration in the process of constitutional interpretation. He comments that “the German Constitutional Court also has regard to such evidence”<sup>82</sup> and in support he relies on the German scholar Kommers’s<sup>83</sup> discussion of the German case.<sup>84</sup>

In the decision on the constitutionality of life imprisonment, [1977] 45 BVerfGE 187, the German Federal Constitutional Court took into account that life imprisonment was seen by the framers of the constitution as the alternative to the death sentence when they decided to abolish capital punishment.<sup>85</sup>

In spite of this, Justice Chaskalson did nothing more than refer to the German case in passing, and it did not seem to have an influence on his ultimate finding that the death penalty is unconstitutional.

Secondly, in analyzing the influence of harsh sentences on human dignity, Justice Chaskalson<sup>86</sup> places reliance, albeit in passing, on Kommers’s discussion of the German courts’ dealing with the role of human dignity in constitutional interpretation.<sup>87</sup> He uses a secondary source, presumably because his knowledge of the German language is not sufficient to allow for the use of original sources.

The second greatest frequency of foreign citations in *S v. Makwanyane*, namely thirty-three, comes from former Justice Ackermann.<sup>88</sup> He is, however, responsible for the most

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<sup>81</sup> *Id.* at para. 37 (citation omitted).

<sup>82</sup> *Id.* at para. 16.

<sup>83</sup> *Id.* at para. 16, n.18 (referencing DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 315 (1989)). This author is quite popular amongst the Constitutional Court judges and is often referred to. See discussion *supra* Part V.

<sup>84</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 14/76, 45 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 187 (Mar. 22–23, 1977) (Ger.). [hereinafter *Life Imprisonment Case*]

<sup>85</sup> *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 16, n.17 (referencing KOMMERS, *supra* note 83).

<sup>86</sup> *Id.* at para. 59 (referencing Kommers in a footnote as translator of *Life Imprisonment Case*).

<sup>87</sup> *Id.*

<sup>88</sup> He is a former justice of the Constitutional Court of South Africa, where he served from 1994 to 2004. His academic qualifications include BA (US), BA Honours (Oxford), LLB (US) and LLD (US). See *Judges: Justice Laurie*

citations from German case law, namely twenty-five. Justice Ackerman refers to German case law in the process of construing part of the limitation clause in section 33(1)(b) of the transitional Constitution, which is similar to a provision (known as the *Wesensgehaltgarantie*) in the German Basic Law (*Grundgesetz*).<sup>89</sup> The two provisions are quite obviously similar. Section 33(1)(b) stipulates as follows: “The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation . . . (b) shall not negate the essential content of the right in question . . .” Article 19(2) of the German Basic Law provides that “In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden.”<sup>90</sup> Even though Justice Ackermann cites quite a number of German precedents dealing with the German provision, he does not really engage with them as is evident from his observation that:

[T]here is a wealth of German case law and scholarship on the topic. Without the fullest exposition of, and argument on, *inter alia*, the German jurisprudence in this regard, I consider it undesirable to express any view on the subject.

The only other judge referring to German case law in *S v. Makwanyane* is former Justice Sachs,<sup>91</sup> with one citation. He raises the issue of proportionality in relation to the right to life as set out in German case law, but does so only in passing and without indicating the possible influence of the German judgment on the South African scenario.<sup>92</sup>

The second case in which German precedent was considered, namely *Ferreira v. Levin; Vryenhoek v. Powell*,<sup>93</sup> also boasts an impressive citation rate of seventeen German cases. Only two judges considered German precedent, namely Justice Ackermann, who delivered the main judgment, with sixteen citations and Justice Chaskalson with one citation. The

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Ackermann, CONSTITUTIONAL COURT OF SOUTH AFRICA,  
<http://www.constitutionalcourt.org.za/site/judges/justicelwhackermann/index1.html> (last visited July 15, 2013).

<sup>89</sup> See *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 167 (S. Afr.).

<sup>90</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 19(2) (Ger.). Translation: “In no case may the essence of a basic right be affected.” See *Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ, available at <http://www.gesetze-im-internet.de/gg/index.html> (Christian Tomuschat & Donald P. Kommers trans., last visited June 25, 2013).

<sup>91</sup> He is a former justice of the Constitutional Court, where he served from 1994 to 2009. See *Judges: Justice Albie Sachs*, CONSTITUTIONAL COURT OF SOUTH AFRICA,  
<http://www.constitutionalcourt.org.za/site/judges/justicealbiesachs/index1.html> (last visited July 15, 2013).

<sup>92</sup> See *S v. Makwanyane* 1995 (3) SA 391 (CC) para. 355, n.17 (S. Afr.).

<sup>93</sup> See *Ferreira v. Levin; Vryenhoek v. Powell* 1996 (1) SA 984 (CC) (S. Afr.).

main issue in this case was if section 417(2)(b) of the Companies Act 61 of 1973<sup>94</sup> infringed the rule against self-incrimination and therefore the right of an accused to a fair trial in terms of section 25(3) of the transitional Constitution.<sup>95</sup> With regard to the question of whether or not certain pre-constitutional laws became invalid when the transitional Constitution came into operation on 27 April 1994, Justice Ackermann comes to the conclusion that they did; contending that when declaring a law unconstitutional a court judicially recognizes a fact already in existence. In Justice Ackermann's own words, "as a matter of fundamental jurisprudence . . . the objective doctrine of constitutional invalidity should be adopted, following—at a basic analytical level— . . . German law."<sup>96</sup> The German position that Justice Ackermann refers to here was deduced from the writings of the German scholar Klaus Schlaich.<sup>97</sup> There is no indication of whether Justice Ackermann read the German case himself or if he relied only on the explanation given by Schlaich. The latter is most likely.

It is interesting to note that Justice Ackermann concludes that the restrictions placed by section 417(2)(b) of the Companies Act "on an examinee's choices and activities constitute an infringement of section 11(1)" of the Constitution<sup>98</sup> before considering "whether comparable foreign case law would lead to a different conclusion."<sup>99</sup> On the one hand he cautions against the unrestrained use of foreign precedent, but on the other hand he acknowledges the fact that other jurisdictions grapple with similar issues. As stated by Justice Ackermann:

Direct comparison is of course difficult and needs to be done with circumspection because the right to personal freedom is formulated differently in the constitutions of other countries and in the international

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<sup>94</sup> It provides that "[a]ny such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court. . . ." *Ferreira v. Levin; Vryenhoek v. Powell* 1996 (1) SA 984 (CC) para. 1 (quoting Companies Act 61 of 1973 § 417(2)(b)).

<sup>95</sup> The relevant portion provided as follows: "(3) Every accused person shall have the right to a fair trial, which shall include the right . . . (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial. . . ." S. AFR. (INTERIM) CONST., 1993, § 25(3).

<sup>96</sup> See Ackermann, *supra* note 12, at 188.

<sup>97</sup> See *Ferreira v. Levin; Vryenhoek v. Powell* 1996 (1) SA 984 (CC) para. 29, n. 18 (referencing KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT 220–21 (1994) and his discussion of Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvG 1/51, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 14 (Oct. 23, 1951) (Ger.).

<sup>98</sup> *Id.* at para. 71. Section 11(1) of the transitional Constitution stipulates: "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial." S. AFR. (INTERIM) CONST., 1993, § 11(1).

<sup>99</sup> See *Ferreira v. Levin; Vryenhoek v. Powell* 1996 (1) SA 984 (CC) para. 72 (S. Afr.).



and regional instruments. Nevertheless, section 33(1) of our Constitution enjoins us to consider, *inter alia*, what would be “justifiable in an open and democratic society based on freedom and equality” and section 35(1) obliges us to promote the values underlying such a society when we interpret Chapter 3 and encourages us to have regard to comparable case law. In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character.<sup>100</sup>

Against this background Justice Ackermann compares Article 2<sup>101</sup> of the German Basic Law with section 11(1) of the South African transitional Constitution. He does this, not to make a direct comparison, but to demonstrate that in spite of dissimilarities between the two provisions, judicial interpretation of the German provision could be used to “illustrate that a Constitution can operate effectively where the widest possible construction is given to a freedom right.”<sup>102</sup> The German jurisprudence which Justice Ackermann considered was of great value in the Court's understanding of the principle of proportionality against which all German legislation must be tested before it could be regarded as constitutional.<sup>103</sup> By

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<sup>100</sup> *Id.*

<sup>101</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 2 (Ger.).

(1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt. (2) Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden.

*Id.*

Translation:

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

See *Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ, available at <http://www.gesetze-im-internet.de/gg/index.html> (Christian Tomuschat & Donald P. Kommers trans., last visited June 25, 2013).

<sup>102</sup> *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 83 (S. Afr.).

<sup>103</sup> *Id.* at paras. 83–87 (noting that Justice Ackermann spent a considerable time and effort in assessing the German jurisprudence in the context of Article 2 of the German Basic Law with the aim of drawing an analogy between this provision and section 11(1) of the transitional Constitution).

analogy with the German jurisprudence, Justice Ackermann concludes that section 11(1) of the transitional Constitution had to be tested for compliance with the principle of proportionality in order to determine whether any limitations could be justified.<sup>104</sup> Although different in wording, the principle of proportionality has the same effect in both jurisdictions, as is pointed out by Justice Ackermann:

[T]he German Constitutional Court requires that all statutory provisions which prima facie limit this right [to self-fulfillment] be tested for compliance with the principle of proportionality. This is the equivalent of requiring all prima facie infringements of the residual freedom rights in section 11(1) of our Constitution to pass section 33(1) scrutiny.<sup>105</sup>

Justice Ackermann spends considerable time discussing the *Elfes Case*,<sup>106</sup> which laid the basis for the German Federal Constitutional Court's approach to Article 2(1) of the German Basic Law (the right to self-fulfillment) as a residual right, and its application of the principle of proportionality. In a similar vein, he cites no less than eight other German cases to give content to this right.<sup>107</sup> By labeling the right to self-fulfillment a residual right in German law, it can be activated only when other rights and freedoms do not apply.<sup>108</sup> Justice Ackermann's predilection for German law again prevails when he states that the position is similar in South African law, but does so in the absence of any hint from the text of the judgment that he does anything more than consider the German case law.<sup>109</sup> It is

<sup>104</sup> *Id.* at para. 85. The limitations are those mentioned in terms of section 33(1) of the transitional Constitution, namely:

(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—(a) shall be permissible only to the extent that it is—(i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and (b) shall not negate the essential content of the right in question . . . .

S. AFR. (INTERIM) CONST., 1993, § 33.

<sup>105</sup> *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 84 (S. Afr.).

<sup>106</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 253/56, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 32 (Jan. 16, 1957) (Ger.) [hereinafter the *Elfes Case*]. Translation directed by Professors P. Schlechtriem, B. Markesinis, & S. Lorenz, available at <http://www.iuscomp.org/gla/judgments/tgcm/velfes.htm> (last visited June 25, 2013). See *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 86 (S. Afr.).

<sup>107</sup> See *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 86 (S. Afr.).

<sup>108</sup> *Id.* at para. 87.

<sup>109</sup> *Id.*

thus impossible to determine how much influence the German jurisprudence exactly had on the eventual finding of the Court.

Justice Chaskalson, however, is less inclined to compare the German provisions with the South African ones and states:

As Ackermann J points out in paragraph 83 of his judgment 'liberty' in the context of article 2(2) is construed as referring to freedom from physical constraint. The fact that it is found alongside a provision which explicitly lays down that 'everyone shall have the right to the free development of his personality' [article 2(1)] which in turn has been construed by the German Federal Constitutional Court as protection of a general freedom to act, *is no reason for us to give that meaning to 'freedom' in section 11(1) of our Constitution*.<sup>110</sup>

In *Bernstein v. Bester*,<sup>111</sup> the third case considering German precedent, there are eleven German case citations. The Court considered whether or not certain sections of the Companies Act,<sup>112</sup> providing for the examination of persons and the disclosure of documents as to the affairs of the company, were consistent with sections 8,<sup>113</sup> 11,<sup>114</sup> 13<sup>115</sup> and 24<sup>116</sup> of the transitional Constitution. This time it was Justice Chaskalson who delivered the judgment and who considered the German cases. Firstly he referred to the wording of section 35(2) of the transitional Constitution, which provided as follows:

No law which limits any of the rights entrenched in this Chapter [the Bill of Rights], shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

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<sup>110</sup> *Id.* at para. 180. (internal citations omitted) (emphasis added).

<sup>111</sup> *Bernstein v. Bester* 1996 2 SA 751 (CC) (S. Afr.).

<sup>112</sup> Companies Act 61 of 1973. Section 417 dealt with the summoning and examination of persons as to affairs of company and section 418 dealt with the process of examination by commissioners. The whole Act was replaced on 1 May 2011 by the Companies Act 71 of 2008.

<sup>113</sup> Right to equality.

<sup>114</sup> Right to freedom and security of the person.

<sup>115</sup> Right to privacy.

<sup>116</sup> Right to fair administrative action.

Justice Chaskalson draws an analogy between the rule of construction contained in this provision and a similar rule he refers to as *verfassungskonforme Auslegung* (statutory interpretation in conformity with the Constitution), sometimes employed by the German Federal Constitutional Court. However, other than noting commonalities, Justice Chaskalson does not indicate whether German jurisprudence influenced his reasoning.<sup>117</sup> He does a comparative survey, but it seems to prove that other jurisdictions follow a similar approach; he does not appear to look for binding authority for the approach he follows, namely “that the nature of privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person’s existence, and not to every aspect within his/her personal knowledge and experience.”<sup>118</sup>

In the fourth case, *Du Plessis v. de Klerk*,<sup>119</sup> also a case decided when the transitional Constitution was still in operation, there are thirteen German case citations. *Du Plessis* dealt with the question of whether the provisions of the Bill of Rights in the transitional Constitution could be applied to relationships in private law or between private parties. The Court came to the conclusion that it could not.<sup>120</sup> As Justice Ackermann points out, German precedent was of great value in the Constitutional Court’s understanding of the “ways in which the horizontal application of a bill of rights can operate and what potential problems inhere in a vertical application of its provisions.”<sup>121</sup> In spite of being of great value, the German precedent did not bind the South African court at all.

Two more cases considered German case law in the context of the transitional Constitution, namely *President of the RSA v. Hugo*<sup>122</sup> (three German case citations) and *Jooste v. Score Supermarket Trading (Pty) Ltd* (two German case citations).<sup>123</sup>

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<sup>117</sup> *Bernstein v. Bester* 1996 2 SA 751 (CC) para. 59, note 109 (S. Afr.).

<sup>118</sup> *Id.* at para 79.

<sup>119</sup> See *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) para. 41 (S. Afr.).

<sup>120</sup> It is generally accepted that the new Constitution overruled the finding of the *Du Plessis* Court by making express provision in Sections 8 and 9 of the Bill of Rights to have horizontal application. See Ackermann, *supra* note 12, at 189.

<sup>121</sup> See Ackermann, *supra* note 12, at 189.

<sup>122</sup> *President of the RSA v. Hugo* 1997 4 SA 1 (CC). This case dealt with the constitutionality of the President’s act to grant remission of sentences to female prisoners who were mothers of children under 12 years without granting the same remission to the fathers of children.

<sup>123</sup> *Jooste v. Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC) (S. Afr.). The Constitutional Court held that a provision of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (providing that employees could not claim damages from their employers, except where provided for in the Act) is constitutional, because viewed in the context of the Act as a whole, the challenged provision—depriving employees of their common law right to damages from their employer—was not arbitrary or irrational.

Since the final Constitution went into effect on 4 February 1997, the Constitutional Court's propensity to cite German precedent has declined considerably. Although the Court continues to cite German jurisprudence every now and then,<sup>124</sup> only three judgments have cited six or more German precedents. To start with, in *First National Bank of SA Ltd t/a Wesbank v. Commissioner of South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance*,<sup>125</sup> there are six citations from German cases, all by Justice Ackermann.<sup>126</sup> The case dealt with the right not to be arbitrarily deprived of property, except in terms of law of general application, and it concerned provisions in customs and excise legislation that deprived an owner of property for the customs debt of someone else.<sup>127</sup> In his quest to give content to this right and determine the meaning of arbitrariness, Justice Ackermann explains the importance of the international jurisprudential context that forms the backdrop to the context in which the South African Constitution must be interpreted.<sup>128</sup> For, as he explains—albeit on a cautionary note—

[T]here is broad support in other jurisdictions for an approach based on some concept of proportionality when dealing with deprivation of property, although the context and analytical methodology are not the same as under our Constitution. It is useful to consider approaches followed in other democratic systems before attempting to conclude what 'arbitrary' deprivation means under section 25 of our Constitution.<sup>129</sup>

It is difficult, nonetheless, to determine the utility of the German jurisprudence that Justice Ackermann alludes to, apart from being of interest to legal scholars in general and property lawyers in particular.<sup>130</sup>

In the second case, *Kaunda v. President of the RSA*,<sup>131</sup> the Court also cites six German cases. This case dealt with the government's responsibility under international law to

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<sup>124</sup> The number of citations per case is reflected in Figure 2, *infra*.

<sup>125</sup> *First National Bank of SA Ltd t/a Wesbank v. Commissioner of South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 4 SA 768 (CC) (S. Afr.).

<sup>126</sup> In general, he cited forty-five foreign cases.

<sup>127</sup> The culprit provision is Section 114 of the Customs and Excise Act 91 of 1964 which prescribes that any duty, interest, penalty or forfeiture incurred under this Act and which is payable in terms of this Act, must be regarded as a debt to the state. Customs and Excise Act 91 of 1964 § 114 (S. Afr.).

<sup>128</sup> *First National Bank of SA Ltd t/a Wesbank v. Commissioner of South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 4 SA 768 (CC) para. 64 (S. Afr.).

<sup>129</sup> *Id.* at para. 71.

<sup>130</sup> *Id.* at paras. 87–93.

protect its citizens from wrongful acts of a foreign state. Three justices considered German case law, namely Justice Chaskalson (three citations),<sup>132</sup> Justice O'Regan (two citations),<sup>133</sup> and Justice Ngcobo (one citation).<sup>134</sup> Justice Chaskalson comes to the conclusion that “[a] court cannot tell the government how to make diplomatic interventions for the protection of its nationals” and refers to German law that also follows this route to prove his point.<sup>135</sup> Former Justice O'Regan,<sup>136</sup> who disagrees with Justice Chaskalson's judgment in certain respects, reflects at slightly greater length on the German position, especially the leading case of *Rudolf Hess*.<sup>137</sup> She agrees with the approach in this case, stating, “The approach adopted by the German Constitutional Court in this regard seems correct.” A similar approach is adopted by Justice Ngcobo,<sup>138</sup> who agrees with the order made by Justice Chaskalson, but disagrees with certain aspects of the latter's reasoning. It appears from the judgment as if Justice Ngcobo finds considerably more support for his viewpoint in two foreign cases, one being the German case of *Rudolf Hess*. He points out that the Court in the *Rudolf Hess* case accepted that the German government was under a constitutional duty to provide diplomatic protection, although it had a fairly wide discretion in doing so.<sup>139</sup> The influence this German case had on Justice Ngcobo's viewpoint is evident from his words:

In my view, it must *therefore* be accepted that the [South African] government has discretion in deciding whether to grant diplomatic protection and if so, in what manner to grant such protection in each case.<sup>140</sup>

Citing seven German precedents, the third case, *Affordable Medicines Trust v. Minister of Health*,<sup>141</sup> dealt with the constitutionality of a licensing scheme that sought to regulate the

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<sup>131</sup> *Kaunda v. President of the RSA* 2005 4 SA 235 (CC) (S. Afr.).

<sup>132</sup> *Id.* at paras. 73, 74, 130.

<sup>133</sup> *Id.* at para. 246.

<sup>134</sup> *Id.* at para. 190.

<sup>135</sup> *Id.* at paras. 73, 74, 130.

<sup>136</sup> She was a justice of the Constitutional Court from 1994 to 2009.

<sup>137</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 419/80, 55 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 349 (Dec. 16, 1980) (Ger.) [hereinafter the *Hess* decision] reported in 90 ILR 386 as it is cited by Justice O'Regan in *Kaunda v. President of the RSA* 2005 4 SA 235 (CC) paras. 246, 247 (S. Afr.).

<sup>138</sup> He was a Chief Justice of the Constitutional Court from 1999 to 2011.

<sup>139</sup> *Kaunda v. President of the RSA* 2005 4 SA 235 (CC) para. 190 (S. Afr.).

<sup>140</sup> *Id.* at para. 191. Emphasis added. The word “therefore” refers back to the discussion he had about foreign law, in which he also refers specifically to German law.

dispensation of medicines by health care providers. Justice Ngcobo delivered the main judgment and was also the only judge that referred to German jurisprudence.<sup>142</sup> He draws a parallel between section 22 of the South African Constitution<sup>143</sup> and Article 12(1) of the German Basic Law, which, according to him, are almost identical.<sup>144</sup> For this reason, Justice Ngcobo finds it necessary to consider German law in giving content to section 22.<sup>145</sup> After an extensive discussion of the German position,<sup>146</sup> Justice Ngcobo warns against the temptation to extract legal reasoning from foreign jurisdictions merely because of similarities between our law and other legal systems:

The similarities between section 22 of our Constitution and article 12(1) of the Basic Law make the German approach somewhat attractive. However, it is our Constitution that is being construed. It must be construed in the light of our constitutional scheme and our jurisprudence.<sup>147</sup>

Against this background, it is interesting to note in figure 2 below the propensity of the Constitutional Court to cite German jurisprudence. In the next section we examine the question of whether this tendency has any explainable correlation with the particular judges that are more inclined to cite German jurisprudence. .

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<sup>141</sup> *Affordable Medicines Trust v. Minister of Health* 2006 3 SA 247 (CC) (S. Afr.).

<sup>142</sup> *Id.* at paras. 59, 64, 65, 87, 88, 89, 90.

<sup>143</sup> It provides that “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.” S. AFR. CONST., 1996 § 22.

<sup>144</sup> It provides that “[a]ll Germans shall have the right freely to choose their trade, occupation, or profession, their place of work, and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law.” As quoted by Justice Ngcobo in *Affordable Medicines Trust v. Minister of Health* 2006 3 SA 247 (CC) para. 64 (S. Afr.).

<sup>145</sup> *Id.* at para. 87.

<sup>146</sup> *Id.* at paras. 87–91.

<sup>147</sup> *Id.* at para. 91. (footnotes omitted).

Figure 2: Constitutional Court Cases that Cite German Cases

Constitutional Case	German cases
<b>Constitution of the Republic of South Africa 200 of 1993 (transitional Constitution)</b>	
1. <i>S v. Makwanyane</i> 1995 3 SA 391 (CC)	28
2. <i>Ferreira v. Levin; Vryenhoek v. Powell</i> 1996 1 SA 984 (CC)	17
3. <i>Bernstein v. Bester</i> 1996 2 SA 751 (CC)	11
4. <i>Du Plessis v. de Klerk</i> 1996 3 SA 850 (CC)	13
5. <i>President of the RSA v. Hugo</i> 1997 4 SA 1 (CC)	3
6. <i>Jooste v. Score Supermarket Trading (Pty) Ltd</i> 1999 2 SA 1 (CC)	2
<b>Constitution of the Republic of South Africa, 1996 (the new Constitution or the Constitution)</b>	
7. <i>De Lange v. Smuts</i> 1998 3 SA 785 (CC)	4
8. <i>National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs</i> 2000 2 SA 1 (CC)	1
9. <i>Sonderup v. Tondelli</i> 2001 1 SA 1171 (CC)	1
10. <i>Carmichele v. Minister of Safety and Security</i> 2001 4 SA 938 (CC)	1
11. <i>Mohamed v. President of the RSA</i> 2001 3 SA 893 (CC)	1
12. <i>Minister of Health v. Treatment Action Campaign (no.2)</i> 2002 5 SA 721 (CC)	1
13. <i>Ex Parte Minister of Safety and Security In re: S v. Walters</i> 2002 4 SA 613 (CC)	1
14. <i>Khumalo v. Holomisa</i> 2002 5 SA 401 (CC)	3
15. <i>First National Bank of SA Ltd t/a Wesbank v. Commissioner of South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance</i> 2002 4 SA 768 (CC)	6
16. <i>Kaunda v. President of the RSA</i> 2005 4 SA 235 (CC)	6
17. <i>Affordable Medicines Trust v. Minister of Health</i> 2006 3 SA 247 (CC)	7
18. <i>Doctors for Life International v. Speaker of National Assembly</i> 2006 6 SA 416 (CC)	1
19. <i>Matatiele Municipality v. President of the RSA</i> 2006 5 SA 47 (CC)	1
20. <i>SABC v. National Director of Public Prosecutions</i> 2007 1 SA 523 (CC)	1
21. <i>Masetlha v. President of the RSA</i> 2008 1 SA 566 (CC)	1
22. <i>MEC for Education Kwazulu-Natal v. Pillay</i> 2008 1 SA 474 (CC)	1
23. <i>Nel v. Le Roux</i> 1996 3 SA 562 (CC)	3
24. <i>City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd</i> 2012 2 SA 104 (CC)	2



*III. The Judges*

In the period under investigation, eleven Constitutional Court judges have referenced German cases.<sup>148</sup> According to the empirical data, Justice Ackermann was the most active with sixty-eight German case citations. This number is particularly striking when one bears in mind that the judge second in line, the late Justice Mahomed,<sup>149</sup> cited only thirteen German cases, followed by Justice Ngcobo with eleven citations.

There is nothing particularly striking in the background of these judges that gives us an indication as to why they, particularly, have been more inclined to consider German law, in spite of the challenges we have identified above. It is well known that, from time to time, young German scholars are appointed as judges' clerks within the Clerk Programme for German Trainee Lawyers, and that they may help facilitate the judges' access to German literature and case law. Justice Ackermann, for instance, has made regular research visits to the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.<sup>150</sup>

Considering the fact that all of the judges who used to cite German precedent, with the exception of Justice Van der Westhuizen,<sup>151</sup> have now either retired or passed away, it is doubtful that the trend to consider German case law will continue. As a matter of fact, the statistics already show a decline in numbers. From 2008 to 2010 there were no German case citations, and in 2011 only two, coming from Justice Van der Westhuizen. Even Kentridge is mindful of the fact that comparison with German precedent is likely to decline in the future when he says, "Now that [Justice Ackermann] has retired, I wonder whether we shall continue to see German material in the judgments of the [Constitutional] Court."<sup>152</sup>

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<sup>148</sup> See figure 2, *infra*.

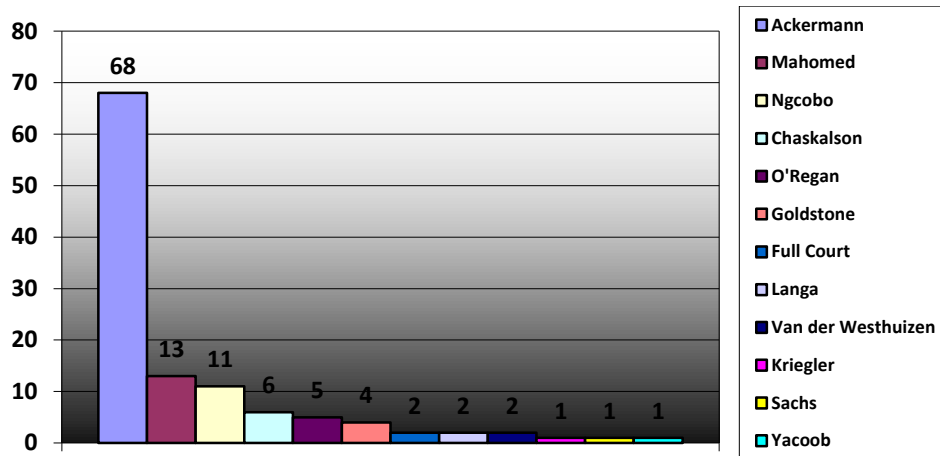
<sup>149</sup> He was a justice of the Constitutional Court from 1994 to 1998.

<sup>150</sup> He paid a short visit in 1990, followed by a six-week visit in 2000 and regular visits since his retirement in 2004.

<sup>151</sup> He is a current justice of the Constitutional Court who was appointed in 2004.

<sup>152</sup> Sydney Kentridge, Judge, Constitutional Court of S. Afr., Speech delivered in Johannesburg, South Africa: Comparative Law in Constitutional Adjudication (Mar. 20, 2004), available at <http://www.constitutionalcourt.org.za/site/judges/justicekentridge/index1.html>.

Figure 3: South African Constitutional Court judges citing German cases



#### IV. The Issues

The statistical evidence has been classified in accordance with three main themes, namely constitutional issues, institutional issues and other issues.<sup>153</sup> Each foreign case citation, including German case citations, was categorized according to the issue it dealt with. Of course, a clear division among these three issues is not always possible. A decision by an institution can, for example, sometimes be classified as a human rights issue, because it deals with the question of whether or not a certain action constitutes just administrative action; it could, however, also be classified as an institutional issue, because it was a decision taken by an institution.<sup>154</sup> Despite the initial difficulties in classifying the particular citations, it is possible, nonetheless, to draw a few general conclusions from the results we obtained.

Give or take a few, eighty-six German case citations dealt with human rights issues, while only eleven dealt with institutional issues. According to the results, the German human rights jurisprudence that formed the focus of the Constitutional Court's attention dealt

<sup>153</sup> For the purpose of this discussion, we discard the results we obtain under the heading "other issues," which mostly include an explanation of the kinds of human rights or institutional issues the cases dealt with. For example, the right to a fair trial is strictly speaking a right on its own but it is placed in the category "arrested, detained and accused persons." However, in order to give more information on the kind of right we speak of, it is classified under "other issues" as "a right to a fair trial."

<sup>154</sup> One such example is *MEC for Education Kwazulu-Natal v. Pillay* 2008 1 SA 474 (CC) (S. Afr.), where the school board of a public school prohibited a learner from wearing a nose stud. The decision by the school board was an institutional issue but the prohibition infringed the cultural and religious rights of the learner.

mostly with the right to life (twenty-eight citations), the right to freedom and security of the person (seventeen citations), the rights of arrested, detained and accused persons (twenty citations) and the right to privacy (fourteen citations). The rights in question are typically those that were threatened under the apartheid dispensation, which was based on racial segregation.

The institutional issues dealt mostly with diplomatic protection (six citations), the separation of powers (two citations), local authorities (two citations), and public health facilities (one citation).

According to Justice Kentridge there are a number of reasons why comparative adjudication is more prevalent in the area of human rights law than in any other area.<sup>155</sup> The first reason, which we have already pointed out, deals with the obvious link between the human rights provisions of the two South African constitutions (the transitional and final one) and those of the German Basic Law, most notably human dignity. Secondly, having introduced a justiciable bill of rights for the first time, the judiciary had to look elsewhere for objective standards to assist them in giving content to the rights entrenched in the Bill of Rights, albeit only to enable “the judge to test his or her value judgment against the judgments of other judges who have grappled with similar provisions.”<sup>156</sup>

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<sup>155</sup> Kentridge, *supra* note 152, at 2–4.

<sup>156</sup> Kentridge, *supra* note 152, at 3–4.

Figure 4: Statistics for Human Rights Issues

Constitutional Provisions	Relevant Human Rights	Statistics
Section 9	Equality	6
Section 10	Human dignity	1
Section 11	Life	28
Section 12	Freedom and security of the person	17
Section 14	Privacy	14
Section 15	Freedom of religion, belief and opinion	1
Section 16	Freedom of expression	7
Section 20	Citizenship	6
Section 22	Freedom of trade, occupation and profession	6
Section 25	Property	6
Section 27	Health care, food, water and social security	1
Section 28	Children	1
Section 32	Access to information	3
Section 33	Just administrative action	3
Section 35	Arrested, detained and accused persons	20

Another phenomenon, which will not be fully explored in this contribution, is the use of substantial indicators to broadly classify the legal reasoning of a judge citing foreign precedent into three main categories. First of all, foreign case citations seem to be used during the first stage of a judge's reasoning process to provide orientation. During this stage foreign cases may be useful to illustrate the range of potential choices available to a judge. The influence of a particular foreign case on the eventual decision of a judge is not always clear, and the references to foreign cases seem to be merely for interest's sake. According to the statistics, all of the German case citations fall within this category.

Secondly, foreign case citations are used with the purpose of "probative comparison", in other words, to prove that "even there" (in this case Germany) a certain measure was adopted, which the court intends to adopt "even here" (in this case South Africa).<sup>157</sup> Although none of the cases we assessed seem to have followed this approach with regard to German case law, there were a few cases that came close to following German

<sup>157</sup> See Tania Groppi & Marie-Claire Ponthoreau, *Introduction: The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 1–9* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

precedent. The most prominent example is *Du Plessis v. De Klerk*,<sup>158</sup> where the German principle of *Drittwirkung* influenced the findings of the court. Two other examples are *Kaunda v. President of the RSA*, where Justice O'Regan was in favor of the German approach in the case of diplomatic protection, and *Affordable Medicines Trust v. Minister of Health*, where Justice Ngcobo was tempted to follow the German approach based on Article 12(1) of the German Basic Law.

Lastly, foreign cases are used as an example not to be followed (*a contrario*) in order to set aside some of the potential interpretative readings. None of the German case citations falls in this category.

#### V. Consideration of German Scholarly Works in the Constitutional Court

Although German jurisprudence tends to be inaccessible to most South African judges as a result of the fact that most German opinions are written in German, the availability of English textbooks on German law and other scholarly works have contributed to the influence of German precedent in the Constitutional Court's jurisprudence.

For example, Kommers' textbook<sup>159</sup> on the constitutional jurisprudence of Germany has been referred to in quite a number of Constitutional Court cases.<sup>160</sup> Other German writings which have been cited include, *inter alia*: Umbach and Clemens,<sup>161</sup> Maunz-Dürig,<sup>162</sup> Isensee and Kirchhof,<sup>163</sup> Gunter,<sup>164</sup> Stone *et al*,<sup>165</sup> Currie,<sup>166</sup> Robbers,<sup>167</sup> Michalowski and Woods,<sup>168</sup> and Wieland.<sup>169</sup>

<sup>158</sup> *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) para. 41 (S. Afr.).

<sup>159</sup> KOMMERS, *supra* note 83.

<sup>160</sup> See *Matatiele Municipality v. President of the RSA* (No 2) 2007 6 SA 477 (CC) para. 36, n.11 (S. Afr.); *Doctors for Life International v. Speaker of the National Assembly* 2006 6 SA 416 (CC) para. 23, n.70 (S. Afr.); *Affordable Medicines Trust v. Minister of Health* 2006 3 SA 247 (CC) para. 59, n.53 (S. Afr.); *First National Bank of SA Ltd t/a Wesbank v. Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 4 SA 768 (CC) paras. 88, n.136, 91 n.139; *Khumalo v. Holomisa* 2002 5 SA 401 (CC) para. 40, n.40 (S. Afr.); *Beyers v. Elf Regters van die Grondwetlike Hof* 2002 6 SA 630 (CC) para. 7 (S. Afr.); *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para. 7, n.11 (S. Afr.); *Christian Education SA v. Minister of Education* 2000 4 SA 757 (CC) para. 24, n.24 (S. Afr.); *Maphahlele v. First National Bank of SA Ltd* 1999 1 SACR 373 (CC) para. 15, n.10 (S. Afr.); *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) para. 104 (S. Afr.); *S v. Makwanyane* 1995 3 SA 391 (CC) paras. 59 n.89, 134 n.164 (S. Afr.).

<sup>161</sup> DIETER UMBACH & THOMAS CLEMENS, *BUNDESVERFASSUNGSGERICHTSGESETZ* (1992) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 39 n.21 (S. Afr.)).

<sup>162</sup> 1 THEODOR MAUNZ & GÜNTER DÜRIG, *GRUNDGESETZ KOMMENTAR* (1944) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 83, n.108, 109 (S. Afr.)).

<sup>163</sup> 6 JOSEF ISENSEE & PAUL KIRCHHOF, *HANDBUCH DES STAATSRICHTS* (1988) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 85, n.114 (S. Afr.)).

The use of secondary sources by some judges has met with the disapproval of Justice Kentridge on a number of occasions, mostly because translations fail to grasp the essence of legal concepts within their socio-historical contexts.<sup>170</sup> Nevertheless, the informative value of these sources should not be underestimated; they give access to a wider base of values that, in the long run, can only benefit South Africa's relatively young human rights jurisprudence.

#### D. Concluding Remarks

South Africa, and consequently its judges, was left out in the cold when the world turned its back on it as a result of its notorious segregation policies. Although the South African courts continually compared South African with foreign case law, they focused mainly on jurisdictions with which South Africa had historical links, most notably England. Now that South Africa has a new constitutional dispensation with a justiciable Bill of Rights that encourages comparative constitutional adjudication, it is only logical that judges would actively note what is going on in the rest of the world to see what they have previously missed. This process is, however, nothing more than looking at and—sometimes—finding helpful guidance from foreign jurisprudence.

We could not find any Constitutional Court case that considered the court to be bound by the findings of a foreign court. To the contrary: what we were able to deduce from the small sample of Constitutional Court cases we discussed is that, in accordance with the explanation of Justice Ackermann in one of his scholarly writings,

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<sup>164</sup> GERALD GUNTER, CONSTITUTIONAL LAW (1992) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 87, n.119 (S. Afr.)).

<sup>165</sup> GEOFFREY STONE *ET AL*, CONSTITUTIONAL LAW (1991) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 87, n.119 (S. Afr.)).

<sup>166</sup> DAVID CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (1994) (cited in *Ferreira v. Levin; Vryenhoek v. Powell* 1996 1 SA 984 (CC) para. 180, n.32 (S. Afr.)).

<sup>167</sup> GERHARD ROBBERS, EINFÜHRUNG IN DAS DEUTSCHE RECHT (1994) (cited in *Bernstein v. Bester* 1996 2 SA 751 (CC) para. 78, n.130 (S. Afr.)).

<sup>168</sup> SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW (1999) (cited in *First National Bank of SA Ltd t/a Wesbank v. Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 4 SA 768 (CC) para. 88, n.136 (S. Afr.)).

<sup>169</sup> Ackermann Joachim Wieland, *Art 14 GG, in GRUNDGESETZ KOMMENTAR* (Horst Dreier ed., 1996) (cited in *First National Bank of SA Ltd t/a Wesbank v. Commissioner, SARS; First National Bank of SA Ltd t/a Wesbank v. Minister of Finance* 2002 4 SA 768 (CC) paras. 89, 90, n.137, 138 (S. Afr.)).

<sup>170</sup> Kentridge, *supra* note 152, at 9–10.

. . . foreign law is not in any sense binding on the court referring thereto. . . . 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, solutions, etc. . . . *Of course*, the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.<sup>171</sup>

It is evident that the South African Constitutional Court is confident enough that its independence will not be tainted by its propensity to consider foreign jurisprudence. It is not looking at foreign cases because it is clueless about what to do, but because it is the right thing to do—it is an example of transnational contextualization in action.

Though foreign law is not binding on South African courts, it can still contribute to shaping and developing South African law—constitutional and human rights law, in particular. Everything depends on the manner in which a court resorts to foreign law, and what it does with the information it gleans from such law. The importance of a properly developed Comparative Constitutional Jurisprudence in this context can hardly be overstated. Let us hope that the flame of comparativism continues to burn in South Africa, kindled by similar flames throughout the world!

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<sup>171</sup> Ackermann, *supra* note 12, at 183–84.