

# The Impact of Foreign Law on Domestic Judgments

Argentina • Brazil • Canada • China • England and Wales • France  
Germany • India • Israel • Mexico • New Zealand  
Nicaragua • South Africa

March 2010



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# Comparative Summary

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From time to time, American courts, which are relatively isolated from foreign influence, consider “civilized standards” and “views that have been expressed by . . . other nations” to support their decisions.<sup>1</sup> Even though the search for solutions to domestic problems beyond national borders is still a novelty for the US judiciary, increasing communications between international and domestic law and the ongoing globalization of the latter require lawyers around the world to study foreign judicial practice and consider it when resolving domestic legal disputes.

This study reviews approaches of judges to foreign judicial experience in thirteen different countries belonging to common law, civil law, and mixed law legal systems, and analyzes to what degree and for what purpose judges cite laws of foreign countries and rulings of their colleagues abroad. Based on doctrinal analysis of national legislation, all reports explore specifics of foreign legal borrowings in the individual countries surveyed. Authors of the country surveys demonstrate how different each jurisdiction is in assessing the possibility of relying on foreign law resources and how the interpretation of foreign court rulings often depends on the constitutional principles accepted by the country or by one of its constituent components—for example, in Quebec, Canada.

Countries surveyed in this report can be divided into four groups.

The first group includes four civil law jurisdictions—Argentina, Brazil, France, and Germany—where foreign laws and court rulings can be used as examples for judicial interpretation of a national law or as preparatory material for judges when they form their opinions in regard to a particular case. In these jurisdictions, foreign law is not binding and does not become a part of national legislation. The authors of these country surveys found that the role of foreign law in these nations is defined by existing constitutional doctrine and legal traditions. For example, in Argentina, where the Supreme Court relies on analysis prepared by the Foreign Research and Reference Institute, which was established within the Court for the purpose of providing research services on foreign court decisions, scholarly works, and legislation, foreign court rulings can be used for judicial argumentation if the Institute’s analysis confirms that “the foreign law to be used has a close similarity to the national law,” that the “facts in the foreign court decision coincide with the facts of the case before the national judge,” and that the “concept of justice in the foreign jurisdiction is similar to the one in its own court.”<sup>2</sup>

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<sup>1</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830 & nn.31, 34 (1988) (recognizing that laws, judicial practice, and statistics of other countries can be used as guidelines in a court’s decision making).

<sup>2</sup> *Argentina Survey*, *infra* at 5.

The Argentinean example is interesting because this country has a very strong judicial tradition. Because the Argentinean National Constitution followed the constitutional model of the United States, the influence of American precedents is strongest in the field of constitutional relations. In civil and commercial cases, the courts consult rulings of French, German, and Italian courts more often because these countries impacted the codification of Argentinean legislation.

In our report, this group of jurisdictions representing the civil law family is joined by Israel, which has a mixed legal system based on civil and common law principles. Regardless of the fact that foreign law is widely cited by Israeli courts, and especially by the Supreme Court, the cited laws do not become binding and serve mostly to inspire judges and provide analogies.<sup>3</sup> Foreign constitutions were frequently cited by Israeli judges for interpretational purposes before 1995, when the Supreme Court President emphasized the merely comparative purpose of foreign law consideration, because each constitution, he stated, reflects the unique specifics of each individual nation.<sup>4</sup>

Common law or mixed jurisdictions—Canada, Great Britain, India, Israel, New Zealand, and South Africa—constitute a second group characterized by direct borrowings from foreign law. In these countries, foreign precedent is considered when national legislation is analyzed or a case is adjudicated. Countries of the British Commonwealth have the most developed practice of applying foreign judgments. Among them, Canada is known as a country where “foreign law has had a major impact on domestic judgments.”<sup>5</sup> Until 1982, the most cited foreign court rulings were those of British courts; however, after adoption of the Canadian Charter of Rights and Freedoms, interest moved toward American case law under the Bill of Rights, and American cases are now cited approximately twice as often as those of all Commonwealth countries combined.<sup>6</sup> In India, where the influence of British and American law is significant, judges traditionally rely on foreign judgments when interpreting national laws and international treaties, especially in such areas as protection of privacy, human rights, and the environment. Court rulings of the British Commonwealth countries served as a basis for all major Indian Supreme Court decisions, which defined the interpretation of the Indian Constitution.<sup>7</sup> The experience of New Zealand demonstrates that in times when legal relations are getting more and more complicated, judges are trying to find in foreign judgments answers to questions that have not yet been resolved by national legislation.<sup>8</sup> A steady decrease of British legal influence and the adoption of a growing number of other foreign and international law provisions in this country demonstrate strong ties between legal development and ongoing economic, political, social, and cultural changes,<sup>9</sup> and show that such factors as a common language, similarities in legal systems, and a joint historic background do not play such an important role as before.

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<sup>3</sup> Israel Survey, *infra* at 49.

<sup>4</sup> *Id.* at 50.

<sup>5</sup> Canada Survey, *infra* at 14 (summary).

<sup>6</sup> *Id.*

<sup>7</sup> India Survey, *infra* at 47.

<sup>8</sup> New Zealand Survey, *infra* at 58.

<sup>9</sup> *Id.* at 61.

Mexico and Nicaragua, both of which follow the civil law tradition, constitute a third group among the nations surveyed in this report, both demonstrating a unique approach to the issue. In these countries, foreign law can be applied—in Nicaragua when national laws or all other formal sources of law, including customary law, are absent,<sup>10</sup> and in Mexico when domestic law specifically provides for its application.<sup>11</sup> However, no cases were located in either country where such application has occurred.

The fourth way of applying foreign law is illustrated by those countries where judges are familiar with foreign methods of legal interpretation and apply their knowledge of foreign legal doctrines in their domestic practice, but do not mention foreign law directly. In this report, China is such a country. A nation that continues to recognize its legal system as socialist relies on its national legislation and not foreign court rulings. In 1986 and 2009, the Supreme People’s Court of China issued directives to lower courts on what should be cited in these courts’ rulings and how citations should be presented. Foreign laws and judicial decisions were absent from this list. However, foreign influence can be found in some rulings of Chinese judges. The China survey included in this report reviews two defamation cases adjudicated in Chinese courts in 2002 and 2003 where foreign law played a significant role. Even though court documents did not mention foreign legal sources directly, the court actually recognized “concepts borrowed from the body of law surrounding the first amendment of the U.S. Constitution.”<sup>12</sup>

These four approaches to comparative law by the courts of foreign countries illustrate the different ways in which foreign law can impact domestic judgments and the varied methods used by national courts in the application of foreign law and foreign court decisions. Because problems resolved by national courts are no longer unique and specific to those countries only and because domestic legislation in individual nations is not always enacted in time to reflect ongoing global changes in philosophy, politics, the economy, and social relations, the role of foreign law and its usage by courts around the globe is increasing dramatically. Reliance on foreign law does not mean directly borrowing or applying such law, however. As the discussion of the surveyed countries demonstrates, it is instead an open exchange of ideas aimed at preserving and enriching the corpus of national law.

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<sup>10</sup> Nicaragua Survey, *infra* at 69.

<sup>11</sup> Mexico Survey, *infra* at 57.

<sup>12</sup> China Survey, *infra* at 24 (summary).

# Argentina

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**SUMMARY** In Argentina, a foreign decision or law is sometimes used to support a court's interpretation of a domestic law. The purpose of the citation is not only to reinforce a court's interpretation of the law, but also to demonstrate how other countries deal with certain issues.<sup>1</sup> Argentine courts have cited foreign law in domestic cases, especially in connection with issues involving constitutional law, mainly because the National Constitution was inspired by the United States Constitution. The courts also cite European continental law with regard to civil and commercial matters.

## I. Introduction

Argentina is a civil law country with a Romanist continental legal system. The judge renders a decision to declare and interpret the correct applicable law, without regard to the legal basis provided by the parties to the case, under the doctrine of *jura novit curia*.<sup>2</sup> In this process, the judge is necessarily obliged to support his decisions and provide the basis for the conclusion he has arrived at.<sup>3</sup> Such basis needs to be found either in the law, court decisions, or other additional secondary sources of law, such as customs, scholarly opinions, and general principles of law. As such, the sentence should be substantiated and supported, and result from a logical derivation from the applicable law and not a dogmatic affirmation based on the judge's will.<sup>4</sup>

It is not uncommon to observe citations of foreign court decisions by Argentine courts as an additional argument of the judge's own decision. It is a way of strengthening the conviction in the selected interpretation offered by the domestic law.<sup>5</sup> This encompasses a comparative analysis between the Argentine law and the foreign one to demonstrate that such a reception by the court is possible. This process should not be considered only as a simple migration of foreign law.<sup>6</sup>

The use of foreign law by Argentina's courts has been quite frequent, especially in constitutional issues, because Argentina's National Constitution dating from 1853 was inspired and modeled after the U.S. Constitution. Until the 1930s, the Supreme Court of Argentina applied U.S. precedent as one of the means of constitutional interpretation, especially in cases involving

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<sup>1</sup> PATRICIA MARCELA CASAL, RECEPCIÓN DEL DERECHO EXTRANJERO COMO ARGUMENTO: DERECHO COMPARADO 37 (Editorial Belgrano, Buenos Aires, 1997).

<sup>2</sup> *Id.* at 41.

<sup>3</sup> *Id.* at 75.

<sup>4</sup> *Id.* at 76.

<sup>5</sup> *Id.* at 77.

<sup>6</sup> *Id.* at 77.

freedom of the press, freedom to engage in commercial activity, and property rights.<sup>7</sup> According to Professor Jonathan Miller, “the nineteenth century experience of Argentina with the U.S. Constitution shows that not only may rules from transplanted constitutional models take root, but that such rules may enjoy extra authority because of the prestige of the foreign model.”<sup>8</sup>

## II. Reception of Foreign Law in Domestic Court Decisions

Current trends show that high court decisions around the world are transposing national boundaries due to the following factors:<sup>9</sup>

- 1) Countries are increasingly more interconnected and interdependent. This is no longer limited to neighboring nations;<sup>10</sup>
- 2) In the current stage of human development most problems are not exclusive of one community or country, but common to the rest of the world as well;<sup>11</sup>
- 3) Scientific, philosophical, political and socioeconomic changes are not incorporated immediately in legislation. The correlation between social circumstances and legal norms is not always present. It is frequent to see the delay of the legislation with regard to social changes, either because of a legislator’s reticence or due to interest groups that hinder any change or because the process of legislative reform is slow and complicated.<sup>12</sup> The lack of availability of an explicit legal solution is irrelevant for the judge who is required to solve the conflict and who cannot stop from deciding it.<sup>13</sup> In this extreme situation, the Civil Code<sup>14</sup> provides that the judge should use the general principles of law as a guide.

A foreign court decision could be effectively used as a valid legal argument, if, after the comparative analysis process, it may be concluded that:

- 1) The foreign law to be used has a close similarity to the national law, from the statutory point of view;<sup>15</sup>
- 2) The facts in the foreign court decision coincide with the facts of the case before the national judge;<sup>16</sup> and

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<sup>7</sup> Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 79 (1997).

<sup>8</sup> Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483 (1997), available at <http://www.wcl.american.edu/journal/lawrev/46/mille.cfm>.

<sup>9</sup> CASAL, *supra* note 1, at 77.

<sup>10</sup> *Id.* at 78.

<sup>11</sup> *Id.*

<sup>12</sup> CASAL, *supra* note 1, at 78-79.

<sup>13</sup> *Id.* at 79.

<sup>14</sup> CÓDIGO CIVIL arts. 15, 16 (Abeledo Perrot, Buenos Aires, 2009).

<sup>15</sup> CASAL, *supra* note 1, at 84.

<sup>16</sup> *Id.*

- 3) The concept of justice in the foreign jurisdiction is similar or equivalent to the one in its own court.<sup>17</sup>

Once these three conditions are met, foreign law may become a valid argument supporting the national court's conclusion.<sup>18</sup>

For example, a foreign precedent may not be cited if the facts involving the case are not identical. In a 1992 decision of the National Civil and Commercial Federal Court of Appeals,<sup>19</sup> the Court concluded that a U.S. precedent on freedom of expression could not be used in a domestic case involving the expression of ideas, because the U.S. precedent was related to official and scientific secrets, the release of which may be forbidden under American law.<sup>20</sup>

A common legal tradition is a strong argument that Argentine courts have used to cite foreign court decisions. In constitutional law matters, U.S. precedents have had a strong influence. With regard to civil and commercial law, Argentine codes have been inspired by the European continental legal system; therefore, French, Italian, and German court decisions have been cited in these cases.<sup>21</sup>

There are numerous decisions<sup>22</sup> from the Supreme Court of Argentina citing foreign law as an argument. For example, in a 1994 case<sup>23</sup>, the Supreme Court decided that the principle of sovereign immunity of another nation was not absolute, as was understood until that time, but limited to public acts by the state and not to private activity, holding that no nation may be sued in Argentine courts if the conflict is related to activities of the foreign nation in the country undertaken in its role as sovereign (*juri imperii*), but may be sued if the actions were of a private character (*jure gestionis*).

The case involved a claim for unpaid social security and labor-related obligations to the employees of the Russian Embassy in Buenos Aires. The Supreme Court concluded that no constitutional, statutory, or conventional norm explicitly provided for an absolute immunity and, therefore, there was no legal impediment for the highest court to limit sovereign immunity to *juri imperii* and not to *jure gestionis*. To reinforce the court's departure from the prior jurisprudence in the case, the court cited a U.S. Supreme Court decision of June 12, 1992,<sup>24</sup> and a German

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> CNCiv. Y Com. Federal, Sala II, 3/7/92, El Derecho, ED 28/9/92, Fallos N 44550.

<sup>20</sup> CASAL, *supra* note 1, at 96.

<sup>21</sup> *Id.* 90.

<sup>22</sup> Citation of foreign law may be found in the following cases: Corte Suprema de Justicia de la Nación [CSJN], Dec. 7, 1934, "Avico, Oscar Agustín v. de la Pesa, Saúl G.," Fallos 172:21, Jurisprudencia Argentina [JA] 48-698; CSJN, July 13, 2004, "Cabrera, Gerónimo Rafael y otro c/ P.E.N. Ley 25.561 - dtos. 1570/01 y 214/02 s/ amparo sobre ley 25.561," Fallos 124. XL, both available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/toc\\_fallos.jsp](http://www.csjn.gov.ar/cfal/fallos/cfal3/toc_fallos.jsp)

<sup>23</sup> CSJN, "Manauta, Juan J. y otros c/ Embajada de la Federación Rusa," Fallos 93485 of Dec. 22, 1994, La Ley (LL), Sept. 1, 1995.

<sup>24</sup> Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992), available at <http://www.law.cornell.edu/supct/html/91-763.ZO.html>.

Constitutional Court decision of April 30, 1963, in a case against the Kingdom of Iran, which as of that date were already accepting the restricted sovereign immunity thesis.<sup>25</sup>

### III. Supreme Court Comparative Law Research Division

In 1992, the Comparative Law Research Division (*Secretaría de Investigación de Derecho Comparado*) was created within the Supreme Court Library to provide research services on foreign and comparative court decisions, scholarly works, and legislation to the Supreme Court.<sup>26</sup> The creation of this division attests to the need and relevance that information on foreign law has for the Court. The mission of the newly-created division aims at providing not only reference, but also research in foreign and comparative law. To this end, the court renamed it the *Instituto de Investigaciones y de Referencia Extranjera* (Foreign Research and Reference Institute) in 2009. The Institute will provide translations, reference services, and publications of relevant foreign court decisions; acquire and catalog foreign legal periodicals; issue a semiannual publication; and make these materials available in a digital or online format as much as possible.<sup>27</sup>

### IV. Conclusion

Argentina's domestic courts have a longstanding tradition of citing foreign law to reinforce the ruling position. This is basically due to the legal traditions adopted from the American Constitution, and the civil and commercial laws adopted from the Europeans. Judges from both the higher and lower courts recognize the advantages of foreign precedents, so much so that the Supreme Court created an office especially dedicated to collecting and researching foreign and comparative law to satisfy the needs of the courts. In the past this practice was based on common legal traditions. Today it is a normal response to an increasingly globalized world, in which very few problems are exclusive to one country, but most likely have already arisen and been solved in other parts of the world.

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<sup>25</sup> CASAL, *supra* note 1, at 106.

<sup>26</sup> Acordada 51/2009 of Dec. 29, 2009, Reglamento del Instituto de Investigaciones y de Referencia Extranjera, available at [http://www.csjn.gov.ar/docus/documentos/cons\\_tipo.jsp?tipo=AC](http://www.csjn.gov.ar/docus/documentos/cons_tipo.jsp?tipo=AC).

<sup>27</sup> *Id.* art. 3.

# Brazil

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**SUMMARY** The Brazilian legal system has its roots in Roman law. As a civil law country, the system is anchored by the enactment of codes and a large body of laws that are approved by the federal, state and municipal legislatures and sanctioned by their respective executive powers.

The use of foreign law in domestic judgments is not binding, but the courts may refer to foreign laws to draw comparisons and conclusions. An example of this use is a benchmark decision issued by the Supreme Court in 2009 declaring that the Brazilian Press Law of 1967 was not in conformity with the Constitution of 1988. On his vote in the case, Justice Gilmar Mendes, the current President of the Brazilian Federal Supreme Court, made use of foreign law to illustrate how freedom of expression and freedom of the press are treated abroad. This does not mean that Justice Mendes applied foreign law to decide a domestic controversy, only that he searched beyond Brazilian borders to enhance the discussion surrounding a national matter.

## I. Introduction

This report provides an example of the nonbinding use of foreign law in domestic court decisions—more specifically, the recent vote issued in a Federal Supreme Court (*Supremo Tribunal Federal*) decision of April 30, 2009, by Justice Gilmar Mendes, in a case involving an allegation of disobedience of a fundamental precept (*Arguição de Descumprimento de Preceito Fundamental*). The report briefly summarizes the Brazilian legal system, provides details regarding the case decided by the Supreme Court, and offers a few excerpts of Justice Mendes’s use of foreign law as a comparative element in his vote.

## II. Legal System

Brazil is a civil law country and its legal system, which has its origin in Roman law, was implemented by the Portuguese during the colonization period and lasted until the promulgation of the first Civil Code in 1917.<sup>1</sup> As a civil law country, its legal system is based on codes and legislation enacted primarily by the federal legislature, as well as the states and municipalities. It is a federative republic formed by the insoluble union of the states, municipalities, and Federal District.<sup>2</sup> The Constitution of 1988 establishes the legislature, executive, and judiciary as the three branches that compose the Brazilian government.<sup>3</sup>

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<sup>1</sup> LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 190 (Herbert M. Kritzer ed., 2002).

<sup>2</sup> CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988 [C.F.] art. 1, *available at* the website of the Brazilian Presidency, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constitui%E7ao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constitui%E7ao.htm).

<sup>3</sup> *Id.* art. 2.

The Federal Supreme Court is the highest court in Brazil and is entrusted with the duty of safeguarding the Constitution,<sup>4</sup> as well as functioning as a court of review. The Federal Supreme Court also has original jurisdiction to try and decide direct actions of unconstitutionality (*Ação Direta de Inconstitucionalidade*) of a federal or state law or normative act, or declaratory actions of constitutionality (*Ação Declaratória de Constitucionalidade*) of a federal law or normative act,<sup>5</sup> which somewhat resemble the issuance of advisory opinions—a situation not allowed in the Supreme Court of the United States.

Brazil does not follow the doctrine of *stare decisis*,<sup>6</sup> and the Supreme Court started issuing binding decisions (*Súmulas Vinculantes*) in special situations<sup>7</sup> only recently, after the amendment of the Brazilian Constitution in 2004.<sup>8</sup>

### III. Supreme Court Case

On April 30, 2009, the Supreme Court issued a decision in a case brought to the Court by the political party PDT (*Partido Democrático Trabalhista*),<sup>9</sup> arguing that Law No. 5,250 of February 9, 1967 (Press Law), disobeyed a fundamental precept (*Arguição de Descumprimento de Preceito Fundamental*).<sup>10</sup> PDT argued that Law No. 5,250 of 1967 was not in accordance with the Constitution of 1988 and asked the Supreme Court to acknowledge the legal nullity of Law No. 5,250, since it was incompatible with the democratic era.

#### A. Justice Gilmar Mendes's Vote

In his vote, Justice Mendes made ample use of foreign law to analyze the meaning of freedom of the press in a democratic constitutional state. Justice Mendes began his analysis by citing Article 12 of the Virginia Bill of Rights, which says “[t]hat the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments.”<sup>11</sup>

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<sup>4</sup> *Id.* art. 102.

<sup>5</sup> *Id.* art. 102(I)(a).

<sup>6</sup> “The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).

<sup>7</sup> C.F. art. 103-A.

<sup>8</sup> On December 30, 2004, Congress amended the Constitution and established that the final decisions issued by an absolute majority of the members of the Federal Supreme Court would have a binding legal effect on the entire judiciary. The so-called *Súmulas Vinculantes* are now regulated by Law No. 11,417 of December 19, 2006, and enable the judiciary to judge in a definitive and final way thousands of cases dealing with the same issue. Emenda Constitucional No. 45, de 30 de Dezembro de 2004, available at [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Emendas/Emc/emc45.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Emendas/Emc/emc45.htm); and Lei No. 11.417, de 19 de Dezembro de 2006, available at [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2006/Lei/L11417.htm](http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11417.htm).

<sup>9</sup> S.T.F., ADPF-130, available at the website of the Federal Supreme Court, <http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?numero=130&classe=ADPF>.

<sup>10</sup> C.F. art. 102(§1).

<sup>11</sup> S.T.F., ADPF-130 at 208 (quoting Virginia Bill of Rights art. 12).

Justice Mendes observed that the discussion gravitates towards arguments for absolute freedom or complete censorship and that for the past centuries the press developed itself in an unstoppable fight towards absolute freedom.<sup>12</sup> He continued by saying:

[T]he great majority of constitutional texts, since the first declaration of rights, expressly proclaim the freedom of the press as a value almost absolute, not subject to restrictions from the government or even the Parliament, in the form of law.<sup>[13]</sup>

In this regard, Justice Mendes cited the previously mentioned Article 12 of the Virginia Bill of Rights and other state constitutional texts that originated during the emancipation process of the British Colonies in North America, namely, New Hampshire, Article XII; South Carolina, Article XLIII; Delaware, Article 1(5); Pennsylvania, Article XII; Maryland, Article XXXVIII; Georgia, Article IV(3); and Massachusetts, Article XVI, as examples that decisively influenced the First Amendment to the Constitution of the United States.<sup>14</sup>

Justice Mendes observed that the first Brazilian Constitutions expressly foresaw the possibility of laws restricting the freedom of the press, and noted that Article 220 of the Constitution of 1988 adopted a position very similar to the classical liberal model of ensuring freedom of the press, providing:

Article 220 – The expression of thoughts, creation, speech, and information, through whatever form, process, or vehicle, shall not be subject to any restrictions, observing the provisions of this Constitution.<sup>[15]</sup>

Justice Mendes noted that “in the permanent debate between absolute freedom and restricted freedom, the jurisprudence of the Courts produced two ideas about the meaning or the content of freedom of the press.”<sup>16</sup>

In the United States, said Justice Mendes, “two traditions or two models of interpretation of the First Amendment were formed.”<sup>17</sup> The first, a liberal concept, emphasizes the good operation of the “market of ideas” and traces back to the dissenting vote of Oliver Wendell Holmes in the famous *Abrams* case;<sup>18</sup> and the second, a civic or republican concept, highlights the importance of the public and democratic debate that, besides the foundation launched by James Madison, was reflected in the opinion of Louis D. Brandeis in the case of *Whitney v. California*, culminating in the landmark decision in *New York Times Co. v. Sullivan*.<sup>19</sup>

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<sup>12</sup> *Id.* (translated by the author, E.S.).

<sup>13</sup> *Id.* at 209 (translated by the author, E.S.).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 210 (quoting C.F. art. 220 (translated by the author, E.S.)).

<sup>16</sup> *Id.* (translated by the author, E.S.).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 210-11 (citing *Abrams v. United States*, 250 U.S. 616 (1919)).

<sup>19</sup> *Id.* at 211 (citing *Whitney v. California*, 274 U.S. 357(1927); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

In Germany, Justice Mendes said, the Constitutional Federal Tribunal (*Bundesverfassungsgericht*), through a continuing line of jurisprudence with its origin in the famous Lüth case, built the concept of the double dimension, double character, or double face of fundamental rights, emphasizing on the one hand the subjective and individual aspect, and on the other hand the objective notion of the institutional character of freedom of expression and the press.<sup>20</sup> Justice Mendes observed that the Lüth case “is a benchmark in the definition of the meaning of freedom of expression in a democracy” and that “the German tribunal recognized the double dimension, subjective (individual) and objective (institutional), of the fundamental rights.”<sup>21</sup>

Additional German cases were cited by Justice Mendes. He mentioned that the objective or institutional dimension of the fundamental right to freedom of the press was affirmed in the famous Spiegel case<sup>22</sup> and that in other important cases the German tribunal reaffirmed the objective or institutional aspect of freedom of the press.<sup>23</sup>

Throughout his vote, Justice Mendes continued to make extensive use of foreign law to help in the analysis of whether or not Law No. 5,250 of 1967 disobeyed a fundamental precept and should be declared void. For the sake of a comparative analysis, Justice Mendes further researched press law in several other countries. In this regard he wrote in his vote, “In Spain, the legal milestone in the area is found in Article 20 of the Spanish Constitution, which expressly prohibits previous censorship and widely recognizes freedom of expression, observing the limitations imposed by the right to honor, intimacy, one’s image, and the protection of childhood and youth.”<sup>24</sup> Justice Mendes also observed that in Spain the right of reply can be found in Ley Orgánica No. 2/1984.<sup>25</sup>

Continuing with his survey of the press laws of other countries, he noted that in Portugal, Articles 37 and 38 of the Constitution of 1976 guaranteed the end of censorship and the independence of the organs of social communication. In addition, the Press Law of 1999, as modified by Law No. 18/2003, defines “press” and establishes its distinct classifications.<sup>26</sup> The right of reply is also present in Articles 24, 25, 26 and 27 of Portugal’s Law No. 18/2003.<sup>27</sup>

Freedom of expression in the United Kingdom, Justice Mendes said, is found in Article 12 of the Human Rights Act of 1998,<sup>28</sup> and the right of reply is found in the Defamation Act of 1996.<sup>29</sup> In

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<sup>20</sup> *Id.* at 211 (citing Lüth, BverfGE 7, 198, 1958).

<sup>21</sup> *Id.* at 218 (translated by the author, E.S.).

<sup>22</sup> *Id.* at 220 (citing Spiegel, BverfGE 20, 62, 1966).

<sup>23</sup> *Id.* at 222 (citing additional German cases).

<sup>24</sup> *Id.* at 236 (translated by the author, E.S.).

<sup>25</sup> *Id.* at 237.

<sup>26</sup> *Id.* at 238.

<sup>27</sup> *Id.* at 239.

<sup>28</sup> *Id.* at 242.

<sup>29</sup> *Id.* at 242-43.

France, “the Declaration of the Rights of Man and of the Citizen of 1789 establishes in its Article 11 that the free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom.”<sup>30</sup> Furthermore, Justice Mendes indicated that the French law regarding freedom of the press is from 1881 (*Loi du 29 juillet 1881 sur la liberté de la presse*) and that freedom of expression is restricted in many situations: for the protection of family intimacy (art. 39); minors (art. 39 *bis*); and the image of persons who are victims of violence (art. 39 *quinquies*).<sup>31</sup>

Justice Mendes also researched the right of reply in Chile,<sup>32</sup> Peru,<sup>33</sup> Uruguay<sup>34</sup> and Germany.<sup>35</sup> After analyzing it, he stated that it “constitutes a fundamental guarantee,”<sup>36</sup> and that:

The right of reply is present in the great majority of democratic countries that safeguard freedom of the press—*derecho de replica* (Spain); *droit de réponse e droit de rectification* (France); *diritto di rettifica* (Italy); *Gegendarstellunsrecht* and *Entgegnungsrecht* (Germany)—and it is assured to those persons or companies, public or private, that suffer an offense as the result of erroneous or untrue information (news) transmitted through the press. It is a guarantee of reply, rectification, correction, clarification, defense, or refutation of the erroneous or untrue information, proportional to the injury suffered, by the same means of communication.<sup>[37]</sup>

According to Justice Mendes, the right of reply, assured by Article 5(V) of the Brazilian Constitution of 1988, is foreseen by the American Convention on Human Rights in the following terms:<sup>38</sup>

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.<sup>[39]</sup>

Justice Mendes continued his analysis by writing that “the right of reply is constitutionally assured, but requires norms of organization and procedure to make its effective exercise

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<sup>30</sup> *Id.* at 243 (translated by the author, E.S.).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 244-45.

<sup>33</sup> *Id.* at 245.

<sup>34</sup> *Id.* at 245-46.

<sup>35</sup> *Id.* at 246.

<sup>36</sup> *Id.* at 261.

<sup>37</sup> *Id.* at 261-62 (translated by the author, E.S.).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting American Convention on Human Rights art. 14(1), *entered into force* July 18, 1978, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123).

possible,” and that “there is no doubt that the adequate regulation of the right of reply is one of the central themes of the Press Law.”<sup>40</sup>

In addition, Justice Mendes observed that:

There are, in the Brazilian law, minimum norms of organization and procedure for the exercise of the right of reply. If these norms are declared as not received by the Constitution of 1988, certainly a scenario of extreme legal uncertainty will be established, which would affect all citizens and means of communication, and that minimum rules for the exercise of the right of reply are, undoubtedly, also a guarantee of legal security for the means of communication.<sup>[41]</sup>

After Justice Mendes’s thorough analysis, he concluded by saying that Law No. 5,250 of 1967 should be declared void in part, and that Chapter IV, Articles 29 to 36, which regulate the right of reply, should be maintained.<sup>42</sup>

## **B. The Supreme Court’s Decision**

After all the legal procedures were followed, all the interested parties (including government offices and officers) participated in the case, and all the Justices had voted, the Supreme Court declared in a 7-to-4 decision issued on April 30, 2009, that the whole Law No. 5,250 was not recognized by the Constitution of 1988.

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<sup>40</sup> *Id.* at 262-63 (translated by the author, E.S.).

<sup>41</sup> *Id.* at 266-67 (translated by the author, E.S.).

<sup>42</sup> *Id.* at 268.

# Canada

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**SUMMARY** Canada has the reputation of being a country in which foreign law has had a major impact on domestic judgments. It is certainly true that English cases were followed by the Supreme Court of Canada and the courts of the common law provinces until fairly recently. The adoption of the Canadian Charter of Rights and Freedoms in 1982 represented a turning point in the direction of Canadian jurisprudence. Since that time, English precedents have been cited significantly less often. Immediately following the adoption of the Charter, there was an increase in interest in American caselaw under the Bill of Rights. However, a recent study has concluded that American jurisprudence is not a “major feature” of the decisions handed down by the Supreme Court of Canada since 2000. Nevertheless, American cases are cited far more frequently in Canada than Canadian cases are in the United States. Cases from other Commonwealth countries are cited about half as often and cases from civil law countries are cited fairly infrequently.

## I. The Popular Image

The literature on the comparative impacts of foreign law on domestic judgments is replete with highly complimentary portrayals of Canadian courts’ purported openness to cross-cultural influences. In their study on *Judicial Recourse to Foreign Law: A New Source for Inspiration*, Sir Basil Markesinis and Dr. Jörg Fedtke state that Canada is “of particular interest” because its mixed cultural background “prepared Canadians for an open and multi-cultural approach to law,” and that Canada’s courts are “more prone to a ‘dialogic’ model” rather than being “enforcers” of the internal constitutional order that was allegedly “especially strong ... during the Rehnquist era” in the United States.<sup>1</sup> The authors also note that there has been “an important *shift*” in the focus of Canadian courts’ attention towards United States jurisprudence since the 1980s, but that this has not been at the cost of losing touch with English, Commonwealth, and civilian systems “above and beyond the obvious interest in French law.”<sup>2</sup>

The analysts’ conclusion is that “Canadian universalism may thus demonstrate the confident state of an eclectic mind which does not see in transnational judicial *dialogues* a threat to national individuality or an impoverishment of the local legal culture but, on the contrary, a source of constant inspiration and reinforced judicial legitimacy.”<sup>3</sup> Markesinis and Fedtke note that they italicized the word “‘dialogue’ because in the reception of American law in Canada ... “we see no slavish adoption of its solutions nor, indeed, the opposite, that is, a closing of the eyes

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<sup>1</sup> SIR BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* 83 (UCL Press 2006).

<sup>2</sup> *Id.* at 84.

<sup>3</sup> *Id.*

towards the large (and sometimes menacing) Southern neighbour, but an opportunity for a genuine dialogue in search for inspiration.”<sup>4</sup>

Although Markesinis and Fedtke have produced perhaps the most glowing portrayal of Canada standing at the crossroads of international judicial thinking, many of their sentiments have been expressed in other forums as well. In 2008, a Canadian court observer stated as follows:

Canadian courts have displayed a great openness in adopting new principles from foreign sources. Canadian society has always championed itself as being tolerant and open to foreign ideas, and it would follow that its legal institutions would want to embrace this spirit as well. In an increasingly globalized world where local law often comes in contact with foreign and international law, courts have two options. One option is to close ranks and concentrate only on the national experience. The second option is to readily accept the transfer of legal ideas and the opportunities of transnational legal discourse. The Supreme Court of Canada appears to have adopted the latter option.<sup>[5]</sup>

One case that this author cited in support of his perception of Canadian courts’ openness to foreign jurisprudence concerned a provision in Canada’s major federal statute governing labor relations, which defined picketing to include leafleting. In fact, he stated that after reviewing foreign cases that distinguished between picketing and leafleting, the Supreme Court of Canada actually followed them in ruling that the extant Canadian restrictions on leafleting were a violation of the right of free expression guaranteed by the Canadian Charter of Rights and Freedoms.<sup>6</sup> While it is true that the Supreme Court did consider the position in the United States in this case and characterized it, as well as American literature, as “helpful,” the Supreme Court does not appear to have looked to the law in any third countries and it was careful to note that freedom of expression is defined quite differently in Canada than it is in the United States.<sup>7</sup> Therefore, to characterize the Supreme Court’s decision as “following” foreign jurisprudence appears to overstate the influence of American cases and writings even in that one instance.

Academics appear to not be the only ones who believe Canada’s courts “have learned from the rest of the world.”<sup>8</sup> It has been reported that the justices of Canada’s Supreme Court challenged Chief Justice Rehnquist in 1999 by stating to him that they cited United States Supreme Court decisions, and asked why the United States Supreme Court did not reciprocate.<sup>9</sup> The Chief Justice reportedly agreed that the United States Supreme Court’s more insular approach was becoming “less defensible.”<sup>10</sup> Since then, other judges in the United States have recognized

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<sup>4</sup> *Id.* at 84-85 (footnote omitted).

<sup>5</sup> Randy Ai, *The Use of Foreign Jurisprudence by the Supreme Court*, THE COURT, Dec. 2008, <http://www.thecourt.ca/2008/12/02/714> (Osgoode Hall Law School blog).

<sup>6</sup> *Id.* (citing *United Food and Commercial Workers, Local 1518 (UFCW) v. Kmart Canada Ltd*, [1999] 2 S.C.R. 1083, available at <http://scc.lexum.umontreal.ca/en/1999/1999scr2-1083/1999scr2-1083.html>).

<sup>7</sup> *United Food and Commercial Workers*, 2 S.C.R. at 1118-21.

<sup>8</sup> Ai, *supra* note 5.

<sup>9</sup> Vicki Jackson, *Yes Please, I'd Love to Talk With You*, LEGAL AFFAIRS, July/Aug. 2004, [http://www.legalaffairs.org/issues/July-August-2004/feature\\_jackson\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_jackson_julaug04.msp).

<sup>10</sup> *Id.*

Canada's contributions in the field of comparative jurisprudence. For example, in a 2009 speech at Ohio State University, Justice Ginsburg reportedly praised the Supreme Court of Canada for its willingness to consider foreign decisions in rendering its opinions in constitutional cases.<sup>11</sup>

The subject of the extent to which the United States Supreme Court looks to foreign judgments in drafting its opinions is beyond the scope of this paper. However, the question of whether the Supreme Court of Canada is really as open to foreign influences as has been portrayed is one that was exhaustively studied in an article published in the prestigious *Osgoode Hall Law Journal* in 2009. That study concludes that the portrayals of Canada's Supreme Court as being at the forefront of the practice of comparative jurisprudence may be somewhat exaggerated and it therefore deserves substantial consideration. However, before undertaking this task, a brief outline of the development of the Canadian legal system and the historical trends in Canadian jurisprudence is provided, in order to provide a context for the study's findings.

## II. Early Development of the Canadian Legal System

Nine of Canada's ten provinces are common law jurisdictions. The one exception is the civil law jurisdiction of Quebec. The question sometimes arises as to what authorizes the courts in the nine provinces to invoke the common law in rendering their decisions. Few reported Canadian cases in which the common law has been interpreted or applied have cited the legal basis for doing so. For the most part, awareness of the fact that the nine provinces outside Quebec are common law jurisdictions is simply assumed by lawyers presenting arguments and judges deciding cases. In other words, lawyers and judges seldom explain why they are resorting to the common law. However, legal authority for the bases of the common law legal system are to be found in the English common law itself, and the English statutes that were received or adopted at various dates. Determining exactly when the common law was introduced and which statutes were received in which provinces at what times is difficult, and has been the subject of extensive research and some debate.<sup>12</sup> In the cases of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the territories, these questions are no longer of great significance because, regardless of exactly when reception first occurred, legislation was subsequently enacted that established dates upon which it is deemed to have occurred. The enactment of these laws clarifies matters to a significant extent.

Today, statutes that were in force in England when English law was received by the common law provinces and territories are still in force in those jurisdictions if they have not been repealed or superseded by later legislation. These statutes still occasionally apply in individual cases, but not nearly as often as the common law. One reason why common law is of greater significance is that it was not frozen at the date of reception, whereas most early English statutes have been superseded by subsequent legislation. As the common law developed in England and Wales, Canadian courts continued to follow the pronouncements of the highest English courts. The position in England and Wales, Canada, and other Commonwealth jurisdictions has always been

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<sup>11</sup> Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 11, 2009, available at <http://www.nytimes.com/2009/04/12/us/12ginsburg.html>.

<sup>12</sup> Peter Hogg, *Constitutional Law of Canada 2-1 to 2-11* (5th ed. 2006); Kenneth Roberts-Wray, *Commonwealth and Colonial Law* 828-37 (1966).

that there is one body of common law that is generally the same throughout the Commonwealth, but that body of law allows for regional differences when recognition of those differences is necessary or dictated by circumstances.<sup>13</sup> This is in contrast to the position in the United States where it has been accepted that the common law can differ from state to state regardless of the circumstances.<sup>14</sup>

One reason for this difference is that in the United States, the Supreme Court generally does not have jurisdiction to reconcile different interpretations of the common law from different states.<sup>15</sup> In Canada, however, adherence to uniform English common law rules was virtually dictated for many years by the Judicial Committee of the Privy Council. This court, which has always met in London, was established for a variety of purposes, one of the most important being to hear final appeals in cases arising from all participating colonies. The Privy Council was not limited to hearing appeals in federal cases arising in such confederations as Canada or Australia. The Privy Council could review decisions as to the state of the common law within provinces or states, as well as constitutional matters. When former British colonies attained independence, the constitutions approved for them by the Parliament of the United Kingdom generally retained the Privy Council as their final court of appeal. Thus, for many years the Privy Council was effectively the high court for Commonwealth countries outside of the United Kingdom. The Privy Council has traditionally heard cases in panels composed of British law lords joined by a judge of a high court in a participating jurisdiction, and it has adhered closely to the decisions of what was the Judicial Committee House of Lords until it was restructured and renamed the Supreme Court of the United Kingdom in October of 2009.

By adhering to English precedents, the Privy Council long served to unify the common law throughout the Commonwealth. However, all of the Dominions and most of the former colonies have now abolished final appeals to the Privy Council. Canada abolished Privy Council appeals in 1949<sup>16</sup> and the last Canadian appeal was disposed of in 1959. Today, the Supreme Court of Canada is the country's final court of appeal. However, while they are not binding, British precedents, particularly decisions of the House of Lords, continue to be highly respected. In fact, in discussions about the state of the common law, English precedents are usually cited without attention being drawn to their origin in a foreign court. Discussions of American cases and most non-English Commonwealth cases, by contrast, are almost always prefaced with a special note of their origin.

Finding the legal basis of the legal system in Quebec is not as difficult as it is in the case of the common law provinces. Quebec does not have unwritten common or customary law underlying its statutes. Instead, the basis of the legal system in Quebec is the Civil Code of Quebec.<sup>17</sup> The

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<sup>13</sup> *Id.* at 2-5.

<sup>14</sup> ERWIN CHERMERINSKY, FEDERAL JURISDICTION 337-38 (5th ed. 2007).

<sup>15</sup> *Id.* at 655-62.

<sup>16</sup> 1949 S.C., ch. 37, § 3.

<sup>17</sup> 1991 L.Q., ch. 64.

current Code was adopted by the National Assembly on December 18, 1991, and went into force on January 1, 1994.<sup>18</sup>

The history leading up to the adoption of the current Civil Code dates back to the sixteenth century. Although the territory that now comprises Quebec was explored and claimed by Jacques Cartier for France as early as 1534, colonization proceeded very slowly. The first settlements were commercial enterprises operated by companies in France, but by 1660, New France still had less than 2000 inhabitants. Three years later, Louis XIV annexed the colony from the company that had been given a commercial monopoly to exploit the fur trade in the area and recreated it as a royal domain. From that time until the conquest in 1759, the population of New France grew to be slightly over 75,000.

The earliest law introduced in New France was based upon feudal principles. New France was divided into seigneuries. Colonists had to pay taxes and rental fees to the seigneurs.<sup>19</sup> This legal system was eventually replaced by the Coutume of Paris by the Company of 100 Associates. The Coutume was confirmed by the Royal Council that later governed New France. In France itself, the Code Napoleon was adopted in 1804. However, by then, Quebec was completely separated from France and the Code Napoleon was not immediately adopted for use in Quebec by the English government. In fact, the Coutume of Paris remained the basis of civil law in Quebec until it was finally replaced in 1866 by the first Civil Code of Lower Canada. Even then, while the Civil Code brought the principles and provisions of the Code Napoleon to Quebec, many of these were modified through the inclusion of aspects of English law.

In interpreting Quebec's Civil Code, the courts of that province have never followed French jurisprudence to the extent that the courts in the common law provinces followed English jurisprudence. The Codes of Quebec and France were always different, there were no final appeals to Paris, and French judgments were not widely available. Thus, Quebec's courts developed their own jurisprudence from an early date to a far greater extent than the common law provinces did. The current Civil Code is more of a domestic creation than a version of its French counterpart.

### III. Constitutional Developments

Canada does not have a single constitutional document. In 1867, the United Kingdom united the four provinces of Ontario, Quebec, Nova Scotia, and New Brunswick as the Dominion of Canada through the enactment of the British North America Act.<sup>20</sup> This statute divided legislative powers between Parliament and the provincial legislatures. The original British North America Act has since been renamed the "Constitution Act, 1867," but it remains in force and its division of powers, though modified, has remained largely intact.<sup>21</sup> On its face, this division would appear to give Parliament very broad authority to enact legislation covering virtually any

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<sup>18</sup> For an overview of the Code in French, *see* MICHEL FILION, GUIDE DU CODE CIVIL DU QUEBEC (1998).

<sup>19</sup> ADRIAN POPVICI & MICHELINE PARIZEAU-POPOVICI, VOUS ET LA LOI 34 (1977).

<sup>20</sup> 30 & 31 Vic. c. 3 (U.K.).

<sup>21</sup> Constitution Act, 1867, R.S.C. No. 5, §§ 91-92 (App. 1985).

matter it wishes to address due to the fact that it gives Parliament jurisdiction over interprovincial trade and commerce and residual powers over matters not assigned to the provinces. However, the courts have interpreted the provinces' enumerated powers, particularly those over what is termed "property and civil rights," broadly and have, consequently, ensured that Canada is, in practice, a more decentralized federation<sup>22</sup> than the United States. Many fields that are governed by federal legislation in the United States are governed by provincial legislation in Canada. A few examples are labor law, securities regulation, and intraprovincial transportation. However, there is one major exception to this rule. The Constitution Act, 1867, gives Parliament exclusive jurisdiction to enact criminal laws for Canada.<sup>23</sup> In exercising this power, Parliament has enacted a Criminal Code that applies throughout the country. The provinces do not have their own separate criminal codes for intraprovincial or minor crimes, but they can enforce laws otherwise within their jurisdiction through what are termed "quasi-criminal laws." Highway traffic laws are an example of quasi-criminal laws. Anti-terrorism legislation, on the other hand, is criminal law in the strict sense that falls almost entirely within the exclusive powers of Parliament. At the same time, the provinces do have prime responsibility for enforcing the criminal laws written by Parliament because charges brought under the Criminal Code are tried in provincial courts.

The original Constitution of 1867 did not give Canada the power to amend its Constitution or give Canadians constitutional guarantees similar to those found in the United States in the Bill of Rights. In 1982, these two matters were addressed through the enactment of the Constitution Act, 1982.<sup>24</sup> This document replaced the anachronistic procedure of formally asking the government of the United Kingdom to enact an amendment to change the Constitution with complex formulas for the Parliament of Canada to amend the Constitution with the consent of all or some of the provinces, depending on the nature of the proposed changes, and it simultaneously created the Canadian Charter of Rights and Freedoms (the Charter).<sup>25</sup> The adoption of the Charter has dramatically altered constitutional law in Canada over the past twenty-four years. Whereas the study of this field was once focused almost entirely on the respective legislative powers of Parliament and the provincial legislatures, the subject of civil rights or what limits the Charter places on the powers of both Parliament and the provincial legislatures moved to the forefront.

The Charter differs from the U.S. Bill of Rights in a number of respects. For example, the Charter is far more detailed. For this reason, as well as on account of a judicial trend that embodies more European influences than are encountered in American jurisprudence, the Charter has been interpreted to give Canadians guarantees that have not been found to exist in the United States. A clear example in this regard is protection from the death penalty. Canadian courts have interpreted the Charter to not only prohibit the imposition of the death penalty, but to also prohibit the extradition of persons to face the death penalty except in "extraordinary circumstances."<sup>26</sup> However, while the Charter is more detailed than the Bill of Rights, it is also

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<sup>22</sup> *Id.* § 92(13).

<sup>23</sup> *Id.* § 91(27).

<sup>24</sup> R.S.C. No. 44 (App. 1985).

<sup>25</sup> Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11 (U.K.).

<sup>26</sup> *United States v. Burns*, [2001] 1 S.C.R. 283.

qualified in two significant respects. First, Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>27</sup> This limitation gives the courts authority to uphold laws that they consider “reasonable” in a democratic society even if they would otherwise contravene the Charter. Secondly, the Charter contains a “notwithstanding” clause that generally gives Parliament and the provincial legislatures authority to declare that legislation they have enacted is to go into force “notwithstanding” the fact that it contravenes the Charter.<sup>28</sup> While some legislators were afraid that the inclusion of this clause would give Canadian governments a convenient way to simply ignore Charter guarantees, Canadian governments have actually been so concerned that invoking the notwithstanding clause would create a public backlash that they have avoided using it almost entirely. In fact, the notwithstanding clause has not been invoked by Parliament on a single occasion and it has only been resorted to on the provincial level in a couple of instances.

From the above it can be seen that Canada has had a legal history quite different from that of the United States. Until sixty years ago, its highest court was an essentially English court and the chief focus of its courts in constitutional cases involved the respective powers of Parliament and the provincial legislatures and much of its other work was in interpreting the common law in cases that would generally fall outside of the jurisdiction of the Supreme Court of the United States. Furthermore, it is not surprising that constitutional cases from the United States did not have much of an early impact in Canada because instead of involving questions of federal versus state powers, the main constitutional issues in the U.S. have involved the Bill of Rights for at least the past 100 years. Canada, on the other hand, did not adopt its equivalent—the Canadian Charter of Rights and Freedoms—until 1982. The question then becomes one of whether this and other developments have increased the overlap of issues faced by Canadian and non-Commonwealth courts in recent years.

#### IV. The McCormick Study

The *Osgoode Hall Law Journal* article previously referred to is entitled “American Citations and the McLachlin Court: An Empirical Study.”<sup>29</sup> It was written by Peter McCormick, a professor of political science at the University of Lethbridge in Alberta, and its thesis is perhaps best summarized by his finding that “American authority is not a major feature of the case law of the McLachlin Court, and is somewhat less prominent than was the case for the preceding Chief Justiceships.”<sup>30</sup> Professor McCormick notes that, by contrast, citation rates for American cases in Australia have been rising steadily for over forty years and are about six times higher than they are in Canada.

While Professor McCormick’s focus is on the citation of American cases in Canada, he begins by reporting some statistics on the sources of all citations by the Supreme Court of Canada. His

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<sup>27</sup> Part I of the Constitution Act, being Schedule B to the Act, 1982, c. 11, § 1 (U.K.).

<sup>28</sup> *Id.* § 33.

<sup>29</sup> Peter McCormick, *American Citations and the McLachlin Court: An Empirical Study*, 47 *OSGOODE HALL L.J.* 83 (2009), available at [http://ohlj.ca/english/documents/0347\\_1\\_McCormick\\_PSS\\_090607.pdf](http://ohlj.ca/english/documents/0347_1_McCormick_PSS_090607.pdf).

<sup>30</sup> *Id.* at 94.

data shows that almost 60% of the citations in a period after the abolition of appeals to the Privy Council in 1949 were to English cases and that less than 1% were to American cases. Citations to all other jurisdictions, both within and outside the Commonwealth, were approximately 1%.<sup>31</sup> Under the current Chief Justice, citations to English cases have fallen all the way to around 6% and citations to U.S. cases stand at around 3.5%. Citations to cases from all other jurisdictions are about 1.5%. The highest rate of citations to U.S. cases was 7.2% under former Chief Justice Dickson. During that same period, citations to cases from all other jurisdictions also reached their high point of 2%.<sup>32</sup> This is largely attributed to the adoption of the Canadian Charter of Rights and Freedoms in 1982. In the first few years, the absence of relevant case law from Canada naturally encouraged the courts to look at some foreign precedents respecting such rights as freedom of speech and freedom of association. However, foreign precedents came to be cited less as Canadian jurisprudence under the Charter grew at a far more rapid rate than was widely foreseen in 1982. Professor McCormick describes this development as the process of “constitutional routinization [setting] in.”<sup>33</sup>

Professor McCormick has broken American citations down and reported that about half of the citations during the current period of interest were to Supreme Court decisions. Perhaps somewhat surprisingly, nearly 30% were to U.S. state courts. This number reflects the fact that matters that fall outside of the jurisdiction of the United States Supreme Court can be considered by the Supreme Court of Canada. One example previously mentioned in this regard is common law that does not involve a federal question.

One interesting statistic is that the median year for decision of United States Supreme Court cases that were cited by the Supreme Court of Canada between 2000 and 2008 was 1973. The average state case cited was about twenty years old. This suggests that the Supreme Court of Canada has been more interested in reviewing established American cases than in tracking recent rulings.

As has been mentioned, Professor McCormick’s thesis is that foreign authorities are not a major feature of the current case law of the United States. This thesis is supported by such a comprehensive analysis of the data that it is easy to overlook one portion of his paper, in which he does acknowledge that the Supreme Court of Canada’s use of foreign law may still be fairly impressive in a comparative context. An analysis of the reserved decisions issued by the Supreme Court of Canada since 2000 shows that “[o]ne in every five ... uses American citations, and two-thirds of those (or one in seven) involve the use of one or more citations to the [United States Supreme Court].”<sup>34</sup> Professor McCormick goes on to state:

The use of federal court citations is somewhat more focused, occurring in only fifty-one cases (or one in eleven), and state court citations are found in only thirty-three cases (or one in seventeen). [Nevertheless], “one case in five” is a solid increase over the “one case in ten” identified by [Ian] Bushnell for the pre-*Charter* period, and it contrasts

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<sup>31</sup> *Id.* at 92.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 93.

<sup>34</sup> *Id.*

dramatically with the [United States Supreme Court's] citation of foreign authority in about one case in every two hundred.<sup>[35]</sup>

The pointing out of this dramatic difference serves to balance Professor McCormick's analysis most effectively.

In his article, Professor McCormick looks at a number of assumptions about the citation of foreign judgments in Canadian judgments. One of these is that American cases are most likely to be cited by judges with legal training in the United States and least likely to be cited by judges with legal training in England. Today there are no judges on the Supreme Court of Canada who received law degrees in the United States. However, under Chief Justice Lamer, current Chief Justice McLachlin's predecessor, only one of the six justices who cited American cases most frequently had received an American law degree. Furthermore, since 2000, the two justices who have cited American cases most frequently both received law degrees from Cambridge.<sup>36</sup> Thus, there does not appear to exist a strong correlation between a judge's foreign legal training, or lack thereof, and his or her openness to foreign law of any one or any number of countries.

Another assumption that Professor McCormick has addressed at some length is of a more political character. Some writings suggest that foreign law is most likely to be used by judges who might be described as "activists" and that the foreign judges they cite are most likely to fall into this same category. The statistics show that of the U.S. Supreme Court cases cited by the Supreme Court of Canada since 2000, about two-thirds were issued by the Burger, Rehnquist, and Warren courts, which ranked in that order in the number of citations. Fourth on the list was the Fuller court, which lasted from 1888-1910. This led Professor McCormick to consider whether, rather than courts of a particular era, Canadian judges were most likely to cite individual judges more on the basis of their reputation. He approached this by noting which U.S. Supreme Court Justices had been most often cited by the Supreme Court of Canada and found that Justices Rehnquist, White, Brennan, Stewart, and Stevens were all tied at fourteen citations each. Behind this group in descending order with a high of thirteen and a low of six were Justices Burger, Blackmun, O'Connor, Scalia, Gray, Warren, Kennedy, and Black. Professor McCormick compared this list with a 1993 survey of judicial reputations conducted by Mersky and Blaustein<sup>37</sup> and found that only three of these justices—Brennan, Warren, and Black—were ranked in the top ten by sixty-five law school deans in the United States. By contrast, former Chief Justice Burger, who only ranked ninety-first in the United States survey, was just one citation short of being tied for the most frequently cited American justice by the Supreme Court of Canada.

The statistics given above do not show a clear pattern with respect to either ideology or reputation.

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<sup>35</sup> *Id.* at 93-94 (quoting Ian Bushnell, *The Use of American Cases*, 35 U. NEW BRUNSWICK L.J. 157, 164-65 (1986)). For the U.S. statistics, Professor McCormick cites David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 EMPIRICAL LEGAL STUD. 297 (2006).

<sup>36</sup> McCormick, *supra* note 29, at 97-98.

<sup>37</sup> *Id.* at 103 (quoting William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 445-52 (1996)).

## V. Conclusion

Canadian courts enjoy the reputation of being comparatively open to foreign law in rendering their decisions. However, aside from the judgments of the highest courts in England and Wales, which were routinely followed until the 1970s and are still cited more than twice as often as judgments from any other country, foreign law does not appear to have ever played a major role in the development of Canadian jurisprudence. The adoption of the Charter of Rights and Freedoms in 1982 did increase interest in American cases under the Bill of Rights for several years, but Canadian jurisprudence has grown rapidly since that time. The Canadian Charter and the American Bill of Rights have many similarities, but major differences between the two ensure that the jurisprudence of the two countries will continue to develop quite independently. Nevertheless, when all cases are considered, statistics show that the Supreme Court of Canada has cited American case law almost forty times as often as the Supreme Court of the United States has cited Canadian case law. Statistics alone may not tell the whole story of the influence of foreign law on Canadian judgments, but they do offer substantiation that Canadian judges have consistently shown an interest in American law even if English law continues to be more influential.

# China

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**SUMMARY** The legal system of China is primarily based upon the civil law model, and as a result the primary source of law is statutory rather than case law. While the courts rarely cite to case law or foreign law directly in domestic judgments, examples of the impact of foreign law in Chinese judges' adjudication of domestic cases do exist. This report discusses two Chinese defamation cases, in which the "public person" standard played an important role in the judgments. This standard, as referred to by Chinese lawyers, is a concept borrowed from the body of law surrounding the First Amendment of the United States Constitution concerning the protection of freedom of the press.

## I. Introduction

The legal system of the People's Republic of China (China or PRC) is proclaimed by the Constitution as a "socialist legal system."<sup>1</sup> The legal system primarily follows the civil law tradition, and the primary source of law is statutory rather than case law.

As early as 1986, the Supreme People's Court of China (SPC) circulated a reply providing direction to the lower people's courts, which was to be followed when citing sources of law in court decisions.<sup>2</sup> The reply arguably applied to civil and commercial cases only. Effective November 4, 2009, the SPC formally enacted *The Provisions on Citation to Regulatory Legal Documents Including Laws and Regulations in Court Decisions* (hereafter, SPC Provisions), in which the sources of law that are allowed to be cited in court decisions are provided.<sup>3</sup>

According to the SPC Provisions, the following sources of law may be cited in court opinions:

- (1) Laws and Legal Interpretations;
- (2) Administrative Regulations;

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<sup>1</sup> See Article 5 of the Constitution of China, which provides: "The state upholds the uniformity and dignity of the socialist legal system." XIAN FA art. 5 (1982, amended 2004), FA GUI HUI BIAN 4, 8 (2004). For the purpose of this report, application of foreign law in foreign-related cases is not discussed.

<sup>2</sup> Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zhizuo Falu Wenshu Ruhe Yinyong Falu Guifanxing Wenjian de Pifu [The SPC Reply on How People's Courts Should Cite Regulatory Legal Documents in Making Court Documents], (Oct. 28, 1986). The text of the 1986 Reply in the original Chinese language is available online, at [http://www.law-lib.com/Law/law\\_view.asp?id=3936](http://www.law-lib.com/Law/law_view.asp?id=3936) (last visited Mar. 17, 2010).

<sup>3</sup> Fa Shi [2009] No. 14 (July 13, 2009). The text in the Chinese original language is available on the SPC website, at [http://www.court.gov.cn/qwfb/sfjs/201002/t20100210\\_1065.htm](http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1065.htm) (last visited Mar. 17, 2010).

- (3) Local Regulations, Autonomous Regulations, and Separate Regulations; and,
- (4) Judicial Interpretations.<sup>4</sup>

In addition to the sources listed above, the court may also (in administrative lawsuits only) cite interpretations of administrative regulations and administrative rules made by the State Council, and departments and agencies authorized by the State Council.<sup>5</sup> Other regulatory documents, according to the SPC, may serve as the basis of argument, but may not be directly cited.<sup>6</sup>

Thus, it appears that neither case law nor foreign law is allowed to be cited in domestic judgments according to the SPC Provisions, although in practice, when encountering new or difficult legal questions, lower court judges often consult with higher courts for instruction. Scholars have also found that Chinese judges are increasingly looking to other courts to see how they have handled similar issues.<sup>7</sup> Examples of the impact of foreign law have also been seen (although rarely and implicitly) in the adjudication of domestic cases by Chinese judges.

## II. ‘Public Person’ Debates in Chinese Defamation Cases

### A. Fan Zhiyi Case

In his article *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, Professor Benjamin Liebman of Columbia Law School introduced a Chinese defamation case where the concept of “public person” was actually discussed in the court decision. The case was adjudicated by a district court in Shanghai in 2002. The article reported:

Chinese soccer star Fan Zhiyi sued the Shanghai-based Wenhui Xinmin United Publishing group after its *Oriental Sports Daily* reported on rumors stating that Fan had gambled on games. The paper contended that its article, which was one of a series reporting on the alleged scandal, had been intended to refute rumors that were widely circulating at the time and to clear Fan of any wrongdoing. In rejecting Fan’s claim, the court noted that Fan “naturally was a public person” and that the defendant had “the responsibility to carry out its right to public opinion supervision” and report on the rumors. The court added that the paper should be protected because it was acting in the public interest and satisfying the public’s “right to know” regarding a public person. As a result, the plaintiff’s reputation “was not just an ordinary matter of one person’s affairs, but rather was a matter of public interest” and thus “certainly” could be a subject of news reporting.<sup>[8]</sup>

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<sup>4</sup> *Id.* art. 2. For definitions of each of the regulatory documents, see Legislation Law of the People’s Republic of China (adopted by the National People’s Congress on Mar. 15, 2000), in THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA 5-27 (2000).

<sup>5</sup> *Id.* art. 5.

<sup>6</sup> *Id.* art. 6.

<sup>7</sup> See, e.g., Benjamin L. Liebman & Timothy Wu, *Chinese Network Justice*, 8 CHI. J. INT’L L. 257 (2007).

<sup>8</sup> Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L.J. 33, 104 (2006). The text of the court’s decision in Fan is available online in the original Chinese language, at <http://www.nwcliniclaw.cn/news/news/35/2005714110248.htm> (last visited Mar. 16, 2010).

After the decision was published, scholars within and outside of China enthusiastically commended it, particularly the fact that the court specifically included the concept of “public person” in the decision. The current Chinese defamation law framework, as pointed out by Professor Liebman, does not provide a basis for distinguishing between “public persons” and others.<sup>9</sup> In their comments on the decision, Chinese scholars have generally referred to the concept of “public person” as a legal concept evolved under the First Amendment law of the United States.<sup>10</sup> Scholars have advocated that China’s highest court, the Supreme People’s Court, include this decision in its guidelines provided to lower courts in China, thereby making it a judicial precedent binding on similar cases in the future. “If so, this case will become a milestone in the judicial history of Chinese media,” according to Professor Xiao Han of the China University of Political Law.<sup>11</sup>

## B. Yu Qiuyu Case

The *Fan* case was just the beginning of the debates on the concept of “public person” in Chinese courts. In another defamation case brought to the court in Beijing by the famous writer Yu Qiuyu, the defendant’s attorney asked the court to accept the “public person” concept as it appeared in the *Fan* case. In his argument, the attorney specifically cited the defamation law of the United States, in particular the case of *New York Times Co. v. Sullivan* and the line of cases which followed, in which the “actual malice” standard was established.<sup>12</sup>

The Beijing court refused to cite to the *Fan* case, however, stating that China is a civil law country and thus citations to case precedent are “not suitable.” The court did, nevertheless, find in favor of the defendant.<sup>13</sup> In his article, Professor Liebman referred to comments made by observers, who argued that despite the court’s statements to the contrary, the “public person” concept and standard played an important role in the outcome of the case.<sup>14</sup>

Professor Liebman opines that in these two defamation lawsuits and similar cases, Chinese courts have directly or indirectly suggested that famous persons should withstand a higher degree of scrutiny than ordinary persons, despite the absence of any distinction between ordinary persons and “public persons” in the defamation law of China. These cases, referred to by Professor Liebman as one of the Chinese court’s “judicial innovations,” “demonstrate the court’s willingness to contemplate expanded protection for the media even absent explicit guidance to

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<sup>9</sup> Liebman, *supra* note 8, at 105-06.

<sup>10</sup> See, e.g., Xiao Han, Gongzhong Renwu Denglu Panjueshu Ji Peishentuan Zhidu de Mengya [Public Person Boarded Court Decision, and the Jury System Germinates], 3 QINGHUA FAXUE 345 (2003) (in Chinese). In this article, Professor Xiao introduced a series of U.S. defamation cases in discussing the evolution of the concept of “public person” in U.S. defamation law.

<sup>11</sup> *Id.* at 346.

<sup>12</sup> Defense attorney’s statement to the court in the case of Yu Qiuyu (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), available at <http://www.huayilawyers.com/cn/ysdl.htm> (in Chinese) (last visited Mar. 17, 2010).

<sup>13</sup> Liebman, *supra* note 8, at 105.

<sup>14</sup> *Id.*

such effect from either the National People’s Congress or the SPC.”<sup>15</sup> Some Chinese judges, he claims, have explicitly decided cases by reference to defamation law in other countries.<sup>16</sup>

### **III. Conclusion**

As a general rule, Chinese judges rely on statutory law in writing their decisions. In domestic judgments, it appears that they are not allowed to cite to foreign law or even to domestic case law. Nevertheless, as shown in the defamation cases discussed in this report, foreign law, in particular United States defamation law, has played an important role in a few domestic judgments of Chinese courts.

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<sup>15</sup> *Id.* at 106.

<sup>16</sup> *Id.*

# England and Wales

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**SUMMARY** The use of comparative law in England is neither unfamiliar nor insignificant. Foreign cases are commonly used in the domestic judgments of courts in England and Wales. The use of these foreign cases is regulated in the lower courts, as certain criteria must be met before they can be utilized. The House of Lords commonly referred to foreign law, writings and cases in its judgments.

**“The discipline of comparative law does not aim at a poll of the solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations. And it reminds us that the law is part of the world of competing ideas markedly influenced by cultural differences.”**

**–Lord Steyn, in *McFarlane et al. v. Tayside Health Board*, [2000] 2 AC 59.**

## I. Introduction

This report will look at the use of comparative law by the judges in the House of Lords, which until late 2009 was the highest court in the land in the United Kingdom. It has since been reconstituted as the Supreme Court, but because the Supreme Court has produced few judgments to date, the report focuses on judgments of the House of Lords, with a brief overview of the regulation of the use of comparative law in the lower courts.

## II. Foreign Judgments in the House of Lords

The use of comparative law in England is neither unfamiliar nor insignificant. The legal system of the country itself has been described as straddling two worlds: “[i]t has one foot in the *ius commune novum* with the legal systems of Continental Europe and the other in the ‘unity of common law’ with the legal systems in the Commonwealth and the USA,” as well as having a mixed jurisdiction within the United Kingdom with Scotland.<sup>1</sup>

Foreign judgments and foreign laws have been used by the Law Lords in the House of Lords as a comparative aid to the interpretation of English law with increasing regularity, both in a supplementary manner as well as substantively. It has been noted that the Commonwealth’s past has meant that the House of Lords is more accustomed and open to the use of comparative law than other jurisdictions.<sup>2</sup>

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<sup>1</sup> Esin Orucu, *Looking at Convergence Through the Eyes of a Comparative Lawyer*, E.J.C.L., vol. 92, July 2, 2005, <http://www.ejcl.org/92/art92-1.html>.

<sup>2</sup> Walter van Gerven, *The Open Method of Convergence*, JURIDICA INTERNATIONAL, vol. XIV, 2008, <http://www.juridicainternational.eu/the-open-method-of-convergence>.

The incorporation of the European Convention on Human Rights into the national law of the United Kingdom by the Human Rights Act 1998 placed the UK in a different legal climate. The directly enforceable rights provided for in the Human Rights Act apply not only to the UK, but also to a number of other countries, as well as having certain parallels with the Constitution of the United States.<sup>3</sup> Certain scholars have noted that the explosion of human rights legislation and treaties has led to a “transjudicial dialogue on human rights [that] has blurred the distinction between comparative constitutional law and international law.”<sup>4</sup>

It should be noted that the English courts are required by law to take into account decisions of the European Court of Justice<sup>5</sup> and organs of the European Convention on Human Rights.<sup>6</sup> Even prior to the incorporation of these legal obligations, however, the House of Lords had been utilizing comparative methods from other jurisdictions. In *White et al.*, the Law Lords took a comparative law approach, with Lord Nicholas noting in the first paragraph of his opinion that “courts in other jurisdictions had reached opposite conclusions.”<sup>7</sup> The judgment in this case referred to cases from New Zealand, Australia, the United States, and Germany. During the trial the Law Lords were referred to over forty cases of English and foreign law. Lord Steyn expressly acknowledged that due to the complexity of the case he also referred to academic writings on foreign law to aid him in his judgment, stating: “such material, properly used, can sometimes help to give one a better insight into the substantive arguments.”<sup>8</sup> Additionally, during his opinion Lord Goff expressed reservations over using comparative practices between Germany’s civil system and England’s common law traditions, but noted that the use of not only cases but comparative writings aided him, stating:

We can, I believe, see this most clearly if we compare the English and German reactions .... Strongly though I support the study of comparative law, I hesitate to embark in an opinion such as this upon a comparison, however brief, with a civil law system; because experience has taught me how very difficult, and indeed potentially misleading, such an exercise can be. Exceptionally however, in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.<sup>[9]</sup>

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<sup>3</sup> See, e.g., *R. v. Camberwell Green Youth Court* [2005] UKHL 4 [14], where parallels were drawn between the U.S. Constitution and the European Convention on Human Rights. Lord Hoffman noted:

It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today’s world. It overlaps, to some extent, with article 6(3)(d) of the Convention as interpreted by the European Court. But, as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that requirement. But, whatever its merits, this line of thought never gave rise to a corresponding requirement in English law. *Id.*

<sup>4</sup> Karen Knop, *Here and There: International Law in the Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501 (2001).

<sup>5</sup> European Communities Act 1972, c. 68 § 3.

<sup>6</sup> Human Rights Act 1998, c. 42, § 2(1).

<sup>7</sup> *White et al. v. Jones et al.*, [1995] 2 AC 207.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The House of Lords has, where relevant, used decisions from foreign courts in these cases to compare how the rights have been interpreted. This applies for not only the European Convention on Human Rights, but also for a number of other international treaties. For example, in *A v. Secretary of State*, foreign cases were used throughout the opinions of the Law Lords, which was considering the use of evidence that may have been obtained by torture. It noted how the Torture Convention had been implemented into the law of France, Canada, the Netherlands, Germany, and the United States.<sup>10</sup> During this case, numerous foreign decisions were referred to—three from the Supreme Court of the United States, twelve from the Supreme Courts of six other countries, and others from international courts and tribunals.<sup>11</sup> Some commentators have noted that the use of so many foreign cases was a “conscious attempt to put the practice of the UK within a global context and to upgrade the common law to modern international standards.”<sup>12</sup> In fact, the approach of Lord Bingham was highly commended by an article in the *Law Society Gazette*, which provided:

Lord Bingham has performed brilliantly in the job for which he was specifically selected in defiance of the principle of “buggin’s turn”, which would have given it to another. He has stitched the Human Rights Act into the fabric of our domestic law and, in doing so, aligned our jurisprudence with that of an emerging global approach. The breadth of the approach of the House of Lords under his leadership throws into stark relief the decline of its US equivalent ... this was a conscious attempt to put the practice of the UK within a global context and to upgrade the common law to modern international standards.<sup>[13]</sup>

In another case, heard by the House of Lords in 2002, Lord Bingham noted at the beginning of his opinion his apparent favor towards the use of comparative law in achieving a fair and just outcome that served the ends of justice:

This survey shows, as would be expected, that though the problem underlying the cases such as the present is universal the response to it is not.... But ... most jurisdictions would, it seems, afford a remedy to the plaintiff. Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question. In a shrinking world ... there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome.<sup>[14]</sup>

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<sup>10</sup> *A et al. v. Secretary of State*, [2005] UKHL 71 [35].

<sup>11</sup> *Id.* (generally).

<sup>12</sup> Roger Smith, *Rights and Wrongs: A Hard Act to Follow*, L. SOC’Y GAZETTE 105.40(1) (2008).

<sup>13</sup> *Id.*

<sup>14</sup> *Fairchild v. Glenhaven Funeral Services Ltd. and others; Fox v. Spousal (Midlands) Ltd.; Matthews v. Associated Portland Cement Manufacturers (1978) Ltd. and others*, [2002] UKHL 22 [34].

The opinions of the Law Lords in this case included substantive references to a number of foreign cases and materials from a significant number of different jurisdictions, with different legal systems. Cases were referred to and discussed from the common law countries of Australia, New Zealand, Canada, and the United States; from Scotland, a mixed jurisdiction; and from civil law jurisdictions, including France, Germany, the Netherlands, Greece, Spain, and Norway; and the opinions also included references to Roman law.<sup>15</sup> Indeed, it has been noted that the use of German legal materials in this case was: “a ‘difficult’ book even for German lawyers to use,”<sup>16</sup> and that it was not counsel that requested the use of foreign law in this instance, but the Law Lords themselves, who requested to be “addressed on the solutions adopted by civilian law systems, thus ‘forcing’ Counsel to extend their research and argument beyond the traditional consideration of Commonwealth and American authority.”<sup>17</sup>

The value that comparative law can bring English law through the use of foreign cases has been observed many times in the House of Lords, with the Law Lords on different occasions noting that England can learn much from legal developments in other jurisdictions.<sup>18</sup>

### III. Restrictions on the Use of Foreign Judgments in the Lower Courts

The benefits of the use of foreign judgments in the lower courts in England and Wales have been noted in a Practice Direction,<sup>19</sup> which regulates the use of foreign cases in these courts. The Practice Direction acknowledges that “cases decided in other jurisdictions can, if properly used, be a valuable source of law in this jurisdiction.”<sup>20</sup> However, the same paragraph that advocates the use of foreign cases also comes with a warning that, “at the same time, however, such authority should not be cited without proper consideration of whether it does indeed add to the existing body of law.”<sup>21</sup>

These courts are permitted to use foreign cases for comparative purposes, but have restrictions on the cases that can be used in court. A Practice Direction notes that:

In recent years, there has been a substantial growth in the number of readily available reports of judgments in this and other jurisdictions, such reports being available either in published reports or in transcript form. Widespread knowledge of the work and decisions of the courts is to be welcomed. At the same time, however, the current weight of available material causes problems both for advocates and for courts in properly limiting

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<sup>15</sup> *Id.* See also Orucu, *supra* note 1.

<sup>16</sup> Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (Nov. 2005) (referring to Fairchild, [2002] UKHL 22 [25]).

<sup>17</sup> *Id.*

<sup>18</sup> *White et al. v. Jones et al.*, [1995] 2 AC 207.

<sup>19</sup> Practice Direction on the Citation of Authorities, <http://www.hmcourts-service.gov.uk/cms/814.htm> (last visited Mar. 15, 2010). This practice direction applies to all courts in England and Wales, with the exception of the criminal courts, but extends to the Court of Appeal’s Criminal Division. See *id.* ¶ 5.

<sup>20</sup> *Id.* ¶ 9.1.

<sup>21</sup> *Id.*

the nature and amount of material that is used in the preparation and argument of subsequent cases.<sup>[22]</sup>

To ensure that foreign authorities are only cited in the English courts when their use would add to the law, the Practice Direction provides specific criteria that must be met. These are that the advocate citing the foreign authority must:

- state the proposition of law that the authority shows;
- indicate what the authority adds that is not found in the cases of England and Wales, or justify what adding a foreign authority to the domestic authorities would bring; and
- certify that there is no authority in England and Wales that prohibits the acceptance of the proposition that the foreign authority seeks to establish.<sup>[23]</sup>

This Practice Direction also does not apply to cases that were decided in the European Court of Justice or the organs of the European Convention on Human Rights. As noted above, cases from these latter bodies have a special status in English law as a result of the European Communities Act 1972 and the Human Rights Act 1998.<sup>24</sup>

#### IV. Concluding Remarks

As can be seen from the case examples from the House of Lords and the Practice Direction issued to the courts of England and Wales, the use of foreign cases and comparative law is widely accepted in England. While the use is regulated, in that there must be specific reasons for resorting to foreign law, its value is not underestimated.

In an article in the *International and Comparative Law Quarterly*, T. Koopmans expressed his opinion that the twenty-first century may become the era of comparative methods, opining that:

As we share so many difficult problems of society, and as we live closer and closer together on the planet, we seem bound to look at one another's approaches and views. By doing so we may find interesting things—but we may also find ways to cope with the tremendous legal challenges that seem to be in store for us.<sup>[25]</sup>

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<sup>22</sup> *Id.* ¶ 1.

<sup>23</sup> *Id.* ¶ 9.2.

<sup>24</sup> *Id.* ¶ 9.3 (referring to the European Communities Act 1972, c. 68, § 3; and the Human Rights Act 1998, c. 42, § 2(1)).

<sup>25</sup> T. Koopmans, *Comparative Law and The Courts*, 45 INT'L & COMP. L.Q. 545, 556 (July 1996).

# France

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**SUMMARY** French courts are among those that do not, as a rule, cite other court decisions or academic authority, with the exception of European Court of Human Rights caselaw. There is, however, a growing trend by these courts to inform themselves about foreign law in diverse ways. References to foreign law principally can be found in the preparatory material of the case or in studies prepared by institutions specializing in comparative law.

## I. Introduction

The French courts are among those that do not, as a rule, cite other court decisions or academic authority. Such a citation as a reason for the decision reached by the court could be grounds for a legal challenge for annulment.<sup>1</sup> In addition, the judgments of the *Cour de Cassation*, France's Supreme Court for civil and criminal matters, and to a lesser extent those of the administrative courts, are also known for their brevity and specific style. Guy Canivet, the former First President of the *Cour de Cassation*, believes that these are the reasons why French courts do not overtly use foreign law. In one of his lectures, he explained these reasons in the following way:<sup>2</sup>

In France, the *Cour de Cassation* and the other jurisdictions are structurally inhibited, by the traditional style in which a decision must be written and the prohibition to mention precedents, to expressly refer to foreign laws in the body of the decision.

This does not mean, however, that foreign law has no significance for the French courts, in particular its two highest courts. In fact, there is a growing trend by these courts to inform themselves about such law in diverse ways.<sup>3</sup> This report first examines the use of foreign law by the *Conseil d'Etat*, France's Supreme Court for administrative matters. The *Conseil d'Etat* was the first to break with tradition in recently citing a judgment of the English High Court of Justice in one of its decision. The report then addresses the use of foreign law by the *Cour de Cassation* and finally looks at the citation of European Court of Human Rights caselaw by French courts.

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<sup>1</sup> Ch. 2: *A Quick Glance at Seven Jurisdictions*, in SIR BASIL MARKESINIS & JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 64 (UCL Press 2006).

<sup>2</sup> *Id.* at 65 (quoting Guy Canivet [source unknown]) (translation by the author of this report, N.A.). Canivet also stated in another article that

... the French courts, in principle, cannot cite doctrinal authorities or jurisprudence in their judgments, whether it be national, supranational, or foreign. Additionally, the French decisions of the highest courts are particularly brief because by tradition and in principle they proceed by strictly deductive reasoning which prevents the elaboration of the true motives of the judgment.

Guy Canivet, Ch: 6: *The Practice of Comparative Law by the Supreme Courts*, in SIR BASIL MARKESINIS & JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW 317 (UCL Press 2006).

<sup>3</sup> *Id.* at 65, 66. See also SIR BASIL MARKESINIS & JÖRG FEDTKE, ENGAGING WITH FOREIGN LAW 220-23 (Hart Publishing 2009).

## II. Use of Foreign Law by the *Conseil d'Etat*

France has a dual court system, with civil and criminal courts as well as administrative courts. Administrative courts form a three-tier hierarchy headed by the *Conseil d'Etat*, below which are the regional administrative courts and the administrative tribunals. The *Conseil* reviews the decisions of the lower administrative courts.

Information on foreign laws are generally found in the conclusions of the *Commissaire du gouvernement* (Government Commissioner) or in the file prepared by the reporting judge. Under administrative procedure rules, once an action is filed before an administrative court, a reporting judge is appointed to the case and is charged with putting together a file that will be presented later to the court. The completed file is then handed over to the Government Commissioner who, contrary to its name, studies and researches cases as a neutral party. The Commissioner prepares an opinion (referred to as *conclusions*) setting forth the facts and analyzing the legal issues that should be raised. The Commissioner's opinions are generally very well researched and written, as well as creative.<sup>4</sup> In important cases, they are published either in legal journals or in the *Recueil des Arrêts du Conseil d'Etat*, the official publication of the *Conseil d'Etat*'s decisions.<sup>5</sup>

According to Roger Errera, a former member of the *Conseil d'Etat*, the Government Commissioners' opinions show that there has been an interest in foreign laws principally in the following fields: civil liability, extradition, and civil liberties.<sup>6</sup> Errera's analysis is summarized in subparts A-C, below.

### A. Civil Liability

In one of the earliest cases, decided in 1895, which dealt with state liability arising from the injuries sustained by a state arsenal employee where there was no fault on either side, Errera noted that the Commissioner quoted Belgian and Luxembourg law.<sup>7</sup> In a 1994 case where the court had to decide whether the principle of *confiance légitime* (legal theory related to legitimate expectations) should be the basis for state liability in cases of violation of such principle, the Commissioner referred to the law of Germany, Luxembourg, and the European Court of Justice.<sup>8</sup> In 2001, when the *Conseil* had to decide the extent of state liability for negligent supervision of banks, the Commissioner quoted the laws and practices of the United States, Great Britain, and Germany.<sup>9</sup>

Two major medical liability cases gave the opportunity to the Commissioners assigned to them to further use foreign laws in their opinions. In the first case, a mother was told by the hospital

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<sup>4</sup> JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 61 (Oxford Univ. Press 2008).

<sup>5</sup> *Id.*

<sup>6</sup> Roger Errera, Ch. 10: *The Use of Comparative Law Before the French Administrative Courts*, in GUY CANIVET ET AL., COMPARATIVE LAW BEFORE THE COURTS 156 (British Inst. of Int'l & Comp. Law 2004).

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

<sup>8</sup> *Id.* at 156, 157.

<sup>9</sup> *Id.* at 157.

that her child would be normal following an amniocentesis. The child was born with Down syndrome. The mother had notified the hospital that she would rather have an abortion than an abnormal child. The *Conseil* found that the state hospital was at fault for failing to notify the mother of the significant margin of error of an amniocentesis. As a result, she had not asked for another test. In this case the Commissioner had quoted American and British caselaw on wrongful life.<sup>10</sup> In the second case, the Paris Administrative Court and, on appeal, the *Conseil*, found that the Paris Hospitals Administration was not at fault for giving a transfusion to a Jehovah's Witness who had explicitly refused it, considering his critical state at his admission. Both Commissioners involved in the case had quoted American, English, and Canadian caselaw.<sup>11</sup>

## B. Extradition

In the case of Mme. Aylor, Errera noted, the Commissioner looked at the laws and practices of Germany, Italy, Austria, Denmark, Switzerland, and Great Britain, where extradition was requested by a state that still applied the death penalty to the offense committed.<sup>12</sup> In another extradition case, the law and practice of the state of California regarding the death penalty was cited.<sup>13</sup>

## C. Civil Liberties

Numerous examples of the use of foreign law can be found in the field of civil liberties, Errera said. In a 1999 case, for example, the Commissioner cited the law of numerous European countries as the *Conseil* had to decide whether a statute prohibiting the publication of polls two weeks before an election violated Article 10 of the European Convention on Human Rights (concerning freedom of expression).<sup>14</sup> In 1990, the constitutional case law of Germany, Spain, the United States, Austria, Italy, Norway, Portugal, and Canada was examined to determine whether the French law on abortion was compatible with the right to life set forth in Article 6 of the International Covenant on Civil and Political Rights, and Article 2 of the European Convention on Human Rights.<sup>15</sup>

Finally, as mentioned earlier, the *Conseil* broke with the tradition of not citing cases by expressly citing, in its own decision, a decision of the English High Court of Justice concerning labeling under EU law. In the Case of Société Techna S.A. rendered on October 29, 2003, the *Conseil* addressed the issue of whether the decree transposing EU directive 2002/2/EC (relating to the Percentage Ingredient Declaration of Compound Feed) into French law should be suspended pending a determination of the Directive's validity by the European Court of Justice. The

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<sup>10</sup> *Id.* at 157, 158.

<sup>11</sup> *Id.* at 158.

<sup>12</sup> *Id.* at 159 & n.23.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 160.

*Conseil* stated that it was suspending the decree for the same reasons cited by the English High Court in suspending the Directive in England.<sup>16</sup>

In addition to the Government Commissioners' opinions, studies on foreign laws and practices may be found in the public annual report prepared by the *Conseil*. These studies are prepared by French and foreign contributors. The 2009 report, for example, contains a study entitled "Foreign experiences in matters of contracts,"<sup>17</sup> while the 2008 report addressed "The right to healthy housing, putting health at the centre of English housing policies."<sup>18</sup>

### III. Use of Foreign Law by the *Cour de Cassation*

The *Cour de Cassation* is referred to as the guardian of the law. It only reviews questions of law, not questions of fact. The Court's essential purpose is to ensure that the interpretation of the law is uniform throughout the country.<sup>19</sup> The Court's decisions are usually short, unsigned, and without concurrences or dissents. The Court reviews approximately 17,000 to 22,000 cases a year. The Court has six chambers: five civil chambers (three strictly civil; a commercial, economic, and financial chamber; and a social chamber) and a criminal chamber. It is composed of a First President, six chamber presidents, eighty-nine judges, and sixty-six assistant judges.<sup>20</sup>

As in the case of the *Conseil d'Etat*, references to foreign laws may be found in the opinions of the *Avocats Generals* (General Advocates), who have a role similar to the role of the Government Commissioners in administrative cases, or the file prepared by the reporting judges. Until recently, these documents were rarely published and focused entirely on national law.<sup>21</sup> It is under the presidency of its former First President, Guy Canivet, that the *Cour de Cassation* started to develop a greater interest in foreign law.<sup>22</sup> Canivet was First President of the *Cour de Cassation* from 1999 to 2007, at which time he was appointed to the Constitutional Council.

In addition to the opinions of the General Advocates or the *conclusions* of the reporting judges mentioned above, the *Cour de Cassation* sometimes resorts to outside neutral institutions or universities to prepare comprehensive studies on the state of foreign law on issues before it. This way of proceeding is seen as increasing "the reliability and up-to-date nature of the research" and

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<sup>16</sup> Conseil d'Etat [CE], Oct. 29, 2003, *Societe Techna S.A. et autres*, No. 260768, available at Lexbase A9824c9Q (fee database).

<sup>17</sup> CONSEIL D'ETAT, 2 RAPPORT PUBLIC 2009 (La Documentation Française, 2009), <http://www.ladocumentationfrancaise.fr/rapports-publics/094000298/index.shtml>.

<sup>18</sup> CONSEIL D'ETAT, RAPPORT PUBLIC 2008 (La Documentation Française, 2008), <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000313/0000.pdf>.

<sup>19</sup> Ordinance 2006-673 Reforming the Code of Judicial Organization art. 411.2, June 8, 2006, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 9, 2006, p. 8710.

<sup>20</sup> Cour de Cassation, *Institution*, <http://www.courdecassation.fr/> (last visited Mar. 12, 2010).

<sup>21</sup> MARKESINIS & FEDTKE, *supra* note 3, at 221.

<sup>22</sup> *Id.*

as “insulating the court from criticism of bias or obvious incompetence” where the judges are not in a position to read the foreign texts.<sup>23</sup>

The Court, for example, requested that the *Société de législation Comparée* (French Comparative Law Institute) prepare two research reports, one on the case of wrongful birth and the other on whether a person who has caused a car accident that led to a miscarriage could be charged with manslaughter.<sup>24</sup> These studies were circulated in advance to all the parties.<sup>25</sup>

In a 2007 case, the *Cour de Cassation* ruled that same sex marriages are invalid under French law and that a marriage is a union between a man and a woman under the Civil Code. The Court had asked the Institute of Comparative Law of Lyon to provide a study on how other countries dealt with the issue. The study had considered the laws of several American States, Great Britain, Denmark, Sweden, Germany, the Netherlands, Belgium, and Spain as well as a decision of the South African Supreme Court.<sup>26</sup>

In the opinion of Canivet, the analysis of the jurisprudence of the *Cour de Cassation* shows that recourse to foreign law is found, for example, each time that:

... the national law has the need to be completed or modernised; when the judge rules on the great societal issues; when the question is common to several countries; when the solution has an economic dimension that exceeds the limits of the legal system in which it applies; and finally when it is a question of deciding purely technical matters.

Finally, the *Cour de Cassation* also benefits from information communicated by judges who have been sent on duty abroad (*juges de liason*). This was the case when the court had to deal with the issue of the professional confidentiality of religious ministers versus the needs of a criminal investigation. In this case, the General Advocate found information on other countries’ solutions through the *juges de liason* network.<sup>27</sup> The Court also entered into a judicial cooperation agreement with Great Britain in 1994, which was extended to Ireland in 2007. Under this agreement, exchanges of judges are organized to further their knowledge of the laws of the other participating countries.<sup>28</sup>

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<sup>23</sup> *Id.* at 223.

<sup>24</sup> Guy Canivet, Ch. 12: *The Use of Comparative Law Before the French Private Law*, in GUY CANIVET ET AL., *supra* note 6, at 191.

<sup>25</sup> *Id.*

<sup>26</sup> MARKESINIS & FEDTKE, *supra* note 3, at 222-23.

<sup>27</sup> Canivet, *The Practice of Comparative Law by the Supreme Courts*, *supra* note 2, at 328.

<sup>28</sup> Cour de Cassation, *Activité Internationale*, [http://www.courdecassation.fr/activite\\_internationale\\_5/britanno\\_irlandais\\_632/](http://www.courdecassation.fr/activite_internationale_5/britanno_irlandais_632/) (last visited Mar. 12, 2010).

#### IV. Citation of European Court of Human Rights Caselaw

As France has recognized the superiority of a treaty over domestic law,<sup>29</sup> the courts are bound to apply the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>30</sup> The courts have achieved this aim in part by referring to the caselaw of the European Court of Human Rights that has extensively interpreted the Convention's rights and freedoms. There are many examples of the *Conseil d'Etat*<sup>31</sup> or the *Cour de Cassation*<sup>32</sup> overtly referring to the caselaw of the European Court of Human Rights. As stated by Canivet, "these references are quite impressive if we keep in mind the French courts' traditional refusal to cite judicial precedent in their decision."<sup>33</sup>

#### V. Concluding Remarks

France's two highest courts have recently shown a greater interest in informing themselves about foreign laws. As a rule, they have not overtly referred to foreign judgments, with the exception of European Court of Human Rights caselaw. Reference to foreign laws can be found in the preparatory material of the case or in studies prepared by institutions specializing in comparative law. The future will show whether this recent trend will continue and grow.

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<sup>29</sup> 1958 CONST. art. 55.

<sup>30</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* Sept. 3, 1953, available at the website of the European Court of Human Rights, <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>.

<sup>31</sup> Bruno Genevois, *La Cour Européenne des droits de l'homme vue du Palais Royal*, in PAUL TAVERNIER, LA FRANCE ET LA COUR EUROPEENNE DES DROITS DE L'HOMME 1998-2008 at 165-83 (2009).

<sup>32</sup> Canivet, *supra* note 24, at 189.

<sup>33</sup> *Id.* at 189 n.28.

# Germany

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**SUMMARY** Germany's Federal Constitutional Court occasionally uses foreign law comparisons when interpreting German constitutional law. This use of the comparative method has not been questioned in general. Dissenting opinions, however, have at times disagreed with the relevance of the comparisons. In recent years, references to foreign laws have become more methodical and comprehensive.

## I. Introduction

In the past sixty years, German judges have occasionally looked at the legal doctrines, laws, and judicial decisions of other countries to help them resolve a legal or constitutional issue.<sup>1</sup> In particular, the Federal Court of Justice (FCJ) and the Federal Constitutional Court (FCC) have included comparative remarks in some decisions. The former is the court of last review for cases on private law and criminal law,<sup>2</sup> and the latter has exclusive jurisdiction over constitutional issues.<sup>3</sup>

This short article will focus on the comparatist endeavors of the FCC. Since its creation in 1951,<sup>4</sup> this Court has become a powerful force in interpreting the Basic Law, the German Constitution that was enacted in West Germany in 1949.<sup>5</sup> The decisions of the FCC have also attracted interest in other countries,<sup>6</sup> and German constitutional thinking had an impact on the European Court of Human Rights (ECtHR) and on the European Court of Justice as, for instance, in the development of the principle of proportionality as a guiding yardstick in the application of constitutional principles.<sup>7</sup>

The FCC also is of interest because it has some communality with the U.S. Supreme Court. In fact, the FCC was modeled to some extent after the U.S. Supreme Court.<sup>8</sup> Like the U.S.

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<sup>1</sup> BASIL MARKESINIS & JÖRG FEDTKE, *ENGAGING WITH FOREIGN LAW* 165-67 (Oxford, 2009).

<sup>2</sup> WOLFGANG HEYDE, *JUSTICE AND THE LAW IN THE FEDERAL REPUBLIC OF GERMANY* 38 (Heidelberg, 1994). For a survey of the comparative decisions of the Federal Court of Justice, see Hannes Unberath, *Comparative Law in the German Courts*, in *COMPARATIVE LAW BEFORE THE COURTS* 307 (Guy Canivet et al. eds., 2004).

<sup>3</sup> HEYDE, *supra* note 2, at 40.

<sup>4</sup> Gesetz über das Bundesverfassungsgericht [BVerfGG], Mar. 12, 1951, BUNDESGESETZBLATT [BGBl., official law gazette for the Federal Republic of Germany] I at 243, *as last repromulgated* Aug. 11, 1993, BGBl. I at 1473, *as amended*.

<sup>5</sup> Grundgesetz für die Bundesrepublik Deutschland [GG], May 23, 1949, BGBl. I.

<sup>6</sup> GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* 61 (Cambridge, 2005).

<sup>7</sup> T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465 (2005).

<sup>8</sup> MARCEL KAU, *UNITED STATES SUPREME COURT UND BUNDESVERFASSUNGSGERICHT* 52 (Heidelberg, 2007).

Supreme Court, the FCC writes lengthy well-reasoned opinions that draw on a variety of resources, including history and interest-balancing;<sup>9</sup> and, like the justices of the U.S. Supreme Court, their counterparts in the FCC may voice their dissent in a separate opinion.<sup>10</sup> Moreover, in its decisions, the FCC has drawn comparisons to the U.S. Supreme Court and U.S. law more frequently than to the courts and laws of any other countries.<sup>11</sup>

## II. Function, Organization, and Procedures of the Federal Constitutional Court (FCC)

The FCC's jurisdiction extends to various types of constitutional issues. These include disputes between the organs of the federal government and between the federation and the states, judicial review of the constitutionality of federal and state law, and complaints by individuals that their constitutional rights have been violated by an act of government.<sup>12</sup> The Court is composed of two senates of eight justices each and they decide by a simple majority. In case of a tie, the challenged measure is deemed constitutional and the defenders of its constitutionality write the opinion.<sup>13</sup>

The justices of the Court also convene in several chambers of three justices. In these groupings they decide whether to accept or reject constitutional complaints of individuals. This procedure decreases the caseload of the Court, yet not as effectively as the denial of *certiorari* does for the U.S. Supreme Court, because the German justices still must provide a reasoned response to each individual complaint.<sup>14</sup>

## III. The Decisions

### A. Overview

Statistics on the number of cases in which the FCC used foreign law as an interpretative tool are not available. In 1974, Mössner counted twenty-four decisions that had employed foreign law comparisons. In 2009, Anna Cárdenas Paulssen counted fifty-nine decisions between 1951 and July 2007 in which the FCC had quoted the courts of other countries.

Cárdenas Paulssen's count, however, does not include the decisions that draw comparisons to foreign statutory law or doctrinal writing, nor does it include unpublished decisions. On the

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<sup>9</sup> DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 48 (Durham, 1989). Among the major differences to the U.S. Supreme Court is the absence of *stare decisis* in Germany and a lack of interest in the subjective will of the framers of the Constitution as an interpretative tool. *Id.* at 49.

<sup>10</sup> KAU, *supra* note 8, at 482.

<sup>11</sup> In the fifty-nine decisions that quoted foreign courts and that were issued between September 1951 and February 2007, U. S. courts were cited twenty-six times. See AURA CÁRDENAS PAULSEN, ÜBER DIE RECHTSVERGLEICHUNG IN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 181-86 (Hamburg, 2009).

<sup>12</sup> GG. art. 93.

<sup>13</sup> BVerfGG § 15. See also ERNST BENDA & ECKART KLEIN, VERFASSUNGSPROZESSRECHT 51 (Heidelberg, 2001).

<sup>14</sup> KAU, *supra* note 8, at 443.

other hand, Cárdenas Paulssen includes numerous decisions in which the FCC examined foreign law in order to ascertain whether a principle had become part of customary international law or a general rule of international law.<sup>15</sup> These are part of German domestic law, outranking domestic statutory law but being themselves outranked by the Basic Law.<sup>16</sup>

It appears that the FCC was most active in its foreign law comparisons in the first two decades of its existence.<sup>17</sup> Yet, in these and other early decisions, references to foreign law were sporadic and unsupported by citations, often generically referring to developments in other countries or “international developments.”<sup>18</sup> As Sir Basil Markesinis, a veteran observer of the FCC, rightly states, this cursory and sketchy referral to foreign law is in marked contrast to the detailed and well-documented exposition of German law in the same decisions.<sup>19</sup>

This treatment of foreign law in the decisions may indicate that foreign law comparisons are not central to the decision-making process of the Court, but are merely illustrative and anecdotal, rounding out a picture or making an additional point. On the other hand, this sketchy treatment in the opinions may have been preceded by lengthy debates in the deliberations of the Court. Markesinis suspected that this had happened in the *Spiegel* case, discussed below (Part II(B), The Early Cases).<sup>20</sup>

During the 1980s and 1990s the FCC’s comparative activity slowed down, resulting only in a handful of cases.<sup>21</sup> Since 2004, however, there has been an increase in comparatist decisions,<sup>22</sup> and in these more recent decisions references to foreign law are more comprehensive and specific. Some recent decisions may also be of interest because they show how the FCC deals with human rights that are guaranteed by the European Convention on Human Rights (ECHR)<sup>23</sup> (see Part II(C), below, Recent Decisions).

## B. The Early Decisions

The use of foreign law comparisons in the early decisions of the FCC has been ascribed to the need of a new court to look at role models in the Western world when interpreting a new

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<sup>15</sup> CÁRDENAS PAULSEN, *supra* note 11, at 31-32.

<sup>16</sup> See also Christian Hillgruber, in BRUNO SCHMIDT-BLEIBTREU ET AL., GG KOMMENTAR ZUM GRUNDGESETZ AT 776-77 (Köln, 2008).

<sup>17</sup> Jörg Mössner, *Rechtsvergleichung und Verfassungsrechtsprechung*, ARCHIV DES ÖFFENTLICHEN RECHTS 2004, 193-94.

<sup>18</sup> *Id.* at 167.

<sup>19</sup> Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TULANE L. REV. 11, 38 (2005).

<sup>20</sup> MARKESINIS & FEDTKE, *supra* note 1, at 170.

<sup>21</sup> Markesinis & Fedtke, *supra* note 19, at 42.

<sup>22</sup> CÁRDENAS PAULSEN, *supra* note 11, at 34.

<sup>23</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], signed Nov. 4, 1950, 213 U.N.T.S. 222.

Constitution.<sup>24</sup> The famous decisions of that time include the *Lüth* case of 1958,<sup>25</sup> citing Justice Cardozo, and the *Spiegel* case of 1966, referring to Swiss law and the “NATO allies.”<sup>26</sup>

In *Lüth*, the FCC applied article 5 of the Basic Law, the guarantee of freedom of expression, to repeal an injunction that a German court had issued against Lüth, a German politician who had called for a boycott of a movie made by a producer who formerly made infamous Nazi propaganda movies. In a decision that became famous for extending the protection of the basic rights of the Basic Law to dealings governed by private law, the Court quoted Cardozo’s famous statement on freedom of expression as “the matrix, the indispensable condition of nearly every other form of freedom.”<sup>27</sup> In addition, the Court referred to article 11 of the French Declaration of Human and Political Rights of 1789.<sup>28</sup>

In *Spiegel*, the Court rejected a constitutional complaint of the editor of the *Spiegel* news magazine that had been brought after prosecutorial authorities searched the premises of the magazine for evidence of treason, of which the magazine was suspected after publishing sensitive materials. The Court rejected the complaint after balancing freedom of the press with security interests. The Court’s opinion asserted that other democracies would rule likewise, but cited only Swiss law and a Swiss commentator who spoke at a conference in support of this statement. In addition, the Court reasoned that a contrary ruling would make Germany look untrustworthy in front of other NATO members, all of which protect military secrets more thoroughly than Germany.<sup>29</sup>

The dissenters in this four-to-four split decision reasoned that a comparison to the laws of other countries is irrelevant if only an individual provision is compared without evaluating the foreign legal system as a whole as to its suitability for a comparison.<sup>30</sup>

### C. Recent Decisions

An FCC decision of 2007<sup>31</sup> is of interest because the recourse to foreign law in the Court’s opinion and its criticism in the dissent raise, though in less strident tones, the same questions that Justice Scalia addressed in *Lawrence v. Texas*.<sup>32</sup> In the July 2007 decision, the FCC ruled on the constitutionality of financial disclosure requirements for members of Parliament and held that the

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<sup>24</sup> BASIL MARKESINIS & JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW* 76, 79 (Austin, 2006).

<sup>25</sup> Bundesverfassungsgericht [BVerfG], Nov. 22, 1951, *Entscheidungen des Bundesverfassungsgerichts* [BverfGE] 7, 198, *partially translated in* KOMMERS, *supra* note 9, at 368.

<sup>26</sup> BVerfG, Jan. 27, 1966, BVerfGE 20, 162.

<sup>27</sup> BVerfG 7, 198, 208 (quoting Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

<sup>28</sup> BverfGE 7, 198, 208 (referring to the *Déclaration des droits de l’homme et du citoyen*, Aug. 26, 1789, *available at* <http://archiv.jura.uni-saarland.de/BIJUS/constitution58/decl1789.htm>).

<sup>29</sup> BverfGE, 20, 162, 221. For a translation of excerpts, *see* MARKESINIS & FEDTKE, *supra* note 1, at 169.

<sup>30</sup> BverfGE 20, 162, 208. *See also* MARKESINIS & FEDTKE, *supra* note 1, at 170, for translated excerpts.

<sup>31</sup> BVerfG, July 4, 2007, BverfGE 118, 277.

<sup>32</sup> As expressed in *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

then newly enacted requirements were constitutional. The case was decided in the Second Senate, by a four-to-four split among the justices, which, in accordance with the Court's procedural laws upheld the constitutionality of the challenged measure.<sup>33</sup>

The Court held that, in the German case, the public's interest in transparency outweighed the privacy interests of Members of Parliament. The Court also found that this balance was in keeping with international developments, because representative democracies had enacted increasingly stricter rules to protect against financial influence on parliamentary decisions. The Court then distinguished between parliamentary disclosure rules, the general publicity of tax returns, prohibitions of outside active income, and a mixture of these restrictions in the surveyed countries.<sup>34</sup>

For disclosure to the public, the Court referred to the United States, Poland, and some unspecified Eastern European countries. For disclosure to the President of the Parliament, the Court referred to Italy. For publicity of tax returns, the Court referred to Sweden, Norway, and some Swiss cantons. For restrictions on outside active income, the Court referred to the Netherlands and Spain. Thereupon, the Court concluded that, in the light of these foreign laws, the German disclosure rules were not objectionable.<sup>35</sup>

The four dissenting justices found that the German disclosure requirements violated the constitutionally mandated independence of the representatives.<sup>36</sup> They also found various flaws in the comparative law remarks contained in the Court's opinion. They found that the countries that required disclosure were a minority, and that without a closer look at these foreign rules they could not be considered a suitable yardstick for Germany.<sup>37</sup>

The dissent questioned the relevance of comparisons to countries that require income disclosure of its population in general because such countries differed from Germany, where the privacy of personal data is a constitutional principle. In addition, the dissent argued that to restrict Members of Parliament from engaging in professional income-earning activities outside of their parliamentary functions would violate the German constitutional guarantee of the freedom to choose one's profession.<sup>38</sup> The dissent recommended that the legislature find other means for protecting against financial influence-peddling that would not infringe on constitutional guarantees, and concluded by stating that:

Otherwise the danger would exist that, under recourse to other legal systems, the protection of the private sphere and the right to informational self-determination (Basic Law art. 2(1) in conjunction with art. 1(1)) would at first be treated as a relative value for

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<sup>33</sup> BVerfGG § 15.

<sup>34</sup> BVerfGE 118, 356.

<sup>35</sup> *Id.* at 357.

<sup>36</sup> *Id.* at 377.

<sup>37</sup> *Id.* at 398.

<sup>38</sup> *Id.* at 399.

Members of Parliament, later on for other societal groups, and ultimately for all citizens.<sup>[39]</sup>

An FCC decision of 2008 ruled on the constitutionality of a criminal prohibition of incest between siblings.<sup>40</sup> As compared to the skimpy comparisons of the earlier years, this decision contains a comprehensive and global survey of the laws of twenty countries, describing whether or not they penalize such incest or otherwise discourage it. It also analyzes the decision of foreign courts that had ruled on the constitutionality of such incest. The decision acknowledged that the foreign law survey was made by the Max Planck Institute for Foreign and International Criminal Law.<sup>41</sup>

Some references to recent FCC decisions may help to explain how FCC decisions relate to human rights guarantees of the ECHR. In a decision of 2006 on the right of aliens to make use of German sex change legislation,<sup>42</sup> the FCC dealt with issues that are protected by the ECHR. The FCC held that a provision of the German Sex Change Act was irreconcilable with the German Basic Law and had to be changed by the legislature. The decision included an extensive survey of how other European countries, the ECtHR, and the Court of Justice of the European Union had applied the ECHR to this issue. In this case, the FCC did not compare the foreign laws and decisions for the purpose of interpreting the German constitutional guarantees. Instead, these foreign decisions and enactments were scrutinized to ascertain the content of the human rights guarantees of the ECHR.

In Germany, the ECHR is effective at the level of ordinary statutory law. Yet, the FCC cannot be petitioned to rule on the compatibility of the ECHR with German legislative or administrative acts; to pursue such a claim, the plaintiff must exhaust the national remedies and then file a claim with the ECtHR.<sup>43</sup> The FCC may disagree with a decision of the ECtHR if the latter does not conform to core tenets of the Basic Law.<sup>44</sup> Generally, however, the FCC uses the ECtHR decisions as a guide for interpreting the German Basic law, given that the human rights guaranteed in both instruments are similar. This was last demonstrated in a decision of the FCC of 2008, in which the Court had to rule on an issue balancing privacy versus freedom of the press,<sup>45</sup> a topic on which the ECtHR and the FCC disagree.<sup>46</sup>

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<sup>39</sup> *Id.* (translated by the author, E.P.).

<sup>40</sup> BVerfG, Feb. 2, 2008, docket no. 2 BvR 392/07, *available at* JURIS (by subscription).

<sup>41</sup> *Id.* at ¶ 15.

<sup>42</sup> BVerfG, July 18, 2006, BverfGE 116, 243.

<sup>43</sup> Schmidt-Bleibtreu et al., *supra* note 16, at 105.

<sup>44</sup> BVerfG, Oct. 14, 2004, BVerfGE 111, 307.

<sup>45</sup> BVerfG, Feb. 26, 2008, docket no. 1 BvR 1626/07, *available at* JURIS (by subscription).

<sup>46</sup> *Anmerkung*, Gewerblicher Rechtsschutz und Urheberrecht 2008, 547.

#### IV. Scholarly Doctrines

The FCC's limited recourse to foreign law comparisons has spawned a limited amount of scholarly interest. Whereas scholars have readily endorsed the judicial use of the comparative method in the realm of private law,<sup>47</sup> the opinions on the use of this method for constitutional interpretations have varied. A cautious approach was adopted by Jörg Mössner in 1974.<sup>48</sup> He would limit the use of the comparative method to the interpretation of existing rules, and he suggests that comparison with foreign countries works best if they have similar constitutional systems.<sup>49</sup>

In 2005, Bernd Wieser suggested that the comparative method is justified in constitutional cases because constitutions contain so many broad and abstract concepts that benefit from concrete examples in their interpretation.<sup>50</sup> Yet, he also recommended that comparison should be limited to foreign countries with compatible constitutional values, and he rejects the comparative method as a tool for creating transnational uniformity in constitutional law.<sup>51</sup> Although Wieser is an Austrian scholar his work is relevant for German scholarship due to his detailed involvement with German theories.<sup>52</sup>

The other end of the spectrum in the range of German opinions on the use of foreign law in constitutional decisions is reflected in the work of Susanne Baer.<sup>53</sup> In 2004 she summarized her thoughts on the desirability of and methodology for foreign law comparisons in constitutional law as follows:

In comparative constitutional law, method is as crucial as it is underdeveloped. The article proposes to apply methodologies developed in gender studies, critical race theory, post-colonial theory, and intercultural settings to comparative law. Namely, it is a call to develop intersubjective [sic] competence and abilities in order to properly deal with the "other." Encounters with the "other" are frequent in comparative law and, looked at in detail, come with almost every term discussed in comparative constitutionalism. Questions like "what is a court," "how important are economic and social rights?," or "which right is at stake in cases of abortion?," then deserve answers based on a reflexive understanding of one's legal system. Such an understanding is needed in a world in which we see more uses and growing acceptance of comparative legal reasoning in higher courts, in a world in which transnational legal practice constantly confronts us with a variety of legal systems and cultures, and in a world in

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<sup>47</sup> MARKESINIS & FEDTKE, *supra* note 1, at 168.

<sup>48</sup> Mössner, *supra* note 17, at 195.

<sup>49</sup> *Id.* at 241-42.

<sup>50</sup> BERND WIESER, VERGLEICHENDES VERFASSUNGSRECHT 35 (Wien, 2005).

<sup>51</sup> *Id.* at 35-37.

<sup>52</sup> *Id.* at 4-5. In BverfGE 118, 277, the dissent quoted WIESER, *supra* note 50, at 398.

<sup>53</sup> Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 2004, 758.

which legal education calls for “key qualifications” to become, after all, a good lawyer able to deal with differences, inequalities, and similarities on the globe.<sup>[54]</sup>

The FCC itself stated its position on the use of comparisons to foreign law by other courts in 1953,<sup>55</sup> in relation to decisions of the German courts that had developed family law in accordance with the then new constitutional guarantee of equal rights of men and women.<sup>56</sup> The FCC stated that the courts proceeded correctly when they applied the existing laws, to the extent that they were compatible with the new constitutional requirement, and when, in cases that required legal interpretation and the filling of gaps, they employed tried and tested judicial techniques, among them, comparisons to foreign law.<sup>57</sup>

## V. Conclusion

The FCC has at times resorted to foreign law comparisons in its interpretation of German constitutional principles. In the first two decades of the Court’s existence, these references to foreign law were cursory and sketchy, and they mostly looked to other Western democracies. In recent years, the Court has adopted a more methodical and global approach when drawing comparisons to foreign law. Throughout the Court’s existence, however, dissenting opinions have disagreed with the relevance of the chosen foreign law comparisons.

The FCC surveys foreign law not only as an aid in the interpretation of the Basic Law, the German Constitution of 1949, but also to ascertain the content of international law principles and human rights guarantees expressed in international treaties. This activity reflects the increasing importance of international human rights standards.

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<sup>54</sup> *Id.* (translated by the author, E.P.).

<sup>55</sup> BverfGE 3, 225, 244.

<sup>56</sup> GG, art. 3(2).

<sup>57</sup> For a translation of this passage, see MARKESINIS & FEDTKE, *supra* note 24, at 76.

# India

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**SUMMARY** Indian legislation is under the strong influence of British and American law, and judges often rely on foreign court rulings in interpreting domestic statutes and international instruments. This is especially true in cases related to the protection of human rights, privacy, and the environment.

Because it inherited a common law judicial system, India frequently relies upon foreign judgments in the interpretation of its laws. In fact, reliance on foreign precedents is necessary in certain categories of appellate litigation and adjudication.<sup>1</sup> Indeed, the current Chief Justice of India stated in a lecture that Indian “domestic courts are called upon to engage with foreign precedents in fields such as ‘Conflict of Laws.’ ”<sup>2</sup>

Indian laws are modeled on British statutes and enactments. The fundamental rights of citizens of India under the Constitution of India are based entirely on the U.S. Bill of Rights. As a result, it is imperative that the higher judiciary in India follow the precedents of foreign courts in clarifying the parameters of statutes applied. Courts are also required to review the text and interpretations of international instruments, e.g., treaties, conventions, and declarations. The Chief Justice of India has stated, “In recent years, the decisions of Constitutional Courts in common law jurisdictions such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law.”<sup>3</sup> In India, as in the jurisdictions mentioned, reliance on foreign precedents has become commonplace in public law litigation.

It is recognized that Indian courts look to international as well as comparative law sources in determining creative strategies for developing norms for the protection of life and liberty guaranteed by Article 21 of the Constitution of India. Reliance on foreign precedents is considered a vital instrumentality for the Indian Supreme Court’s decisions, which have extended constitutional protection to several socio-economic entitlements and causes, such as environmental protection, gender justice, and good governance, among others. Access to foreign legal materials has become much easier because of the development of information and communications technology. Thus, the Indian courts can more easily obtain and review foreign judgments and precedents for use in domestic law interpretations.

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<sup>1</sup> Chief Justice K.G. Balakrishnan, *The Role of Foreign Precedents in a Country’s Legal System*, Lecture at Northwestern University (Oct. 28, 2008) (transcript available on the Supreme Court of India’s website, at [http://www.supremecourtfindia.nic.in/speeches/speeches\\_2008/28%5B1%5D.10.08\\_Northwestern\\_University\\_lecture.pdf](http://www.supremecourtfindia.nic.in/speeches/speeches_2008/28%5B1%5D.10.08_Northwestern_University_lecture.pdf)).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.* at 3.

Since the promulgation of its Constitution in 1950, courts in India have frequently relied on decisions from other common law jurisdictions, the most prominent among them being the United Kingdom, the United States, Canada, and Australia. The opinions from the courts of these countries have been readily cited and relied on in landmark constitutional cases dealing with the right to privacy, including one such case in which the Supreme Court of India dealt with unauthorized police surveillance and held it was a violation of the “right of privacy” on the facts of the case presented.<sup>4</sup> In upholding this right, the Court relied on numerous decisions of the U.S. Supreme Court.<sup>5</sup> In another instance concerning freedom of the press,<sup>6</sup> the Court relied on the U.S. Supreme Court’s decision in *Kovacs v. Cooper*.<sup>7</sup> While subsequently upholding the death sentence, the Supreme Court of India relied on the U.S. cases of *Furman v. Georgia*, *Arnold v. Georgia*, and *Proffitt v. Florida*.<sup>8</sup>

In a recent decision of the Delhi High Court, delivered on July 2, 2009, section 377 of the Indian Penal Code (No. 45 of 1876), which describes the offense of homosexuality, was declared a violation of those rights guaranteed under the Constitution.<sup>9</sup> In declaring the provision unconstitutional, the High Court relied on a number of U.S. decisions, including *Griswold v. State of Connecticut*, where the U.S. Supreme Court invalidated a state law prohibiting the use of drugs or devices of contraception in protecting the right of privacy; *Olmstead v. United States*, where the Indian Supreme Court especially considered the dissent of Justice Brandeis on the right to privacy; and the landmark abortion decision, *Roe v. Wade*.<sup>10</sup>

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<sup>4</sup> *Kharak Singh v. State of Uttar Pradesh*, (1963) A.I.R. S.C. 1295.

<sup>5</sup> *Id.* (citing *Munn v. Illinois*, 94 U.S. 113 (1876); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

<sup>6</sup> *Bennett & Coleman v. Union of India*, A.I.R. S.C. 106 (1973).

<sup>7</sup> *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

<sup>8</sup> *Bachan Singh v. Union of India*, (1980) A.I.R. S.C. 898 (citing *Furman v. Georgia*, 408 U.S. 238 (1972); *Arnold v. Georgia*, 224 S.E.2d 386 (Ga. 1976); *Proffitt v. Florida*, 428 U.S. 242 (1976)).

<sup>9</sup> *Naz Foundation v. NCT of Delhi*, WP(C) No. 7455/2001.

<sup>10</sup> *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Olmstead v. United States*, 277 U.S. 438 (1928); *Roe v. Wade*, 410 U.S. 113 (1973)).

# Israel

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**SUMMARY** Israeli courts, particularly the Supreme Court, extensively cite foreign law for purposes of analyzing Israeli law. This practice evolved during the British Mandate era, continued after the State became independent, and has resulted in both common law as well as continental law influencing Israeli law. The citation of foreign law by the Court does not make the cited foreign law binding on Israeli courts, and is used for inspirational purposes only.

## I. Introduction

The citation of foreign law by Israeli courts is relatively common. The scope and purpose of such citation, however, has changed over the years. Until repealed in 1980, a statutory 1922 British Mandate requirement to apply English common law and equity when Israeli law was silent was part of the existing law. Following its repeal, the reference to English law, much like references to the laws of other countries, became merely optional. Even before its repeal, the requirement that English law be imported into the Israeli system had not been implemented by Israeli judges, who viewed the conditions arising from the state's independence in 1948 as justifying deviation from English law based on the exception recognized in the original 1922 law for different circumstances of the country and its inhabitants.

While Israeli judges are under no obligation to apply or consider the law of England or any other country in analyzing Israeli law, a review of Israeli court decisions indicates that comparative law is frequently cited by the courts. References to the laws of the United States, the United Kingdom, Canada and Australia are said to be commonplace, as are references to the laws of Continental Europe (primarily German, French and Italian laws).<sup>1</sup>

## II. Historical Background

The State of Israel occupies part of the territory of Palestine. Prior to 1948, this territory included areas currently belonging to Israel, Jordan, the West Bank, and Gaza. Palestine was carved out of the Ottoman Empire after World War I and entrusted to Great Britain as a mandated territory by the League of Nations. In accordance with the British Mandate's art. 46 of the Palestine Order in Council 1922, domestic courts were instructed to exercise the Ottoman Law in force in Palestine on November 1, 1914, as well as orders in council, ordinances, and regulations imposed by the British authorities. Where no law existed on a particular matter (*lacuna*), courts were instructed to exercise their jurisdiction:

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<sup>1</sup> Aharon Barak, *Comparison in Public Law, in* JUDICIAL RECOURSE TO FOREIGN LAW 287, 292 (Sir Basil Markesinis & Professor Jörg Fedtke eds., UCL Press 2006).

...in conformity with the substance of the common law and the doctrines of equity in force in England. ... Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.<sup>[2]</sup>

Following the establishment of the State of Israel, art. 11 of the Law and Administration Ordinance 1948<sup>3</sup> continued the application of the then existing law, subject to necessary modifications that might have resulted from the establishment of the State and its authorities.

In 1980, the link to English common law and doctrines of equity contained in Article 46, cited above, was repealed by Foundation of Law, 5740-1980,<sup>4</sup> section 1 of which stated, “[W]here the court, faced with a legal question requiring a decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.”<sup>5</sup>

### III. Impact of Israel's Heritage as Compared with Foreign Law

According to judicial interpretation, the above cited provision of the Foundation of Law, 5740-1980<sup>6</sup> recognizes specific principles of Israel's heritage, including freedom, justice, equity and peace, rather than general Jewish law, as a source for judicial decisions when there is no relevant law either in a statute, in case law, or by analogy.<sup>7</sup>

A 1980 decision of the Israeli Supreme Court demonstrates the Court's approach. Supreme Court President Aharon Barak rejected Jewish law as a basis for the interpretation of the right of a finder under the Israeli legislation of the Restoration of Lost Property Law, 5733-1973.<sup>8</sup> He held that Jewish law is not a source of law in the State of Israel, but that it can be used for judicial inspiration for comparison purposes. Comparative law, in the court's view, is useful “when the legal institutions that are being compared are compatible, in that they are based on mutual basic assumptions and are designed to obtain mutual goals.”<sup>9</sup> Justice Barak determined that the position of Jewish law in that case was irrelevant for the interpretation of Israeli legislation because of its focus on rewarding the finder for guarding a lost item if the original owner is not found, rather than on preservation of the original ownership.<sup>10</sup>

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<sup>2</sup> 3 THE LAWS OF PALESTINE 2580 (rev. ed. 1933), STATUTORY RULES AND ORDERS 362 (London, 1923).

<sup>3</sup> 1 Laws of the State of Israel (LSI) 7 (5708-1948).

<sup>4</sup> Foundation of Law, 5740-1980, 34 LSI 181 (5740-1979/80).

<sup>5</sup> *Id.*

<sup>6</sup> Foundation of Law, 5740-1980, 34 LSI 181 (5740-1979/80).

<sup>7</sup> AHARON BARAK, 1 INTERPRETATION IN LAW 528-32 (Nevo Publishing, 1992).

<sup>8</sup> Restoration of Lost Property Law, 5733-1973, 27 LSI 187 (1972/73).

<sup>9</sup> Civil Appeal 546/78 Bank Kupat Am Ltd. v. Eliezer Handles, 34(3) Piske Din (P.D.) 57 (1980).

<sup>10</sup> *Id.*

In addition to obtaining inspiration by resorting to Jewish law principles, Israeli courts make frequent references to foreign law. This practice, in fact, seems to be more common than referring to Jewish law sources. In a 1984 decision, the Supreme Court expressly recognized that it may review court decisions from the United States or other foreign countries “that apply legal provisions similar to ours, for determination of our own views... for understanding similar legal provisions...”<sup>11</sup> The reference is made for the purpose of comparison and has no binding effect.

#### IV. The Impact of Foreign Law on Domestic Judgments

Justice Barak actively promoted the use of comparative law in judicial lawmaking. In addition to writing numerous leading decisions on human rights and other significant constitutional principles, Barak has been a prolific writer and academic. In his 2006 book, *The Judge in a Democracy*, he expressed his support for the use of comparative law in adjudication. He stated that as a judge he was greatly assisted by case law from the courts of the United States, Australia, Canada, the United Kingdom and Germany. In his view, “comparing oneself to others allows for greater self-knowledge. ... A useful comparison can exist only if the legal systems have a common ideological basis.”<sup>12</sup>

Barak listed the following three types of assistance that can be derived from the use of comparative law:

- (1) **Interpretive Theory**—“Comparative law helps the judge better understand the role of interpretation and of judicial making. Before judges decide their own position on the issue, they would do well to consider how other legal systems treat the question.”<sup>13</sup>
- (2) **Finding Democracy’s Fundamental Values**—“Democracies share common fundamental values. Democracy must infringe certain fundamental values in order to maintain others. It is important for judges to know how foreign law treats this question and what techniques it uses.”<sup>14</sup>
- (3) **Comparative Law Solutions to Specific Situations**—Barak stated that he was not advocating for the adoption of foreign arrangements but for an “open approach, one which recognizes that for all our singularity, we are not alone. That recognition will enrich our own legal systems if we take the trouble to understand how others respond in situations similar to those we encounter.”<sup>15</sup>

Comparative law is used in Israel to interpret statutes as well as constitutional issues. Although Israel does not have a written constitution contained in one document, it has eleven basic laws,

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<sup>11</sup> Special Hearing 29-30/84 Kosoi v. Bank Foichtunger, 38(4) Piske Din (Decisions of the Supreme Court) 505 (5745-1984).

<sup>12</sup> *Reproduced in* Barak, *supra* note 1, at 292.

<sup>13</sup> *Id.* at 289.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

two of which have express provisions granting them higher normative value than regular laws. The Supreme Court, based on its interpretation of the Declaration of Independence, has developed additional constitutional principles.<sup>16</sup> The following will address the use of comparative law in constitutional interpretation.

## V. Comparative Law and Constitutional Interpretation

The citation of foreign constitutions in Israeli constitutional interpretation appears frequently in decisions of the Supreme Court. Court President Shamgar, however, in a 1995 leading decision, expressed a cautionary note:

[B]ut it should be understood that the consideration of other constitutions and their implementation is merely comparative. Every constitution reflects in the protections of rights that are granted therein the social order of priorities that is unique to it and the outlooks that have been adopted in its society. It need not be added that there is also a whole range of political considerations that accompanies the formulation of a constitution. Thus, for example, in Canada it was decided not to include a prohibition against the violation of property in the Charter of Rights.<sup>17</sup>

The citation of foreign law by the Supreme Court in interpreting the following two major issues under Israeli constitutional law exemplifies its approach to comparative law analogies.

### A. Environmental Law

A 2004 decision of the Supreme Court in a petition regarding environmental rights further explains the role of comparative law in interpreting Israeli law. While noting that some countries recognize the existence of a constitutional right to an environment that is not harmful to health or well-being, the court recognized that other countries do not award such high normative status to environmental rights. Rather, the Court observed that many countries maintain comprehensive legislation regarding various aspects of environmental protection.<sup>18</sup>

The Court went on to state:

In comparative law there is much discussion of the environment. Many laws addressing the environment have been enacted in many countries ... sometimes the environment has been given a constitutional status. In a large number of constitutions, a constitutional right to have a suitable environment has been recognized.<sup>[19]</sup>

This comparative law—whether in the international sphere or in the national sphere—is of great importance. Nonetheless, each country has its own problems. Even

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<sup>16</sup> For additional information, see Ruth Levush, *Israeli Law Guide*, LLRX.COM (Nov. 24, 2007), <http://www.llrx.com/features/israel3.htm>.

<sup>17</sup> CA 6821/93 United Mizrahi Bank Ltd v. Migdal Cooperative Village, 49(4) Piske Din (P.D.) 221, p. 329 (1995).

<sup>18</sup> HC 4128/02 Adam Teva VeDin v. Israel's Prime Minister, available at The State of Israel, The Judicial Authority website (in Hebrew), <http://elyon1.court.gov.il/files/02/280/041/A16/02041280.a16.pdf> (last visited Mar. 8, 2010).

<sup>19</sup> *Id.* p. 514.

if the basic considerations are similar, the balance between them reflects the uniqueness of every society and what characterizes its legal arrangements. Indeed, this is the power and these are the limits of comparative law. Its power lies in extending the interpretational horizon and field of vision. Its power lies in guiding the interpreter with regard to the normative potential inherent in the legal system. Its limits lie in the uniqueness of every legal system, its institutions, the ideology that characterizes it and the manner in which it deals with the individual and society. Indeed, comparative law is like an experienced friend. It is desirable to hear his good advice, but this should not replace one's own decision.<sup>[20]</sup>

After reviewing Israeli law on the issue, Barak determined that the provisions challenged in the petition did not violate any constitutional rights under Israeli law, including the constitutional right to human dignity and liberty.<sup>21</sup> The Court held, however, that there had not been a sufficient passage of time to allow for the preparation of guidelines for reviewing environmental impact under the contested provisions, and that the deadline for preparation of the guidelines must be extended in specific cases where such extension is clearly needed.<sup>22</sup>

## **B. Immigration, Unification of Families, and Public Security**

A leading decision on the constitutionality of temporary legislation exemplifies the significant usage of comparative law by Israeli courts in constitutional interpretation. The legislation at issue restricted residents of the West Bank and Gaza between the ages of fourteen and thirty-five (for men) or twenty-five (for women) from relocating into Israeli territory based on marriage to Israeli citizens.<sup>23</sup>

The decision in this very sensitive case was a few hundred pages long, and was rendered by an extended bench of eleven justices. In addition to citing Israeli legislation, 183 Israeli court decisions, and two Jewish law sources, the justices cited foreign court decisions from the following countries:

- United States–30
- Australia–1
- Canadian–9
- England–6

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<sup>20</sup> *Id.* pp. 515-16.

<sup>21</sup> Basic Law: Human Dignity and Freedom, Sefer HaHukim (Official Gazette, hereafter S.H.) No. 1391, p. 150 (5752- 1992). See also the Knesset (Israel's Parliament) website, [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm) (last visited Mar. 8, 2010).

<sup>22</sup> HC 4128/02 Adam Teva VeDin v. Israel's Prime Minister.

<sup>23</sup> HCJ 7052/03, Adalah v. Minister of Interior, available at The State of Israel: The Judicial Authority website (in English), [http://elyon1.court.gov.il/files\\_eng/03/520/070/a47/03070520.a47.pdf](http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.pdf) (last visited Mar. 11, 2010).

- European Court of Human Rights—6
- Ireland—1
- South Africa—3

The challenged legislation had been enacted during the height of a wave of terror attacks within Israel's borders, some perpetrated by Palestinian residents of these territories in the second *intifada* (uprising) commencing in September 2000. In response to the intensity of these attacks the Knesset (Israeli Parliament) enacted legislation in the form of the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003.<sup>24</sup> The law was initially valid for one year, and was extended several times. The Court observed:

Because some of the terror attacks were perpetrated with the assistance of persons who were originally Palestinians living in the occupied territories and had received permission to live in Israel within the framework of family reunifications, the government decided in 2002 to stop giving permits to Palestinians from the occupied territories to live in Israel.<sup>[25]</sup>

The constitutionality of the legislation was questioned in thirty-three petitions submitted by both individuals and human rights organizations. The united petitions requested the Supreme Court, sitting as a High Court of Justice, to consider whether the blanket prohibition of family reunification (with Palestinians of certain ages) violated constitutional rights, and if so, whether the violation of those rights complied with the conditions of the limitations clause in the Basic Law: Human Dignity and Liberty,<sup>26</sup> and was therefore constitutional. Prior to the blanket prohibition in the law, applications of Palestinians to live in Israel were considered on an individual basis, with a view to whether the applicant presented a risk to the security and safety of the Israeli public. An extended bench of eleven justices, by a majority of six to five, denied the petitions.

A minority opinion by Justice Barak included a review of legal arrangements in foreign countries, in the European Union, and under international law to support a conclusion that the right to family life is anchored in the right to dignity, which is guaranteed under Israel's Basic Law: Human Dignity and Liberty. The six justices of the majority rejected this conclusion. While agreeing that comparative law has great significance in both national and international spheres, Justice Cheshin cautioned that in the instant matter comparative law must be used in a sensitive and careful way. In his opinion, Israel, similar to other countries around the world, does not recognize an individual constitutional right to have foreign members of a person's family immigrate into the country. He stated:

The attitude of each state to immigration arrangements—including immigration arrangements by virtue of the right to marry and to family life—originates not only in the

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<sup>24</sup> Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, S.H. No. 1901, p. 544.

<sup>25</sup> H CJ 7052/03, *Adalah v. Minister of Interior*, summary notes.

<sup>26</sup> Basic Law: Human Dignity and Liberty, S.H. No. 1391 (5752-1992).

legal system and its characteristics in each different place but also, mainly, in the reality with which the state is required to contend. It is therefore not surprising that the countries of the world have adopted and continue to adopt, each for itself, arrangements that are suited to its needs from time to time, and moreover they tend to change from time to time the immigration arrangements prevailing in them according to the reality—a changing reality—with which the state is required to contend. See the remarks that we cited above ... with regard to the position prevailing in the United States and changes in immigration arrangements in that country[.]<sup>[27]</sup>

In rejecting Justice Barak's analogy to the laws of other countries, Justice Cheshin noted that none of the referenced countries ever contended with a reality similar to that with which Israel was contending. The Justice stated that there existed "a time of armed conflict — a time of quasi-war,"<sup>28</sup> between Israel and the Palestinian Authority and the Hamas organization that controlled it. Justice Cheshin concluded that the analogy to the laws of other countries was wrong, due to the existence of the state of armed conflict and the general hostile attitude of the population in the territory of the Palestinian Authority. He asked, "Is there any other country that is being asked to allow in its territory the establishment of a family unit in which one of its members is an enemy national?"<sup>29</sup>

It is interesting to note that in this case both the majority and minority opinions of the court cited international law to support their opposing positions. While the minority cited international human rights law to support the view that human rights include the right to family reunification, the majority cited the international law of armed conflict to support the position that enemy nationals do not have a right to relocate into the territory of a state during armed conflict, even for the purpose of marriage, based on considerations of public and state security.<sup>30</sup> In the absence of domestic legislation, international law does not form part of Israeli domestic law and references to it in this case, similarly to those references to foreign law, were made merely for the purpose of analogy and not for implementation per se.

## VI. Concluding Remarks

Comparative law is heavily used by Israeli judges. Decisions of the Israeli Supreme Court are especially indicative of such use. An American scholar has opined "that it (the Court) is the most important comparative constitutional law institute of the world."<sup>31</sup>

Having inherited the British *stare decisis* system of respecting domestic court decisions, combined with the historical legal influences of Ottoman, Continental European, and English law, Israel seems to be naturally receptive to the use of comparative law in domestic decisions.

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<sup>27</sup> H CJ 7052/03, Adalah v. Minister of Interior.

<sup>28</sup> *Id.* para. 73.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* para. 71.

<sup>31</sup> Alexander Somek, *Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284 (Fall 1998).

This background, together with the diverse origins of judges and jurists in the early days of the State's independence, may explain the Court's openness towards comparative law.<sup>32</sup>

The current ability of the Court to retrieve and analyze foreign law from numerous foreign countries is said to partly "stem from the Court's practice of employing clerks from all over the world, who do the research work on their country of origin."<sup>33</sup> The Supreme Court of Israel actively recruits foreign clerks. The Court's website explains:

Unlike many common law systems that have a long, rich, and plentiful jurisprudence from which to draw upon, the State of Israel, a relatively young country, has a comparatively small body of jurisprudence. Thus, the Israeli Supreme Court often looks to American and Commonwealth precedent, as well as European countries, for inspiration in rendering its decisions. As a result, Justices of the Israeli Supreme Court solicit individuals trained in the American and Commonwealth legal tradition, as well as European traditions, to work as Foreign Clerks.<sup>34</sup>

The Israeli law doctrines discussed above have enabled the Court to encourage the consideration of foreign law.

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<sup>32</sup> For further information on the Israeli legal system and the impact of foreign law on the system in general, see Ruth Levush, *The Reception of Legal Systems- Implantation and Destiny*, in LA RECEPTION DES SYSTEMS JURIDIQUES: IMPLANTATION ET DESTIN 411 (Michel Doucet & Jacques Vanderlinden eds., Buxelles 1994).

<sup>33</sup> Somek, *supra* note 31.

<sup>34</sup> *Foreign Clerkships with the Supreme Court of Israel*, THE STATE OF ISRAEL: THE JUDICIAL AUTHORITY, [http://elyon1.court.gov.il/eng/Clerking\\_opportunities/frameset.html](http://elyon1.court.gov.il/eng/Clerking_opportunities/frameset.html) (in English) (last visited Mar. 16, 2010).

# Mexico

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Mexico is formed by thirty-one states and a Federal District, best known as Mexico City. Every state and the Federal District have their own judicial procedure laws. This report covers federal law only.

Article 12 of Mexico's Federal Civil Code provides that foreign law may be applied in Mexico as long as Mexican law specifically provides for its application.<sup>1</sup> However, cases adjudicated by Mexican courts by applying foreign law could not be located. It should be noted that a Mexican jurist recently reported the following:

Although Mexican judges are legally empowered to apply foreign law in Mexican proceedings, and no formal or informal survey has been conducted since 1988 to determine the number of substantive cases that have been resolved on the basis of foreign law, empirical data suggests that the number of these cases is close to zero. In an informal and preliminary survey conducted with judges and court secretaries in the six Mexican states bordering the United States (in addition to Mexico City), no cases of any Mexican court resolving a given case based on American law or any other foreign law were reported.<sup>[2]</sup>

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<sup>1</sup> Código Civil Federal [Federal Civil Code], *as amended*, Diario Oficial de la Federación, May 26, July 14, & Aug. 3 and 31, 1928, *available at* Mexico's House of Representatives website, <http://www.diputados.gob.mx/LeyesBiblio/pdf/2.pdf>.

<sup>2</sup> Jorge A. Vargas, *Mexican Law in California and Texas Courts and the (Lack of) Application of Foreign Law in Mexican Courts*, II (No. 1) Mexican L. Rev. 45, 69 (New Series, July-Dec. 2009), *available at* the Legal Research Institute website of Mexico's National Autonomous University (UNAM), <http://info8.juridicas.unam.mx/pdf/mlawrns/cont/3/arc/arc2.pdf>.

# New Zealand

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**SUMMARY** New Zealand courts have a strong tradition of citing foreign judgments in their decisions. Historically, this was due to the application of the common law and statutes of England. In recent decades however, various factors have led to a broader range of jurisdictions being cited. While laws now have a uniquely New Zealand character, judges remain willing to look outward to consider developments in other countries. This approach is evident in cases involving the application of the New Zealand Bill of Rights Act 1990, and will likely have an ongoing impact.

## I. Introduction

New Zealand's colonial heritage has greatly influenced the development of the country's legal system and constitutional arrangements. Further, the common law system that New Zealand inherited from England places a strong emphasis on the doctrine of precedent and the need to cite authorities to ensure the legitimacy of court decisions.<sup>1</sup> Historically, New Zealand courts have looked to the courts of England for sources of precedents in order to apply established principles and rules. Over time, as local statutes were developed, international law and different international relationships increased in prominence, and as the issues coming before the courts became more complex, the courts have expanded the range of countries from which foreign cases are examined, particularly looking to Australia, Canada, and the United States, as well as to international tribunals.

This report discusses the impact of foreign case law as evidenced in the citation practices of New Zealand's higher courts, including in the context of interpreting and applying the New Zealand Bill of Rights Act 1990. The possible reasons for New Zealand judges being demonstrably willing to consider and cite foreign cases are examined, along with the views of some judges and academics regarding this approach.<sup>2</sup>

## II. Constitutional Arrangements

After the establishment of colonial rule in New Zealand, as a result of the signing of the Treaty of Waitangi between the British Crown and Maori tribes in 1840, the laws of England became directly applicable in New Zealand.<sup>3</sup> Imperial legislation established the New Zealand Parliament and other branches of government. Although New Zealand achieved legal and

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<sup>1</sup> Russell Smyth, *Judicial Citations: An Empirical Study of Citation Practice in the New Zealand Court of Appeal*, 31(4) VUW L. REV. 847, 848 (2000), available at <http://www.nzlii.org/nz/journals/VUWLawRw/2000/41.html>.

<sup>2</sup> The application of foreign statute law is beyond the scope of this paper.

<sup>3</sup> MORAG MCDOWELL & DUNCAN WEBB, *THE NEW ZEALAND LEGAL SYSTEM* 100 (2d ed. 1998). The English Laws Acts 1854, 1858, and 1908 provided that all laws in existence in England on January 14, 1840, were to be applied to New Zealand.

constitutional independence in the mid-twentieth century,<sup>4</sup> a number of the current constitutional arrangements and procedures are based on various rules and principles that were developed in England.<sup>5</sup>

There are three branches of government in New Zealand: Parliament, the executive branch, and the judiciary. The Queen is the head of state. The cornerstone of the legal system is that parliament “has supreme lawmaking powers that cannot be challenged.”<sup>6</sup> Judicial independence is also emphasized, and judges do not have political allegiances and are not influenced by party politics.<sup>7</sup>

New Zealand retained the Judicial Committee of the Privy Council in England as its final appeal court until 2004, when the Supreme Court of New Zealand was established.<sup>8</sup> The court hierarchy now consists of the district courts, the High Court, the Court of Appeal, and finally the Supreme Court.

New Zealand does not have a single written constitution. The country’s constitutional arrangements are derived from a variety of written and unwritten sources, including particular statutes from Britain and New Zealand, conventions and customs of government, fundamental legal principles, court decisions, and the Treaty of Waitangi.<sup>9</sup> The New Zealand Bill of Rights Act 1990 confirms the protection of fundamental rights in statutory form. While it is not entrenched or “supreme law” in the sense of overriding other statutes, the Bill of Rights Act is seen as forming part of the constitutional arrangements.<sup>10</sup>

A concise and authoritative statement of New Zealand’s constitutional arrangements can be found in the introduction to the Cabinet Manual.<sup>11</sup> In this document, in addition to the sources identified above, New Zealand’s international obligations and international processes more generally are identified as both an influence on constitutional change and as a limit on the exercise of decision making authority.<sup>12</sup> Such an outward-looking perspective is clearly evident in the impact of foreign law on the judgments of New Zealand’s courts.

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<sup>4</sup> *Id.* at 106-09.

<sup>5</sup> *Id.* at 110-11.

<sup>6</sup> *Id.* at 4, 112.

<sup>7</sup> *Id.* at 4, 114.

<sup>8</sup> The Supreme Court was established by the Supreme Court Act 2003, available at <http://www.legislation.govt.nz/act/public/2003/0053/latest/DLM214028.html>. The legislation entered into force on January 1, 2004.

<sup>9</sup> MCDOWELL & WEBB, *supra* note 3, at 110, 127-45. See also Rt. Hon. Sir Kenneth Keith, *On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government*, CABINET MANUAL 2008, available at <http://www.cabinetmanual.cabinetoffice.govt.nz/introduction>.

<sup>10</sup> Keith, *supra* note 9. See also Rt. Hon. Sir Kenneth Keith, *Concerning Change: the Adoption and Implementation of the New Zealand Bill of Rights Act 1990*, 31(4) VUW L. REV. 721 (2000), available at <http://www.nzlii.org/nz/journals/VUWLawRw/2000/37.html>. Keith notes that there was no public support for the legislation to be entrenched, primarily because this would give power to a “non-elected, non-accountable, and non-representative judiciary.”

<sup>11</sup> Keith, *supra* note 9.

<sup>12</sup> *Id.*

### III. Empirical Analysis of Foreign Law Citations

Three empirical studies of the citation practices of New Zealand's courts have been undertaken in the past decade.<sup>13</sup> The results of these studies show that the influence of British law has receded, and that this recession has been accompanied by a significant rise in citations to the previous decisions of domestic courts. In addition, an increasing number of court decisions now refer to the judgments of courts in other jurisdictions, particularly Canada, Australia, and the United States. This trend is particularly evident in cases related to the New Zealand Bill of Rights Act 1990.

#### A. *Smyth* Study of the Citation Practices of the Court of Appeal (2000)<sup>14</sup>

The *Smyth* study provided a snapshot of citation practices by analyzing 300 of the most recent Court of Appeal decisions reported in the New Zealand Law Reports as of December 1999. The study recorded citations of foreign and domestic judgments, decisions of international courts, and references to secondary material. Russell Smyth, the author of the study, has conducted similar analyses of Australian courts.<sup>15</sup>

The *Smyth* study found that the highest number of references made by the New Zealand Court of Appeal were to its own previous decisions, and this accounted for 33% of case citations. In fact, if Privy Council decisions were included (the Privy Council was the highest court at the time of the study), over 50% of citations made were to the Court's own decisions or the decisions of other courts in the same judicial hierarchy.<sup>16</sup>

Decisions of English courts (other than the Privy Council) made up 23% of citations, or a total of 2,839 citations in the 300 judgments.<sup>17</sup> A total of 1,878 citations (18% of all case citations) were to courts in countries other than New Zealand and England.<sup>18</sup> Of those citations, nearly 95% were to courts in Australia (45%), Canada (31%), and the United States (16%).<sup>19</sup>

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<sup>13</sup> Smyth, *supra* note 1; Rt. Hon. Justice Sir Ivor Richardson, *Trends in Judgment Writing in the New Zealand Court of Appeal*, in LEGAL METHODS IN NEW ZEALAND 261 (Rick Bigwood, ed. (2001)); James Allan et al., *The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?*, 11(3) OTAGO L. REV. 433 (2007).

<sup>14</sup> Smyth, *supra* note 1.

<sup>15</sup> *Id.*; Ingrid Neilson & Russell Smyth, *One Hundred Years of Citation of Authority on the Supreme Court of New South Wales*, 7 UNSW L.J. 189 (2008), available at <http://www.austlii.edu.au/au/journals/UNSWLawJl/2008/7.pdf>.

<sup>16</sup> Smyth, *supra* note 13, at 861, 875-76.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The study's author noted that this was much higher than comparable figures for Australia, and also discusses comparisons with the citation practices of Canadian and United States courts. *Id.* at 863-68.

<sup>19</sup> *Id.* at 866, 878.

The *Smyth* study also recorded citations to four international courts, with the most cited being the European Court of Human Rights with forty-seven citations (2.5% of all case citations).<sup>20</sup>

### **B. *Richardson* Study of Citation Trends in the Court of Appeal (2001)**<sup>21</sup>

The *Richardson* study examined all of the decisions of the Court of Appeal made during the years 1960, 1980, 1990, 1997, and 2000. This study included those cases that had not been reported in the New Zealand Law Reports.<sup>22</sup>

The *Richardson* study showed that there has been a significant increase in the number of decisions rendered by the Court of Appeal. Between 1960 and 2000 there was a 500% increase in the caseload of the court.<sup>23</sup> The study suggested that a range of factors contributed to this change, including the growth of New Zealand's population, higher crime rates, and, most plausibly, increased economic activity and greater litigiousness among New Zealanders.<sup>24</sup>

Another finding was that the proportion of citations to English decisions had reduced considerably. In 1960, citations of English cases accounted for 69% of cases cited. By 1990 that figure had fallen to 35%, and in 2000 it was just 17%, which represented a 75% decrease since 1960.<sup>25</sup> This decline was accompanied by a significant rise in citations to the decisions of New Zealand courts—from 26% of citations in 1960, to 51% in 1990, and 74% in 2000.

Also noted in the *Richardson* study was the trend in the citation of Australian decisions. While there was an increase in the proportion of decisions cited between 1960 and 1990 (from 4% to 12%), there was a drop down to 5% in 2000.<sup>26</sup> It was suggested that this may have partially been due to the difficulty in dealing with the decisions of the High Court of Australia, which frequently contain multiple judgments.<sup>27</sup>

The *Richardson* study also indicated an increase in the number of citations made to Canadian and United States cases over the years, as well as the emergence of citations to the European Court of Justice and the European Court of Human Rights.<sup>28</sup>

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<sup>20</sup> *Id.* Other courts in this category were the Human Rights Commission (twenty-seven citations or 1.44%), Commission of the European Community (three citations or 0.16%), and the International Court of Justice (three citations or 0.16%).

<sup>21</sup> Richardson, *supra* note 13.

<sup>22</sup> *Id.* at 261. In explaining this approach and comparing it to the *Smyth* study, Justice Richardson noted that the proportion of cases actually reported in the New Zealand Law Reports has fluctuated over the years.

<sup>23</sup> *Id.* at 262.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 264.

<sup>26</sup> *Id.* at 265.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

**C. *Allan* Study of the Citation of Foreign Judgments in New Zealand Bill of Rights Act 1990 Cases (2007)**<sup>29</sup>

The *Allan* study examined reported cases relating to the New Zealand Bill of Rights Act 1990 from the date of enactment of the legislation to April 2006.<sup>30</sup> The study showed that the decisions of Canadian courts were cited far more often than those from any other jurisdiction, having been cited in eighty-four New Zealand cases.<sup>31</sup> The next highest number of citations was to United States judgments (cited in forty-six cases).<sup>32</sup> Third, but with much fewer citations, was the United Kingdom.<sup>33</sup> The authors did note that the United Kingdom Human Rights Act 1998 only came into force in England in 2000.<sup>34</sup>

Similar to the *Smyth* study, the *Allan* study showed that the European Court of Human Rights was the most cited international tribunal (cited in forty-four cases).<sup>35</sup> About one-third as many citations were to the United Nations Human Rights Committee.<sup>36</sup> The authors suggested that the European Court's decisions were far more sophisticated than those of the Human Rights Committee, which "often simply recite facts and submissions."<sup>37</sup>

The results of the *Allan* study indicated that New Zealand judges are "most likely to cite the decisions of overseas courts when considering criminal procedure rights, and by a noticeable margin."<sup>38</sup> This may be because criminal procedure rights are the most litigated rights. Outside of the context of criminal procedure, "freedom of expression gets the international treatment more than any other rights and freedoms," again by a considerable margin.<sup>39</sup> There were also cases involving particular rights where foreign law was not cited at all, including electoral rights, freedom of movement, and the rights of minorities. These were also the least litigated rights. In addition, some rights not explicitly set out in the New Zealand Bill of Rights Act 1990 arose in litigation and led to foreign law citations by judges, particularly the right to privacy and the right (or remedy) to have evidence excluded.<sup>40</sup>

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<sup>29</sup> Allan et al., *supra* note 13.

<sup>30</sup> The outcomes of this study were referred to in a *New York Times* article. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, available at [http://www.nytimes.com/2008/09/18/us/18legal.html?\\_r=4&hp=&adxnml=1&oref=slogin&pagewanted=all&adxnmlx=1221833346-HD0Iphcv9NPt5FE8Ahl/Jw](http://www.nytimes.com/2008/09/18/us/18legal.html?_r=4&hp=&adxnml=1&oref=slogin&pagewanted=all&adxnmlx=1221833346-HD0Iphcv9NPt5FE8Ahl/Jw).

<sup>31</sup> Allan et al., *supra* note 13, at 437, 455.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Judgments relating to the Human Rights Act 1998 were only cited in two New Zealand cases, but there were citations to European Convention cases in the United Kingdom in eleven New Zealand cases.

<sup>34</sup> *Id.* at 438, 455. There were also a small number of citations to German, Indian, and Irish cases.

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.* at 438-39.

<sup>38</sup> *Id.* at 436.

<sup>39</sup> *Id.* This was followed by freedom from discrimination.

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

The *Allan* study also examined whether or not the overseas rights cases cited supported the eventual conclusions of New Zealand judges. The figures showed that twenty-eight of the seventy-five cases that referred to overseas authorities included a citation that *did not* support the New Zealand court's final decision.<sup>41</sup> The authors also observed, however, that in Court of Appeal and Supreme Court decisions, the right at issue is extended "more than four times more often than it is given an interpretation narrower than it had before the court's decision."<sup>42</sup>

#### IV. Reasons for the Influence of Foreign Law

Hierarchical citations play a clear and important role in the common law system that New Zealand inherited from England.<sup>43</sup> Historical factors, including the fact that the Privy Council was the highest court in New Zealand's judicial hierarchy, meant that throughout the nineteenth and most of the twentieth century New Zealand courts relied heavily on English jurisprudence.<sup>44</sup> In more recent decades there have been a number of sociocultural, economic, legal, and political changes that have resulted in a shift in the influences on New Zealand's courts to include a broader range of jurisdictions.

##### A. Receding Influence of England

England's influence, not only on the law but more generally on New Zealand society, receded as England began looking increasingly to Europe on economic and trade issues, and immigration from England to New Zealand decreased.<sup>45</sup> One commentator notes that any attempt to keep the common law of the Commonwealth uniform "has been abandoned."<sup>46</sup> A change of mindset or focus in New Zealand can also be seen, including a stronger sense of nationhood, independence, and increased economic and diplomatic ties with other countries.<sup>47</sup>

Perhaps more significant, particularly in explaining the substantial rise in citations to New Zealand cases, is the vast increase in the number of domestic statutes.<sup>48</sup> The interpretation and application of legislation, rather than the common law inherited from England, now dominate the work of the courts, meaning that precedents are now "more likely to be used to show prior interpretation of statutes and subordinate legislation."<sup>49</sup>

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<sup>41</sup> *Id.* at 440, 457.

<sup>42</sup> *Id.* at 441, 458-67.

<sup>43</sup> Smyth, *supra* note 1, at 861-62.

<sup>44</sup> See Hon. Justice Robert Fisher, *New Zealand Legal Method: Influences and Consequences*, in *LEGAL METHOD IN NEW ZEALAND* 25, 27, 40 (Rick Bigwood ed., 2001).

<sup>45</sup> *Id.* at 41.

<sup>46</sup> *Id.*

<sup>47</sup> Richardson, *supra* note 13, at 264.

<sup>48</sup> Fisher, *supra* note 44, at 43; see also Richardson, *supra* note 13, at 266.

<sup>49</sup> *Id.*

## B. Increased Complexity of Cases

As demonstrated in the *Richardson* study discussed above, there has been a huge growth in litigation in New Zealand.<sup>50</sup> The novelty, complexity, and level of controversy of the issues coming before the courts have also increased, including a larger number of public law cases.<sup>51</sup> This may be an outcome of the significant deregulation and privatization processes undertaken by the government (particularly during the 1980s), a tendency for Parliament to be less prescriptive in statutes, and the creation of broad statutory discretions.<sup>52</sup> Judges are now frequently asked to “decide issues by drawing broad inferences as to legislative intent, reasoning from first principles, and evaluating policy considerations.”<sup>53</sup>

With regard to rights litigation, the authors of the *Allan* study observed that “New Zealand courts are likely to cite overseas authority for a very practical reason: even seventeen years after passage of the New Zealand Bill of Rights Act, there remains a dearth of New Zealand authority in regard to many of the rights and freedoms.”<sup>54</sup> Given the common law system’s focus on the use of precedents to ensure the legitimacy of decisions, this factor means that judges will often seek to rely on the decisions of foreign courts in interpreting different rights, rather than starting from scratch.<sup>55</sup>

## C. Shared Affinities with Other Countries

In addition to the growth of citations to New Zealand cases, the declining proportion of citations to English cases has been accompanied by a “remarkable growth in resort to other jurisdictions.”<sup>56</sup> The greatest number of citations have been to courts in countries with which New Zealand can be seen as having a shared affinity. This may be due to their common law legal systems, language,<sup>57</sup> similar social and historical experiences (in particular Australia, and to a lesser extent Canada), and geographic proximity and strong economic relations (Australia).<sup>58</sup>

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<sup>50</sup> See also *id.* at 38-39.

<sup>51</sup> *Id.* at 39-40.

<sup>52</sup> *Id.* Fisher suggests that reasons for these changes include the difficulty for politicians to “sell detailed solutions to a population fragmented by divergent cultures and income,” as well as the introduction of a Mixed Member Proportional electoral system in 1996, which has seen governments needing to accommodate the diverse demands of their coalition partners.

<sup>53</sup> *Id.* at 40.

<sup>54</sup> Allan et al., *supra* note 13, at 445.

<sup>55</sup> *Id.*

<sup>56</sup> Fisher, *supra* note 44, at 44.

<sup>57</sup> See Allan et al., *supra* note 13, at 438, stating that “Although many countries have bills of rights, New Zealand judges are likely to be far more receptive to overseas authority from jurisdictions with which they are comfortable, among other things because of shared affinities. For example, decisions from English speaking courts are likely to be cited more than decisions from non-English speaking courts, and decisions from common law legal systems are more likely to be cited than those from civilian systems, and so on.”

<sup>58</sup> See Smyth, *supra* note 1, at 866. See also Richardson, *supra* note 13, at 265, and Fisher, *supra* note 44, at 41.

Further, the international reputation of different courts and judges,<sup>59</sup> and the number, scope, and depth of their body of precedents (particularly in the United States),<sup>60</sup> may impact on the willingness of New Zealand judges to cite cases from particular jurisdictions.

It is particularly noteworthy that the New Zealand Bill of Rights Act 1990 was explicitly modeled on the Canadian Charter of Rights and Freedoms.<sup>61</sup> This fact goes a long way in explaining the “ransack” of Canadian reports for their Charter jurisprudence.<sup>62</sup> The historical experiences of the United States and Europe with bills of rights or other human rights laws can also be seen as an explanation for New Zealand courts “drawing deeply” from these countries in interpreting and applying individual rights and freedoms.<sup>63</sup>

#### **D. Impact of International Law**

The need to look beyond English and New Zealand decisions has been “reinforced by the growing influence of international treaties, covenants, and declarations to which New Zealand adheres.”<sup>64</sup> It was noted in 2001 that “as many as one-third of the 600 public Acts on the New Zealand statute book give effect in one way or another to international standards or obligations.”<sup>65</sup> In addition, the Court of Appeal has accepted the proposition that “the Court should strive to interpret legislation consistently with the treaty obligations of New Zealand.”<sup>66</sup>

In the context of the New Zealand Bill of Rights Act 1990, although there is no statement or requirement regarding the use of foreign law to assist with its interpretation, the statute explicitly refers to the International Covenant on Civil and Political Rights (ICCPR).<sup>67</sup> This fact has “frequently been referred to in order to justify interpretations of the New Zealand Bill of Rights Act which are consistent with the ICCPR and with jurisprudence of the Human Rights

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<sup>59</sup> Smyth, *supra* note 1, at 868. *See also* Allan et al., *supra* note 13, at 445, stating that the “use of overseas precedents can be especially helpful if the relevant overseas jurisdiction is thought to have a good reputation for human rights.”

<sup>60</sup> Allan et al., *supra* note 13, at 437, states that the number of citations to United States judgments in New Zealand Bill of Rights cases “is hardly surprising given the extensive United States history with judicial review.”

<sup>61</sup> Fisher, *supra* note 44, at 42. *See generally* Keith, *supra* note 9, for a discussion of the background to and development of the New Zealand Bill of Rights Act 1990.

<sup>62</sup> Smyth, *supra* note 1, at 867 (quoting Lord Cooke of Thorndon, *The Dream of an International Common Law, in* COURTS OF JURISDICTION: THE MASON COURT IN AUSTRALIA 138, 142-43 (Cheryl Saunders ed., 1996)). *See also* Allan et al., *supra* note 13, at 444-45.

<sup>63</sup> *Id.* Lord Cooke stated: “In the five years since the enactment of the New Zealand Bill of Rights Act 1990 we have tended to ransack the Canadian reports for their Charter jurisprudence, while drawing deeply also from the European and United States as well.”

<sup>64</sup> Fisher, *supra* note 44, at 42.

<sup>65</sup> Rt. Hon. Sir Kenneth Keith, *Sources of Law, Especially in Statutory Interpretation, with Suggestions about Distinctiveness*, in *LEGAL METHOD IN NEW ZEALAND*, *supra* note 44.

<sup>66</sup> *Puli’uvea v. Removal Review Authority*, (1996) 2 H.R.N.Z. 510, 516-17.

<sup>67</sup> The long title of the New Zealand Bill of Rights Act 1990 states that it is an Act “To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.”

Committee and other relevant international jurisprudence.”<sup>68</sup> Significantly, the Court of Appeal has observed that “[w]hether a decision of the Human Rights Committee is absolutely binding in interpreting the New Zealand Bill of Rights Act may be debatable, but at least it must be of considerable persuasive authority.”<sup>69</sup>

The clearest example of the desire of New Zealand judges to “keep pace” with international developments is *Baigent’s Case*.<sup>70</sup> In this case the Court of Appeal found in favor of awarding compensation for breaches of the New Zealand Bill of Rights Act 1990, despite this remedy not being provided for in the legislation. After reviewing a range of overseas cases, the then President of the Court stated: “In other jurisdictions compensation is a standard remedy for human rights violations. There is no reason for New Zealand jurisprudence to lag behind.”<sup>71</sup>

The current Chief Justice has also emphasized the impact of international law and the wish to ensure the legitimacy of the rights-related decisions of New Zealand’s courts at an international level. She has stated that:

The accession to the Optional Protocols means that our legal system is now scrutinized for compliance with the international covenants and that the decisions of our courts are taken on an international world stage. These influences cannot be underestimated. We are only at the beginning of the process. It is in the area of human rights that the standards of the international community have the greatest impact.<sup>[72]</sup>

## E. Increased Sharing of Information

Access to decisions (from New Zealand and overseas courts) has increased significantly, particularly as a result of more case reporting and publication of cases on the internet. This is an important development in terms of judges and lawyers being able to reference a range of cases in their reasoning.<sup>73</sup> In addition, academics and commentators have become increasingly influential in New Zealand, and often discuss judgments in the context of other disciplines and international developments.<sup>74</sup>

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<sup>68</sup> Andrew S. Butler & Petra Butler, *The Judicial Use of International Human Rights Law in New Zealand*, 29(1) VUW L. REV. 173, 177 (1999), available at <http://www.nzlii.org/nz/journals/VUWLawRw/1999/15.html>. See also Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007), for a discussion of New Zealand’s approach to using the ICCPR in interpreting both statutes and in developing the common law. See also Keith, *supra* note 65, at 89-93.

<sup>69</sup> R. v. Goodwin (No. 2), [1990-1992] 3 N.Z.B.O.R.R. 314, 321 (C.A.).

<sup>70</sup> Simpson v. Attorney General (*Baigent’s Case*), [1994] 3 N.Z.L.R. 667 (C.A.).

<sup>71</sup> *Id.* at 676.

<sup>72</sup> Rt. Hon. Dame Sian Elias, Chief Justice of New Zealand, 4<sup>th</sup> Annual Ethel Benjamin Commemorative Address at Dunedin, Diversity and the Law (May 18, 2000), transcript available at <http://www.lawfoundation.org.nz/publications>.

<sup>73</sup> See Allan et al., *supra* note 13, at 443. See also Fisher, *supra* note 44, at 43.

<sup>74</sup> See Fisher, *supra* note 44, at 42-43.

Changes in legal education and the expectations of the judicial role may also be factors in judges becoming “internationalists.”<sup>75</sup> A number of influential judges, as well as lawyers and academics, have obtained their postgraduate education overseas, particularly in the United States.<sup>76</sup> They also frequently participate in international conferences, publish articles in international journals, and form relationships with legal professionals from many different countries.<sup>77</sup> Judges can be seen as seeking to promote and expand the influence of their decisions internationally, as well as looking at developments in other jurisdictions that they are increasingly familiar with.<sup>78</sup> In general, there is “an increased receptiveness to new ideas on the part of lawyers as well as judges.”<sup>79</sup>

## V. Criticism and Future Prospects of Foreign Law Citations

The authors of the *Allan* study were concerned that there are “no rules (hard and fast ones or otherwise) about when overseas precedents should be cited, which overseas precedents should be cited, or what weight they should be accorded.”<sup>80</sup> The authors considered that the findings of the study showed that “rights-based internationalism” is not overly constraining on judges and is largely ad hoc.<sup>81</sup> The authors concluded that the data supports their view that “overseas authority is not used in a principled or systematic way by New Zealand courts in interpreting the New Zealand Bill of Rights Act.”<sup>82</sup>

The authors of the *Allan* study opined that the ability of judges to pick and choose which foreign judgments to cite may potentially present a problem in that the “process of interpretation inevitably remakes the constitution in the likeness favored by the judges.”<sup>83</sup> Judges are “tempted to draw on the most expansive interpretations of judges from other jurisdictions, while seldom being tempted to rely on the more restrictive interpretations on offer.”<sup>84</sup> Further, the authors felt that the reliance on Canadian precedents in rights cases may be a concern to some people given that Canadian judges are seen as “the most judicially activist in the common law world—the

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<sup>75</sup> Allan et al., *supra* note 13, at 443.

<sup>76</sup> Richardson, *supra* note 13, at 265, noting that four of the seven Court of Appeal judges on the bench in 2001, as well as the Chief Justice, had studied at United States law schools.

<sup>77</sup> Allan et al., *supra* note 13, at 443-44. The contact between judges from different jurisdictions has been emphasized by Hon. Justice Susan Glazebrook of the Court of Appeal, who stated that “I think it vital to take the time to look outwards periodically to the world beyond these shores as it broadens the perspective and lessens the tendency towards insularity.” Hon. Justice Susan Glazebrook, Court of Appeal, 8th Annual Ethel Benjamin Commemorative Address at Dunedin, Looking Outward, (Apr. 5, 2004), *transcript available at* <http://www.courts.govt.nz/speechpapers>.

<sup>78</sup> Allan et al., *supra* note 13, at 443-44.

<sup>79</sup> Richardson, *supra* note 13, at 265.

<sup>80</sup> Allan et al., *supra* note 13, at 441.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 445.

<sup>83</sup> *Id.* at 434 (quoting Hogg and Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L. J. 75, 77 (1997)).

<sup>84</sup> *Id.* at 442.

most willing to second-guess the decisions of the elected legislatures.”<sup>85</sup> The study recommended that New Zealand judges be more skeptical of overseas authorities than they currently appear to be.<sup>86</sup>

The level of discretion that New Zealand judges have in citing foreign and international precedents has also been identified by a former New Zealand Supreme Court and Court of Appeal judge, Rt. Hon. Sir Kenneth Keith, who stated that “New Zealand Courts have not elaborated tight criteria and statements of purpose for the use of ... international material.”<sup>87</sup> However, current and former judges tend to view the approach in a more positive light, with the “eclecticism” of New Zealand’s legal method seen as having saved it “from the relative insularity of major jurisdictions like the United States and the United Kingdom.”<sup>88</sup> Keith also observes that, although the New Zealand “character” of the law has been enhanced by the large number of local statutes, “that does not have to lead to a cloying inwardness.”<sup>89</sup>

In any case, the tradition of New Zealand courts borrowing heavily from other jurisdictions, which has resulted from a range of both historical and modern influences, is unlikely to be scaled back.<sup>90</sup> Various comments from judges, both in decisions and extra-judicially, indicate that the willingness to cite foreign law is becoming ingrained in New Zealand’s legal system and, together with international law, will have a continuing impact. For example, the current Chief Justice has stated:

I am not sure that the international trend and the domestic adoption of statements of human rights can now be reversed. Increasingly, the response of domestic legal institutions and laws is shaped by international covenants and institutions. This is an aspect of the shrinking of the world which has already had profound implications for all aspects of New Zealand life.<sup>[91]</sup>

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<sup>85</sup> *Id.* at 437.

<sup>86</sup> *Id.* at 446.

<sup>87</sup> Keith, *supra* note 65, at 98-99.

<sup>88</sup> Fisher, *supra* note 44, at 44, 72.

<sup>89</sup> Keith, *supra* note 65, at 98.

<sup>90</sup> *See id.* at 98-99. *See also* Fisher, *supra* note 44, at 44.

<sup>91</sup> Elias, *supra* note 72.

# Nicaragua

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**SUMMARY** Although foreign law may be used as the last resort when there is a gap in domestic legislation and other statutory sources of law are also unavailable, it appears that foreign law has not been used to adjudicate cases in Nicaragua. It is common, however, for the courts to cite analyses of foreign law made by prestigious scholars to support or enhance the court's opinion issued in a particular case.

## I. Legal System and the Law

Nicaragua is a nation that belongs to the civil law tradition and as such, legislation is the principal source of law.

Under Article 18 of the Organic Law of the Judicial Branch<sup>1</sup> and Article 443 of the Code of Civil Procedure,<sup>2</sup> judges and tribunals may not excuse themselves from adjudicating a case brought by the parties. Both provisions list the formal sources of law that are applicable when, in the opinion of the judge or the tribunal, there is no legislation applicable to the particular case, or if they have doubts concerning the scope and/or application of the legislation. The lists are not identical and a harmonized reading of them is required.

According to a treatise by Nicaraguan legal scholar and Supreme Court Justice Iván Escobar Fornos,<sup>3</sup> when there is a gap in the legislation a judge or tribunal will decide a case applying a harmonized interpretation of Article 18 of the Organic Law of the Judicial Branch and Article 443 of the Code of Civil Procedure, taking into account the chronological order of their entry into force, in the following order of preference:

1. Judges and tribunals must apply jurisprudence (rules derived from decisions of the Supreme Court).
2. If this is not possible, they must apply general principles of law or natural reason.
3. Where neither applicable legislation, jurisprudence, nor general principles of law or natural reason are available, judges and tribunals must follow the law applicable to analogous cases.

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<sup>1</sup> Ley No. 260, 7 July 1998, Ley Orgánica del Poder Judicial, art. 18, LA GACETA [L.G.], 23 July 1998, available at the database of the Nicaraguan National Assembly, [http://legislacion.asamblea.gob.ni/normaweb.nsf/\(\\$All\)/12E78B7532199BD0062570B3005D9A1D?OpenDocument](http://legislacion.asamblea.gob.ni/normaweb.nsf/($All)/12E78B7532199BD0062570B3005D9A1D?OpenDocument).

<sup>2</sup> CÓDIGO DE PROCEDIMIENTO CIVIL DE LA REPÚBLICA DE NICARAGUA art. 443 (Editorial Jurídica, Managua, 2000).

<sup>3</sup> I IVÁN ESCOBAR FORNOS, ESTUDIOS JURÍDICOS 331 (Editorial Hispamer, Managua, 2007).

4. If this is not available, they must apply customs when their application is allowed by the Civil Code.<sup>4</sup>
5. If none of the above sources is available, they must follow the opinion of authoritative legal scholars.
6. Lastly, they must apply foreign law applicable to analogous cases.<sup>5</sup>

## II. Court Decisions

Although courts are permitted to apply foreign law as a last resort, no court decisions based on foreign law were found.

In a case heard by the Supreme Court of Nicaragua in 1961,<sup>6</sup> the Court considered but rejected the petitioner's argument that the lower court erred by failing to apply the legal doctrine offered by Ambroise Colin and Henry Capitant, two renowned French scholars, and a relevant opinion issued by the French *Cour de Cassation*.<sup>7</sup> The Court determined that application of the French legal doctrine and court opinion were unnecessary because the case being heard could be decided by applying provisions of the Civil Code of Nicaragua.<sup>8</sup> The Court stated that Colin and Capitant's commentaries referred to French legislation from which the applicable Nicaraguan legislation in this case was not derived. The Court added that the option of applying foreign law offered by Article 443 of the Code of Civil Procedure should be applied as a last resort.<sup>9</sup>

Although the Nicaraguan Supreme Court's decision was based on provisions of the Civil Code of Nicaragua, the Court provided several lengthy quotations to a treatise by a renowned Spanish scholar commenting on various articles of the Civil Code of Spain that related to the points of law dealt with in the case, in support of its interpretation of the applicable Nicaraguan legislation.<sup>10</sup>

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<sup>4</sup> CÓDIGO CIVIL DE LA REPÚBLICA DE NICARAGUA, vols. I & II, arts. 1496, 2480, 2502, 2860, 2899, 2903, 2920, 2958, 3139 & 3446 (Impresiones La Universal, Managua, 2000-2001). Under articles 2-5 of the Commercial Code, mercantile customs have a broader application when there is a gap in the law. CÓDIGO DE COMERCIO arts. 2-5 (Grupo Editoria Acento, Managua, 2007). Customs are not applied in criminal matters. Under article 34, section 11 of the Constitution, any defendant has the right not to be tried or sentenced for an act or omission that, at the time of committing it, had not been previously specified expressly and unequivocally as punishable and sanctioned with a penalty not provided by law. Constitución Política de la República de Nicaragua art. 34, § 11 (Grupo Editoria Acento, Managua, 2007). *See also* ESCOBAR FORNOS, *supra* note 3, at 334-35 (discussing the application of customs under both the Civil and Commercial Codes).

<sup>5</sup> ESCOBAR FORNOS, *supra* note 3, at 331.

<sup>6</sup> Sentencia de las 12:00 p.m., 28 February 1961, Boletín Judicial [Supreme Court] pp. 20315-19.

<sup>7</sup> *Id.* at 20318. The *Cour de Cassation* is the highest court of ordinary jurisdiction in France.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 20319.

<sup>10</sup> *Id.* at 20318-19.

In Nicaragua it is common to cite commentaries by well-known, prestigious legal scholars in court decisions,<sup>11</sup> and those scholars are usually foreigners. It is equally common to see references to foreign law in the commentary of such scholars.

### **III. Concluding Remarks**

The Nicaraguan Code of Civil Procedure allows the court to apply foreign law as the last resort among a list of formal sources of law when there is no applicable legislation in a particular case. This limited authority to use foreign law was reaffirmed by a Supreme Court decision. The Court's decisions often cite the legal opinions of foreign law scholars, who may include references to foreign law in their commentaries.

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<sup>11</sup> ESCOBAR FORNOS, *supra* note 3, at 340.

# South Africa

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**SUMMARY** The South African Constitution allows South African courts to consider foreign law in adjudicating human rights issues. Courts have unfettered freedom to consider the laws of any jurisdiction, to the extent and as often as they deem fit. Foreign law is often used by the courts, particularly the Constitutional Court, in deliberations on issues germane to the Bill of Rights provisions in the Constitution.

## I. Introduction

The use of foreign law by South African courts is specifically sanctioned by the South African Constitution. This concept was first introduced in the South African Interim Constitution<sup>1</sup> in 1993, and was retained in the 1996 Constitution,<sup>2</sup> which is currently in force.

Although South African courts are said to have utilized foreign law often, information concerning the specific numbers regarding the frequency of use, extent of use, and the influence that foreign law has had on South African courts has been difficult to locate. This report briefly describes the mandate on the use of foreign law (comparative interpretation) contained in the South African Constitution, the reasons foreign law is used by South African courts, and difficulties associated with the use of foreign law.

## II. Comparative Interpretation

South African law authorizes its courts to consider foreign law in interpreting the Bill of Rights section of the South African Constitution. The 1996 Constitution states:

When interpreting the Bill of Rights, a court, tribunal or forum must:

- promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- must consider international law; and,
- may consider foreign law.<sup>[3]</sup>

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<sup>1</sup> S. AFR. (Interim) CONST. 1993, § 35(1).

<sup>2</sup> S. AFR. CONST. 1996, § 39(1).

<sup>3</sup> S. AFR. CONST. 1996, § 39(1). The language of the mandate for the use of foreign law was slightly different in the 1993 Interim Constitution. The 1993 Constitution provided that in interpreting the chapter on Fundamental Rights, a court "... may have regard to comparable foreign case law." S. AFR. (Interim) CONST. 1993, § 35(1). This, however, did not prevent courts from referring to sources outside of court cases. DU PLESSIS & CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 121 (Juta & Co., Ltd. 1994).

The consideration of foreign law is permissive. The court is required however, to consider international law. In addition, the consideration of international or foreign law by a South African court does not make such law binding in South Africa.<sup>4</sup> In *State v. Makwanyane*,<sup>5</sup> the South African Constitutional Court stated “we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”

The influence of foreign law may extend beyond the interpretation of the Bills of Rights provisions of the Constitution.<sup>6</sup> The provision that authorizes the consideration of foreign law in interpreting the Bill of Rights also provides that “when interpreting any legislation, and when developing the common law or customary law,” one “must promote the spirit, purpose and objects of the Bill of Rights.”<sup>7</sup> A strict following of this provision virtually guarantees that jurisprudence will be developed that will be used to address legal issues that are not directly germane to the Bill of Rights.

A number of reasons have been cited to justify the authorization to consider foreign law by South African Courts. One reason given was that South Africa was not considered to have had sufficient local precedents “to resolve jurisprudential issues precipitated by the justiciability of provisions of the Bill of Rights.”<sup>8</sup> Additionally, South Africa’s recent past as an apartheid state made it especially difficult to locate domestic jurisprudence to support the interpretation of the new Constitution.<sup>9</sup> The authorization was also justified by the fact that the Bill of Rights was heavily influenced by the constitutions of other countries, including those of Canada, Germany, and Namibia.<sup>10</sup> For example, the concept of a two-stage process of adjudicating violations of rights was Canadian, while that of the prominence of human dignity as a fundamental right was German.<sup>11</sup> It has also been argued that comparative interpretation in general was an inevitable phenomenon due to the “internationalization of human rights issues.”<sup>12</sup> It has even been suggested that one reason for the authorization was political in nature, and was an attempt on the part of South Africa to seek international credibility after years of isolation by showing its commitment to international standards of human rights.<sup>13</sup>

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<sup>4</sup> An international instrument ratified by South Africa, or one that has acquired the status of international customary law would of course be binding whether or not considered by a South African Court for purposes of comparative interpretation.

<sup>5</sup> 1995 (6) BCLR 694.

<sup>6</sup> GEORGE DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN BILL OF RIGHTS 620 (Butterworths, 1999).

<sup>7</sup> S. AFR. CONST. 1996, § 39(2).

<sup>8</sup> GEORGE DEVENISH, CONSTITUTIONAL LAW IN THE LAW OF SOUTH AFRICA 1, 202 (LexisNexis Butterworths, 2d ed. 2004).

<sup>9</sup> Andrea Lollini, *Legal Argumentation Based on Foreign Law: An Example from Case Law of the South African Constitutional Court*, 3 UTRECHT L. REV. 60, 65 (2007).

<sup>10</sup> J.R. de Ville, *Constitutional and Statutory Interpretation* 241 (Interdoc Consultants Pty Ltd. 2000).

<sup>11</sup> Sydney Kentridge, *Comparative Law in Constitutional Adjudication, The South African Experience in JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION?* (Basil Markesinis & Jörg Fedtke eds., UCL Press 2006).

<sup>12</sup> DEVENISH, *supra* note 6, at 620.

<sup>13</sup> Lollini, *supra* note 9.

The South African Constitution leaves the decision as to the manner in which a comparative interpretation is to be conducted to the courts. No criterion is provided instructing the court on how to select relevant foreign laws for consideration or establishing to what extent foreign laws may be used in deliberations and decisions. With such an open-ended authority, the use of foreign law could be tricky. Possible issues that could arise from the unfettered use of foreign law by South African Courts have been summarized as:

[a] fixation on legal rules and concepts and a neglect of legal culture and context; considering foreign legal rules and judgments in isolation and failing to situate them within a larger legal system and tradition; using foreign law as authority for a certain standpoint rather than as a basis for comparison and a source of constitutional arguments; failing to appreciate that presuppositions and prejudices deeply embedded within our own legal culture may distort our understanding of foreign legal materials; uncritically accepting the distinction between public and private law; and restricting the sample of jurisdictions to be surveyed to those which favor a particular standpoint.<sup>[14]</sup>

Since its establishment in 1994, the South African Constitutional Court is said to have extensively engaged in comparative interpretation.<sup>15</sup> The Court made attempts to address the risks associated with the unfettered permission to engage in comparative interpretation. For instance, in *Shabalala v. The Attorney-General of Tvl*<sup>16</sup> the court stated:

[The mandate to consider foreign law] should be exercised with circumspection, since the resort to case law of foreign jurisdictions by persons not fully acquainted with the practice in these jurisdictions or with the concepts and techniques of foreign system entails a real risk that a foreign legal position would be misinterpreted. It is necessary to take into account the accumulated experience of what does and does not work satisfactorily in the administration of justice in South Africa.

The challenges faced by the court in engaging in comparative interpretation are seen in the case of *Makwanyne*,<sup>17</sup> one of the first cases adjudicated by the Constitutional Court following its establishment. At issue was the constitutionality of capital punishment – whether it was cruel and degrading treatment. The court in deliberating on this matter consulted a wide range of foreign laws, including the laws of Canada, Germany, Hungary, India, Tanzania, the United Kingdom, the United States and Zimbabwe.<sup>18</sup> The Court attempted to define the limited role that foreign laws could play and the caution with which comparative interpretation should be approached. It stated that although comparative “Bill of Rights” jurisprudence, in the absence of “indigenous jurisprudence,” is important and that foreign authorities are valuable to the extent that they show the arguments for and against the death penalty and how other jurisdictions have

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<sup>14</sup> Henk Botha, Foreign Constitutional Law and the Courts: Reflections from South Africa (presented at the International Association of Law Schools Conference on Constitutional Law, Washington, DC, Sept. 11-14, 2009), available at <http://www.ialsnet.org/meetings/constit/papers/BothaHenk%28SouthAfrica%29.pdf>.

<sup>15</sup> Lollini, *supra* note 9, at 65.

<sup>16</sup> 1995 (12) BCLR 1593.

<sup>17</sup> 1995 (6) BCLR 694.

<sup>18</sup> *State v. Makwanyne*, 1995 (6) BCLR at vi-xiii.

resolved the issue, foreign jurisprudence “will not necessarily offer a safe guide to the interpretation of [the Bill of Rights chapter of the South African Constitution].”<sup>19</sup> The jurisdictions that were considered provided a wide range of at times conflicting solutions on the matter. For instance, constitutions of the United States and India expressly permitted the death penalty, while the constitutions of Germany and Namibia prohibited it.<sup>20</sup> With the exception of Hungary, all jurisdictions that outlawed the death penalty did so through their legislatures.<sup>21</sup> Within the United States, which provided the largest number of cases,<sup>22</sup> the Court found a contradiction in the way in which the death penalty issue was handled. The Court stated that United States jurisprudence has not yet solved the dilemma created by the constitutional prohibition against cruel and unusual punishment and the acceptance of capital punishment by the majority of the United States Supreme Court as constitutional.<sup>23</sup> After completing its review the court found the death penalty to be incompatible with “the recognition of the dignity of and worth of the individual which underlay the [1993 Interim] Constitution.”<sup>24</sup> In the absence of clear guidance on what is and is not appropriate in conducting comparative interpretation, judges may be influenced by a certain foreign law viewpoint beyond what was intended by the drafters of the South African Constitution.

### III. Conclusion

Two methods of citing of foreign law are said to have emerged from the way in which the South African Constitutional Court has conducted comparative interpretation. These are:

- When judges cite foreign law to support a certain interpretation of law (which has been called the “they also think this way abroad” approach); and
- When foreign law informs a particular interpretation for a constitutional provision (which has been called the “considering they think this way abroad” approach).<sup>25</sup>

While the use of the first approach, which serves to reinforce a particular interpretation, appears reasonable, the use of the latter approach is considered inappropriate.<sup>26</sup>

The shortcomings of comparative interpretation aside, however, there appears to be a general consensus in South Africa regarding the need to use foreign law in interpreting the South African

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<sup>19</sup> *Id.*

<sup>20</sup> Kentridge, *supra* note 11, at 329-30.

<sup>21</sup> *Id.*

<sup>22</sup> *State v. Makwanyne*, 1995 (6) BCLR at xii-xiii.

<sup>23</sup> *Id.* at 694.

<sup>24</sup> Kentridge, *supra* note 11, at 331.

<sup>25</sup> Lollini, *supra* note 9, at 66.

<sup>26</sup> *Id.* One example provided was a fairly recent Constitutional Court case, *Laugh It Off Promotion v. South African Breweries International*, 2005 (8) BCLR 743. The Court in this case was criticized for failing to make “clear comparison” and for simply importing foreign rulings into the South African pool of interpretation without analysis regarding the relevance of the foreign cases it considered. *Id.* See also BOTHA, *supra* note 14, at 5.

Constitution.<sup>27</sup> As it has elegantly been put, for courts that do not have the benefit of dipping into 200-year-old jurisprudence, abandoning comparative interpretation is not an option and that when “carefully used, [comparative interpretation] is at least informative, is often enriching, and at best can be inspiring.”<sup>28</sup>

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<sup>27</sup> *Id.* See also *State v. Makwanyne*, 1995 (6) BCLR at 686.

<sup>28</sup> Kentridge, *supra* note 11, at 333.