FOREIGN FADS OR FASHIONS? THE ROLE OF COMPARATIVISM IN HUMAN RIGHTS LAW

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Abstract Although there is a broadly similar core of human rights law and courts in different jurisdictions face strikingly similar questions, the use of comparative law in the human rights context remains controversial. Reference to foreign human rights materials is regarded as undemocratic, selective and misleading. Rather than searching for a single 'right answer', or expecting convergence, this article addresses these challenges from a deliberative perspective. A deliberative approach requires decisions to be taken on the basis of reasons which are thorough and persuasive. Even where outcomes diverge, there need to be good reasons, whether textual, institutional, or cultural. Comparative materials constitute an important contribution to this process. Part I critically assesses various alternative potential functions of comparative law. Part II develops the deliberative model while Part III addresses the main critiques of comparative law. Part IV tests the deliberative approach against a selection of cases dealing with two particularly challenging issues confronted by courts in different jurisdictions, namely the use of substantive principles such as dignity, and the application of justification or limitation clauses in the context of prisoners' right to vote. Case law is drawn from countries which already cite each other and which have broadly similar institutional frameworks: the USA, Canada, South Africa, India, Australia, the UK, New Zealand and the European Court of Human Rights to the extent that it too considers comparative law.

Keywords: comparative human rights law, deliberative approach, dignity, prisoners' right to vote, sexual orientation discrimination, theories of comparative law.

I. INTRODUCTION

Just as the US Supreme Court seems to be tentatively embracing comparative perspectives in human rights law, so the Indian Supreme Court, in two judgments in the space of a few months, has both rejected and embraced their

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relevance. All three developments concerned the rights of lesbian, gay, bisexual and transgender people (LGBT). In *Lawrence v Texas*,[1] Kennedy J drew on European Court of Human Rights (ECtHR) case law to support overruling his own Court's precedent and strike down the criminalization of sodomy.[2] This was against a scathing dissent by Scalia J. 'The Court's discussion of these foreign views … is… meaningless dicta. Dangerous dicta, however, since ''this Court … should not impose foreign moods, fads, or fashions on Americans''.' For him, such citation is a pretext for judges to impose their own subjective values, invoked 'when it agrees with one's own thinking' and therefore 'not reasoned decision making, but sophistry'.[3] Similarly conflicting trends are visible in the Indian Supreme Court. In its 2014 decision in *Koushal*, reinstating the criminalization of sodomy, the Court was dismissive of the reliance on comparative law by the Delhi High Court.[4] 'In its anxiety to protect the so-called rights of LGBT persons … the High Court has extensively relied upon the judgments of other jurisdictions. Though these judgments shed considerable light on various aspects of this right …, we feel that they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.'[5] Yet only a few months later, a different division of the Indian Supreme Court cited expansively from foreign materials to support its innovative decision to recognize not just transgender rights, but a third gender.[6] Taking an even stronger position, Waldron sees the citation of foreign law as the manifestation of a nascent system of law common to mankind, which we are all partly governed by.[7]

These disagreements reflect the real complexities raised by the use of comparative law. The charge of 'cherry-picking' is easily made and difficult to refute. Which jurisdictions form appropriate comparators, and which issues are appropriate for comparison? Given the important social, political and legal differences between jurisdictions, how can the conclusions reached by judges in other jurisdictions be evaluated and weighed against each other?[8] Where there is no express constitutional mandate to refer to foreign norms, is it illegitimate and undemocratic for Courts to do so?[9] While these difficulties arise in comparative law more generally, human rights law is arguably distinctive. On the one hand,

[1] *Lawrence v Texas* (2003) 123 SCt 2472 (US Supreme Court).
[2] *Bowers v Hardwick* (1986) 478 US 186 (US Supreme Court).
[3] *Roper v Simmons* (2005) 543 US 551 (US Supreme Court) 627 (Scalia J).
[4] *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1 (Indian Supreme Court).
[5] ibid [52].
[6] *NALSA v Union of India* (Writ Petition 604 of 2013) (April 2014) (Indian Supreme Court).
[7] J Waldron, *Partly Laws Common to Mankind: Foreign Law in American Courts* (Yale University Press 2012).
[8] Montesquieu for example argued that laws 'should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another'. CdS Montesquieu, Baron de, *The Complete Works of M. de Montesquieu , vol. 1 (The Spirit of Laws)* [1748] (T Evans 1777) 5 at <http://oll.libertyfund.org/titles/837>.
[9] I Cram, 'Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases' (2009) 68 CLJ 118, 140.

there is a broadly similar common core of human rights both internationally and domestically, and human rights guarantees in different jurisdictions have important central affinities, often through conscious adoption or adaptation. The major international human rights instruments have been widely ratified, forming a shared international frame of reference even where individual jurisdictions do not automatically incorporate international law. Moreover, the human rights questions posed to courts in different jurisdictions are often the same: Does the right to vote include prisoners? Is freedom of speech incompatible with the prohibition of hate speech? What does the right to equality entail for LGBT people? On the other hand, human rights are inevitably formulated in open-textured terms, requiring interpretation and application in specific contexts. The differences in text, culture, history and institutions might be more important than the similarities. Thus posing the same questions does not necessarily entail that different jurisdictions should give the same answers. Comparative law is particularly challenging when the issue before the court is whether the State has justifiably limited the right. Balancing public interests against individual human rights might seem to be a paradigmatically domestic exercise.[10] Yet many bills of rights allow States to limit rights only when necessary in a democratic society, suggesting that there are common values in democratic societies.

In practice there is a growing trend among apex courts to cite cases from other jurisdictions in reaching their own decisions on human rights law.[11] However, while there is now a rich academic literature on comparative constitutional law,[12] judges themselves rarely articulate expressly the role of comparative materials in human rights cases.[13] Kriegler J, in an early case in the South African Constitutional Court (SACC) declared his 'wish to discourage the frequent – and, I suspect, often facile – resort to foreign "authorities".'[14] While not opposed in principle to such citation, Kriegler J regarded it as important to articulate its function precisely. Thus where 'courts in exemplary jurisdictions have grappled with universal issues confronting us';

[10] L Hoffman, 'Human Rights and the House of Lords' (1999) 62 MLR 159, 165.

[11] See more generally E Mak, *Judicial Decision-Making in a Globalised World* (Hart 2013); ibid 4; for New Zealand see J Allan, G Huscroft and N Lynch, 'The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?' (2007) 11 OtagoLRev 433.

[12] O Kahn-Freund, 'The Uses and Misuses of Comparative Law' (1973) 37 MLR 1; A Barak, 'Response to "The Judge as Comparatist": Comparison in Public Law' (2005) 80 TulLRev 195; D Davis, 'Constitutional Borrowing: The Influence of Legal Culture and History in the Reconstitution of Comparative Influence: The South African Experience' (2003) 1 ICON 181; Waldron (n 7); C McCrudden, 'Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499; A Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 URichLRev 99; R Posner, *How Judges Think* (Harvard University Press 2008) ch 8; R Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014); M Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar Publishing 2014).

[13] Cram (n 9); Allan, Huscroft and Lynch (n 11).

[14] *Bernstein v Bester* (1996) 2 SALR 751 (South African Constitutional Court).

or 'where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision'. Considering such materials, however, 'is a far cry from blithe adoption of alien concepts or inapposite precedents'.[15]

Building on these insights, this article aims to sketch out the beginnings of a theory of comparativism in the human rights field based on a more general principle of deliberative reasoning. Judicial accountability depends centrally on the quality of the reasons adduced. A deliberative approach requires that decisions be taken on the basis of reasons which are thorough and persuasive. In contested human rights cases there can be no single right answer; but the suspicion that judges are imposing their own subjective beliefs can only be dispelled by reasoning which is capable of being persuasive and openly canvasses a range of alternative solutions. Comparative materials constitute an important contribution to the rigour of this process, particularly with respect to canvassing alternative solutions. A deliberative approach does not regard the function of comparativism as tending towards convergence in human rights decision-making worldwide. Even apart from the difficulty in establishing a universal meaning of human rights, there are important and relevant differences in constitutional texts, legal institutions and social, cultural, historical and political contexts. But whether the outcomes converge or diverge, there need to be good reasons, articulated in the decision explaining why the textual, institutional, legal, social or cultural context demands convergence or divergence.

Once it is recognized that the function of comparative law is deliberative rather than binding, the force of many of the criticisms falls away. Because comparative materials are not binding precedents, they need only be chosen for the force of their reasoning, rather than for their legal status in foreign countries. This undercuts the basis of the cherry-picking critique: judgments can be chosen from those countries where there is relevant and valuable material, and dissents could be preferred to majorities. Foreign judgments can even be referred to for the main purpose of demonstrating why they should not be followed. A similar response can be made to the argument that it is illegitimate to refer to foreign judgments where there is no specific mandate in the constitution to do so.[16] By considering how courts in other jurisdictions have answered similar questions, particularly where they reference similar human rights norms, judges improve the range and quality of the reasoning. But because foreign judgments are persuasive but not binding, judges in the domestic court remain the final arbiters of the value to be accorded to such materials.

Viewing comparative law as a deliberative resource does not sanction, in Kriegler J's words, 'blithe adoption of alien concepts or inapposite

[15] ibid.

[16] Cram (n 9) 140.

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precedents'. Instead, it provides a way of assessing the appropriateness of its use. To be of deliberative value, foreign judgments must be read and understood in their legal and social context. Judgments based on a legal text with important differences in wording may not be as persuasive as those based on more similar constitutional texts. Similarly, institutional and doctrinal differences, such as the relationship between the court and the legislature, the separation of powers principle and the role of precedent, should also be accounted for. For these reasons, we would not necessarily expect to see a convergence of outcomes, although we would hope to see good reasons for divergence.[17]

This article is both descriptive and normative: it assesses the ways in which judges have used comparative law in the human rights field in order to begin to construct a theory of comparativism which meets the objections of opponents of the use of comparative materials. It builds on the foundational work of McCrudden who surveyed and analysed why judges actually use comparative law.[18] The relationship between theory and the case law is dialectic: the paper aims both to test the theory against the case law and to test the case law against the appropriately modified theory. Case law is drawn from a sample of jurisdictions identified by three criteria: first that courts in these jurisdictions cite each other's judgments in human rights contexts, whether or not they regard them as persuasive; second, that the language of judgments is English; and third that citation of authorities perform a broadly similar role, in terms of their influence on the ultimate decision. The common law method is the most illuminating in this respect. Applying these criteria, the following jurisdictions were selected: the USA, Canada, South Africa, India, Australia, New Zealand and the UK. The ECtHR is also included to the extent that it too cites the other jurisdictions in the sample and is cited by them; one of its official languages is English and it uses a broad doctrine of precedent. Importantly, these criteria are compatible with the existence of significant differences in the relationship between court and legislature; the history and context; the text of the constitution or human rights instrument and the ease with which the latter can be amended through the political process. Applying these criteria makes it possible to trace the migration of judgments from one jurisdiction to another and to assess how they are handled by different judges. In particular, it makes it possible to show whether judges openly articulate their reasons for accepting

[17] Thus Montesquieu himself, having pointed out the specificity of laws to their own nations, went on to create a work in comparative public law which is, in Hirschl's words: 'indisputably a – if not the – defining moment in the history of comparative public law'. Hirschl (n 12) 127. Although many criticisms can be made of Montesquieu's methodology (ibid), he drew extensively on comparative legal research in both a descriptive and a normative sense, primarily to support his taxonomy of laws, but also to measure those laws against some of his background normative principles, such as the separation of powers.

[18] McCrudden, 'Transnational Judicial Conversations' (n 12).

or rejecting foreign judgments and whether and how institutional and other contextual differences are used to justify diverging or converging results.

It should be noted that the aim of the selection is not to make a generalized assessment of which jurisdictions are appropriate for comparison; but to assess the reasoning actually used by courts when they do in fact refer to foreign judgments in the light of the deliberative theory. The deliberative model does not give a generalized answer as to the appropriateness of comparison, but requires judges resorting to foreign materials to justify their use in each context and to deal expressly with textual, institutional or other factors which have a bearing on the appropriateness of the use in the case in question.

Part I of the article critically assesses various alternative potential functions of comparative law. Part II develops the deliberative model. Part III addresses the main critiques of comparative law and Part IV tests the deliberative approach against a selection of cases where courts have confronted broadly similar questions in human rights law.

II: WHY COMPARATIVE HUMAN RIGHTS LAW?

A. A Universal Meaning for Human Rights

The most intuitive but ultimately least persuasive reason for using comparative human rights law is based on the theory that human rights are universal. If we take the view that human rights are based on universal values, then we would expect that judges would seek to articulate those values in interpreting human rights.[19] This argument goes beyond the expectation of consistency in interpretation. It assumes that there is a 'right answer' to fundamental questions of interpretation of human rights. In Posner's more florid words: 'To cite foreign decisions as precedents is indeed to flirt with the idea of universal natural law, or, what amounts to almost the same thing, to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience.'[20] It also implies that, if judgments contradict each other on core human rights issues, some are correct and others are not.

Put in these terms, the hazards of using comparative law to find the right answer to human rights questions are immediately apparent. It is not easy to tell which answers are correct: 'there is pervasive disagreement on its actual content, on how to ascertain it, and on how to resolve disagreements over it'.[21] Moreover, as Waldron points out, there is no real need to look to foreign decisions for the 'right' answer. 'Natural law only guarantees that there is a right moral answer; it does not guarantee that any existing consensus embodies it.'[22] Similarly, Slaughter argues that 'the premise of

[19] R Posner, 'The Supreme Court 2004 Foreword: A Political Court' (2005) 119 HarvLRev 32, 85.

[20] ibid 86–7. McCrudden, 'Transnational Judicial Conversations (n 12); Slaughter (n 12).

[21] Posner, 'A Political Court' (n 19).

[22] Waldron (n 7) 41.

universalism … does not anoint any one tribunal with universal authority to interpret and apply these rights'.[23] Even if there were universal human rights values, there would be a need to determine how they applied to the local context in different jurisdictions. It is unlikely that we will find universal answers to institutional questions, such as the appropriate separation of power between the judiciary and executive; or to the fair balance between human rights fulfilment and appropriate limitations and indeed between conflicting rights. In any event, Posner may well be tilting at windmills. Although he labels Kennedy J a 'natural lawyer',[24] in practice courts do not see themselves as using comparative law as a means of discovering the truth behind human rights.[25]

B. A Global Framework

Rather than a natural law vision, it is possible to suggest a softer and more aspirational role for the quest for universal values. This approach would see transnational sharing as part of a common enterprise in developing a universal meaning for human rights. Slaughter argues that such sharing 'suggests recognition of a global set of human rights issues to be resolved by courts around the world in colloquy with each other. Such recognition flows from the ideology of universal human rights embedded in the UN Declaration of Human Rights.'[26] This need not stop at the Universal Declaration. The major international human rights documents are widely ratified. Moreover, the intensity of constitution-making in the post-colonial period has witnessed much conscious borrowing, adaption and interaction in framing human rights. The Irish concept of non-justiciable directive principles directly influenced the incorporation of directive principles of social policy into the Indian Constitution.[27] The Canadian Charter served as the model for the South African constitutional text, with 'liberal borrowings from Germany and the USA'.[28]

However, it is too strong to suggest that such similarities should lead to a converging understanding of human rights across different jurisdictions. While there is a common core to most bills of rights, there are also significant differences, often derived from a conscious rejection of a comparative approach. For example, according to Choudhry,[29] the drafters of the Canadian Charter deliberately set out to avoid the US experience in *Lochner v New York*,[30]

[23] Slaughter (n 12) 121–2.
[24] Posner, 'A Political Court' (n 19) 85.
[25] McCrudden (n 12) 528.
[26] Slaughter (n 12) 121–2.
[27] See further S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 93.
[28] Davis (n 12) 191. See further D Law and M Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 NYULRev 762.
[29] S Choudhry, 'The *Lochner* era and comparative constituitonalism' 2 (2004) 2 ICON 1, 1.
[30] *Lochner v New York* 198 US 45, 25 SCt 539 (United States Supreme Court).

where the US Supreme Court invalidated maximum working hours legislation on the grounds that it interfered with the employer's rights under the Fourteenth Amendment, which declares that 'no State can deprive any person of life, liberty or property without due process of law'. The Canadian provision therefore deliberately omits a right to property[31] and includes a legislative override.[32]

Such textual differences mean that citation of comparative law can lead to appropriate divergence in outcomes. A particularly salient example is the right to freedom of speech, where the US First Amendment stands out for including no explicit limitation clause. By contrast, like other freedom of speech guarantees, the Canadian Charter permits the right to be subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[33] This difference has been particularly important in addressing the question of whether prohibiting hate speech contravenes freedom of expression. In the Canadian hate speech case of *Keegstra*, Dickson CJ made it clear that: 'It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States.'[34] In particular, since the limitation clause in the Canadian Charter 'operates to accentuate a uniquely Canadian vision of a free and democratic society … we must not hesitate to depart from the path taken in the United States'.[35]

Rather than convergence, we could see comparative law in terms of what Mendes calls mutual cooperation, leading to 'not only mutual understanding, but also reciprocal improvement'.[36] He does not, however, elaborate on what standards should apply to judge reciprocal improvement. This is a complex issue. Aharon Barak, former President of the Supreme Court of Israel, gives two ways in which this might work. First, 'comparative law awakens judges to the potential latent in their own legal systems'. Second, 'it informs judges about the successes and failures that may result from adopting a particular legal solution'.[37] Similarly Lord Mance recently wrote that 'when judges look to comparative and international material, they may do so for information, inspiration or confirmation, just as they use domestic decisions that are not binding on them. The coherence of a legal system is encouraged if different

[31] Section 7 of The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK), 1982, c 11 (Canadian Charter) reads: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

[32] Canadian Charter, section 33; Choudhry (n 29).

[33] Canadian Charter, section 1; see similarly European Convention on Human Rights (ECHR) 213 UNTS 222, entered into force 3 Sept, 1953, art 10(2).

[34] *R v Keegstra* [1990] 3 SCR 697 (Supreme Court of Canada).

[35] ibid 743.

[36] C Mendes, 'A Global Constitution of Rights: The Ethics, the Mechanics and the Geopolitics of Comparative Constitutional Law' in U Baxi, F Viljoen and O Velhena (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Press 2014) 55.

[37] Barak (n 12).

judges follow broadly similar tracks, unless and until an appellate court marks a new path … .'[38] It is important, however, to be cautious about what lessons should be learned. As Kahn-Freund so cogently argued, wholesale transplantation is hazardous, and a legal model which has flourished in one jurisdiction might not take well to transplantation in a very different legal environment.[39] Notably too, the trajectory of development of an initially similar model is influenced by the particular environment, with often radically different results. Thus the Irish directive principles have remained sternly non-justiciable, while the Indian Supreme Court found ways of enforcing them by using them to shape the interpretation of justiciable rights.[40]

C. *Ius Gentium?*

Waldron takes a stronger position. For him, citation of foreign law is a manifestation of a wider *ius gentium* or a set of laws partly common to all humankind.[41] Convergent currents of foreign statutes, constitutional provisions and precedents can add up to 'a body of law that has its own claim on us, the law of nations, or *ius gentium* which applies to us simply as law, not as the law of any particular jurisdiction'.[42] In this way, governance by law can be recognized, not just as the idiosyncratic traditions of particular countries, but, at least in part as a shared or common enterprise in human civilization.[43] Like science, law becomes a 'global enterprise'.[44] Courts in different jurisdictions regularly cite one another because they value one another's assistance; they see each country as 'contributing to a common storehouse of intellectual legal resources', linking to an overarching system: 'laws common to all mankind'.[45]

This raises the question of how we determine which laws constitute *ius gentium*. Waldron accepts that this task cannot be done in a technical, value-neutral way: *ius gentium* is 'a body of principles, discerned interpretively from the commonalities that exist among the positive laws of various countries, by a legal sensibility that is both lawyerly and moralized'.[46] Waldron is careful to distance himself from natural law. He makes it clear that *ius gentium* is not a guarantor of truth: consensus in both law and science can be wrong. However, it is a repository of wisdom to which many have contributed over the years. There is therefore no sensible alternative but to pay attention to it.[47] Moreover, *ius gentium*, although not enacted as such by any sovereign legislature, is nevertheless positive law. It has its source in municipal legal systems of the world, but its legal effect presents itself as 'a body of principles that particular systems may draw down from when

[38] L Mance, 'Foreign Laws and Languages' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodgers of Horsferry* (OUP 2013).
[39] Kahn-Freund (n 12). [40] See *NALSA* (n 6) [95].
[41] Waldron (n 7) 3. He uses the term 'partly common to all mankind'. [42] ibid.
[43] Waldron (n 7) 3. [44] ibid 5. [45] ibid 20. [46] ibid 35. [47] ibid 41.

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seeking to resolve difficult issues in a way that is wise and just and in harmony with the way those issues are resolved elsewhere in the world'.[48] Waldron makes a strong argument that in this way it is binding, as 'a sort of law, the law of the whole world'.[49]

Waldron is able to take this step while remaining a legal positivist by drawing on Hart's understanding that something is called law, not because there is a sovereign authority behind it, but because there is a settled practice among a group of officials, such as judges, of recognizing and acting on it. Therefore, he argues, 'if judges were to develop a settled practice of inferring, citing, manipulating and applying principles from decisions by courts in foreign countries, then that might make the results "law" for their system'.[50] For him, we are at a 'Tinkerbell' moment: this material will exist as a body of law if judges believe in it enough and begin articulating this belief into practice.[51] This echoes Barak's description of how comparative law becomes widely received. For Barak, 'this vicious circle is coming to its end. Judges will start to rely on comparative law; lawyers will tend to cite it to judges; law schools will start teaching comparative law; scholars will be encouraged to research in comparative law; judges will rely more and more on comparative law.'[52]

Waldron's development of the concept of *ius gentium* is ambitious and challenging. However, it is problematic in two respects. First, his claims for a systematic set of principles in the form of *ius gentium* are too strong. Even within international law, it has become increasingly difficult to find a cohesive set of central principles.[53] How much more so for comparative law? Second, to regard *ius gentium* as 'binding' is to invite many of the criticisms that have been levelled against the use of comparative law, such as that it is undemocratic, not comprehensive, and methodologically unsound. Waldron deals with this criticism by adopting a particular understanding of what is 'binding'. Like precedents, *ius gentium* may only be binding if the reasons against it are not very strong;[54] but the court still has a duty to take it into account and give it appropriate weight.[55] Nevertheless, 'binding' has stronger connotations in law than is necessary to give a true picture of its value as a deliberative resource.

III. COMPARATIVE LAW AS A DELIBERATIVE RESOURCE

It is not necessary to go so far as to regard comparative law as *ius gentium* to see it as playing a role in the evolution of human rights law. Instead, drawing together much of what has been said above, I would articulate its role as a valuable deliberative resource. While there can be no absolute right answers

[48] ibid 51. [49] ibid 48. [50] ibid 54. [51] ibid 55. [52] Barak (n 12) 195.
[53] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 1. [54] Waldron (n 7) 61.
[55] ibid 62. For a discussion of comparative law as persuasive authority see McCrudden, 'Transnational Judicial Conversations' (n 12).

to human rights questions, judges are required to make their decisions on the basis of reasons which are the best they can find.[56] Comparative materials, on this approach, constitute an important contribution to the rigour of the deliberative process. If other jurisdictions, faced with similar dilemmas, have discussed and weighed up the arguments in either direction, these should be canvassed as part of the decision-making process. In Waldron's terms, this is equivalent to consulting the laboratory of the world;[57] for Barak, this is the judge's 'experienced friend'.[58] In the context of international law, Koskenniemi refers to 'Kant's cosmopolitan project rightly understood: not an end-state or party programme but a project of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot be reformulated into an institution, a technique of rule, without destroying it'.[59] The deliberative approach suggests that comparative law should do more than just confirm a judge's predetermined opinion. It should also be persuasive in a deliberative sense. It is neither binding nor a fig leaf, but rather a resource to be considered as part of the judicial decision-making process, a process by judges of 'getting their bearings among a tangle of issues, exploring options, considering various possible models of analysis'.[60] This is not blind deference, but a nuanced discussion of the different possible approaches.

Although a deliberative approach entails regarding comparative law as a valuable and sometimes essential part of judicial decision-making on human rights issues, it does not require judges to regard foreign materials as binding at any level.[61] In the end result, it is the judge's decision as to the appropriateness and value of the deliberative resource which is controlling. This is expressly reflected in the South African constitution, which states that when interpreting the Bill of Rights, courts may consider foreign law and must consider international law.[62] Under the UK Human Rights Act 1998 (HRA), courts must 'take into account' the judgments of the ECtHR.[63] Both require the Court to consider comparative law rather than regard it as binding. However, the fact that it is not binding does not mean that recourse to comparative law commits judges to embarking on moral rather than legal decision-making. Dworkin argues that to discern the principles already embedded in the law, a judge must 'grappl[e] with a whole set of shifting, evolving and interacting standards … about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all of these to contemporary moral practices and hosts of other

[56] On deliberative approaches see J Cohen, 'Deliberation and Democratic Legitimacy' in A Hamlin and P Pettit (eds), *The Good Polity* (Oxford 1989); S Fredman, 'From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Right to Vote' (2013) PL 292.

[57] Waldron (n 7) 89, 199. [58] Barak (n 12) 195. [59] Koskenniemi (n 53) 30.

[60] Waldron (n 7) 80. [61] A major exception is EU law, which is binding on all Member States.

[62] Constitution of the Republic of South Africa, 1996, section 39.

[63] Human Rights Act 1998, (UK) section 3. This point is discussed further below.

such standards'.[64] Comparative human rights materials should be one of the sources in this exercise;[65] and in fact, this is how many judges regard its role. In her important study, Mak found that the majority of interviewed judges focussed more on finding relevant arguments for their decision than the status of the source. In particular, arguments from comparative law were 'valued for the insights which they provide regarding the possible interpretation of the law'.[66]

A deliberative approach permits judges to choose what they regard as the most persuasive authority, but requires persuasive deliberative reasons for such choices. We have already rejected the possible role of comparative law in discovering a universal meaning. Nevertheless, there may be good deliberative reasons to expect that similarly worded human rights should be given similar meanings; or at least that judges should consider whether it was appropriate to expect such a convergence. This could be because consistency is valued in itself, especially where a domestic instrument is specifically intended to function as the State's compliance with the mutually shared international human rights provision. But it could also be because judges in different jurisdictions might find the same reasons equally persuasive.

However, viewing comparative law as a deliberative resource places important constraints on its appropriate use.[67] Most important is the role of the text itself. Judgments based on a legal text with significant differences in wording may not be as persuasive as those based on more similar constitutional texts. A second set of constraints arises from institutional and doctrinal differences, such as the relationship between the court and the legislature, the separation of powers principle and the role of precedent. Third and equally important are differences in social, economic, historical and political contexts. It is therefore appropriate, as McCrudden found, that 'it is the judiciaries of liberal democratic regimes that cite each other'.[68] The balance is summed up neatly by Sachs J in the SACC where he reiterated that 'in developing doctrine we had to take account both of our specific situation and of problems which we shared with all humanity'.[69]

At the same time, simply citing such difference is not sufficient: the deliberative approach requires good reasons for divergence as much as for convergence. For example, in a model deliberative approach, Kriegler J rejected the relevance of US First Amendment jurisprudence in interpreting freedom of speech in the South African Constitution. Thus, he stated: 'The First Amendment declaims an unequivocal and sweeping commandment; … With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of

[64] R Dworkin, *Taking Rights Seriously* (Duckworth 1977) 40; see also R Alexy, *A Theory of Constitutional Rights* (OUP 2004). [65] Waldron (n 7) 64. [66] Mak (n 11) 4.
[67] McCrudden, 'Transnational Judicial Conversation' (n 12) 517. [68] ibid.
[69] *Lawrence v State* [1997] ZACC 11 (South African Constitutional Court) citing the earlier case of *Prinsloo v Van der Linde* [1997] (6) BCLR 759 (South African Constitutional Court).

protection as is the right to freedom of expression.'[70] More complex is a situation in which foreign materials point in opposite directions. In the *Keegstra* hate speech case, the Court was faced with the decision as to whether the Canadian guarantee of freedom of speech was closer to the US provision or that of international human rights documents, which saw the right to freedom of expression as compatible with a ban on hate speech. In the result, Dickson CJ regarded the existence of a global consensus as good reason to prefer the international understanding to that of the US Supreme Court: 'That the international community has collectively acted to condemn hate propaganda and to oblige State Parties to CERD and ICCPR to prohibit such expression, thus emphasizes the importance of the objective behind [the Canadian prohibition on hate speech] and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter.'[71] As we have seen, he was fortified in this view by the textual difference between the Canadian and the US guarantees of freedom of speech. McLachlan J, however, came to a different conclusion. For her, 'the experience most relevant to Canada is that of the United States, since its Constitution, like ours, places a high value on freedom of expression, raising starkly the conflict between freedom of speech and the countervailing values of individual dignity and social harmony'.[72] That judges using the same comparative material reach opposing conclusions does not, however, undermine the deliberative model. Rather, provided both sides make it clear how and why they are using comparative sources, this contributes to the deliberative legitimacy of the decision. At the same time, the reasons given can continue to convince as the jurisprudence evolves. In the 2012 hate speech case of *Whatcott*, McLachlan CJ appeared to have been persuaded that 'the balancing of competing Charter rights should also take into account Canada's international obligations with respect to international law treaty commitments …[which] reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values'.[73]

A similarly deliberative approach can be found in the New Zealand case of *R v Hanson*[74] where Elias CJ referred to foreign case-law in the process of construing the meaning of two central provisions of the New Zealand Bill of Rights Act, the interpretation provision and the limitation clause.[75] Elias CJ considered but rejected the views of the UK court in relation to the interpretation provision,[76] but found the Canadian Charter helpful in

[70] *S v Mamabolo* (CCT 44/00) [2001] ZACC 17 (South African Constitutional Court) [41]–[42].
[71] *Keegstra* (n 34) 754. [72] ibid 838.
[73] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (Supreme Court of Canada). [74] *R v Hanson* [2007] NZLR 7 (Supreme Court of New Zealand).
[75] Section 5 of the New Zealand Bill of Rights Act 1990.
[76] *Hanson* (n 74) [12]. Section 6 of the New Zealand Bill of Rights Act provides that where an enactment can be given a meaning consistent with the rights and freedoms in the Bill of Rights, that meaning should be preferred.

determining the relationship of the substance of the right to the limitation clause, which was patterned on Section 1 of the Canadian Charter. Acknowledging that the Canadian Charter differed from its New Zealand counterpart in that only the former included a strike down power, he argued that nevertheless 'that difference does not detract from the assistance to be obtained from the Canadian cases on the approach to s 1 of the Charter'.[77] In particular, he noted that the Canadian approach to justification was to keep the definition of the substance of the right separate from and prior to the question of whether it could be legitimately limited. Thus the seminal Canadian case of *R v Oakes* held that the meaning of the right must first be ascertained for the 'cardinal values' it embodies.[78] Any limitation should therefore be on the basis of a stringent standard appropriate to the prima facie violation of a constitutionally guaranteed right. Elias CJ concluded: 'This reasoning is in my view equally compelling in the context of s 5 of the New Zealand Bill of Rights Act.'[79] This approach is quintessentially deliberative: Elias CJ considered foreign materials for the force of their reasoning, conscious of relevant differences between jurisdictions and also of the ultimate authority of the New Zealand court to determine whether the reasoning was compelling.

Less convincing from a deliberative standpoint has been the Indian Court's reference to social and historical differences to justify rejecting the relevance of foreign materials. In *Koushal*,[80] the Supreme Court referred to only two previous decisions to reject the Delhi High Court's use of comparative law in determining whether the criminalization of sodomy was a breach of the rights to life and equality. The first was an early death-penalty case where the Court had expressed 'grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.'[81] The second was a 1974 ruling in which it rejected the relevance of *Halsbury's Laws of England*, cited by Counsel on the issue of undue influence in relation to engagement to be married.[82] In that case, the Court explained that the context in which marriage took place in India, and in particular, the continued prevalence of arranged marriages, made *Halsbury's Laws* irrelevant.

The Court's reasons, however, fall below the deliberative standard required to give cogency to that rejection. The cases cited by the Delhi High Court in support of striking down the provision were not wholly 'western' but also

[77] ibid [19]. Such assistance was also envisaged in the White Paper and law reform report which preceded the Act.

[78] *R v Oakes,* [1986] 1 SCR 103 [28] (Supreme Court of Canada).

[79] *Hanson* (n 74) [23]. This approach had also been adopted in South Africa, where the Constitution contained a limitation clause similar to that in New Zealand.

[80] *Koushal v Naz Foundation* (n 4) (Indian Supreme Court).

[81] *Jagmohan Singh v State of U.P*. (1973) 1 SCC 20 (Indian Supreme Court). For the same dictum, see also *Bachan Singh v State of Punjab* AIR 1980 SC 898 (Indian Supreme Court).

[82] *Surendra Pal v Saraswati Arora* 1974 AIR 1999 (Indian Supreme Court).

included South African cases where arguably conditions are comparable. Moreover, the assumption that comparative experience is irrelevant ignores the fact that section 377 of the Indian Penal Code, which criminalizes sodomy as an 'unnatural offence' was never explicitly enacted by the Indian legislature, but instead imported from British law through the colonial code drawn up in the nineteenth century.[83] The result was that in practice a British colonial relic was upheld. It might well be that the specific laws in some areas, such as marriage, might differ in differing contexts. But under the deliberative model much more is needed to support the view that social conditions are sufficiently different to make it plausible that opposing answers should be given to the same fundamental human rights questions in different jurisdictions.

The deliberative approach is particularly helpful in providing a framework for what has become a somewhat fraught relationship between UK courts and the ECtHR. As we have seen, the HRA was deliberately formulated to require courts to 'take into account' judgments of the ECtHR, rather than regarding them as binding.[84] Nevertheless, for a period the superior courts in the UK took the view that they should defer to the interpretation given by the ECtHR. In the words of Lord Rodgers, when 'Strasbourg has spoken, the case is closed'.[85] This seems to have been based on a strong sense that there should be convergence in the interpretation of the ECHR. [86] This can be contrasted with the deliberative approach of Lord Phillips in the later case of *Horncastle*,[87] which was both more in tune with the textual mandate of the HRA and better reflected the dynamic and evolutionary nature of human rights interpretation:

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court.[88]

Holding that it would not be right to apply the principle laid down by the Strasbourg court in the particular context, he stressed that 'I have taken

[83] M Kirby, 'Sodomy Revived: The Supreme Court of India Reverses Naz' (Oxford Human Rights Hub Seminar, Oxford, 22 April 2014) at <http://ohrh.law.ox.ac.uk/the-hon-michael-kirby-sodomy-revived-the-supreme-court-of-india-reverses-naz/>.

[84] HRA, 1998 (UK), section 2(1).

[85] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 (UK Supreme Court).

[86] *Regina (Ullah) v Special Adjudicator Do v Immigration Appeal Tribunal* [2004] UKHL 26 (UK House of Lords).

[87] *R v Horncastle* [2010] 2 AC 373 (UK Supreme Court).

[88] ibid [11].

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careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.'[89] The Strasbourg court did indeed take into account those views.[90] As Sir Nicolas Bratza, previous President of the ECtHR put it: 'I believe it is right and healthy that national courts should continue to feel free to criticize Strasbourg judgments where those judgments have applied principles which are unclear or inconsistent or where they have misunderstood national law or practices.'[91]

It could be asked how the relevance or persuasiveness of a foreign authority can be assessed, without measuring it against a background moral position. This is, of course, a question which arises for all judicial decision-making, even when solely citing domestic sources. As McCrudden points out, the 'rules of relevance' in determining the applicability of national precedents are 'extraordinarily fluid in this respect, and in a state of considerable flux, not only between, but also within jurisdictions'.[92] Summers draws the very useful distinction between 'authority reasons', which regard a conclusion as correct because a previous court or judge so decided, and 'substantive reasons', which 'derive their justificatory force from a moral, economic, political, institutional, or other social consideration'.[93] 'Authority reasons' cannot provide the only, or even the primary, source of justificatory reasons. Cases arise where precedents point in opposite directions, and there are always a significant number of cases which raise issues not covered by any precedent. In any event, as Summers points out, a judge cannot apply a precedent wisely without determining whether the application is consistent with the substantive reasons behind the precedent and indeed, behind the doctrine of precedent itself.[94] Precedents might also be wrong.[95]

The absence of strict rules of relevance for apex courts and the inevitable need for substantive reasoning lead us to question whether judges adjudicating complex human rights questions can ever be, or indeed should be, strictly neutral as to the background moral principles on which they are drawing. The deliberative approach does not eschew reasoning based on background moral principles: it accepts, at least in the human rights context, that value judgements need to be made. Indeed, many bills of rights, both internationally and domestically, explicitly incorporate terminology that invites value judgements, whether broadly in the preamble, or within different substantive rights. The concepts of 'fairness' in the right to a fair trial; of 'degrading' in the context of the right not to be subjected to inhuman or degrading treatment or punishment; of 'democracy' in many limitations clauses, are just a few which spring to mind. Instead of disguising such value

[89] ibid. [90] *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 (ECtHR).
[91] N Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] EHRLR 505, 512. [92] McCrudden, 'Transnational Judicial Conversations' (n 12) 515.
[93] RS Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification' (1978) 63 CornellLRev 707, 716. [94] ibid 731. [95] ibid 716, 732.

judgements under the guise of technical legal interpretation or rules of relevance, the deliberative model requires judges openly to articulate their understanding of the background values they are adopting. It is the concealment of such value judgements which enables open-ended judicial discretion, risking that personal likes and dislikes will be the determining influence on conclusions. By requiring judges to account explicitly for the values they are using, personal interests which cannot qualify as valid reasons can be flushed out.[96] As Freund puts it, when precedents

> prove unavailing, as is more likely in the case of courts of last resort at the frontiers of the law, and most likely in a supreme constitutional court, the judge necessarily resorts to his [or her] own values. It may therefore be said that the most important thing about a judge is his [or her] philosophy; and if it be dangerous for him [or her] to have one, it is at all events less dangerous than the self-deception of having none.[97]

This does not mean that the values judges can draw on in resolving human rights disputes are entirely at large. Human rights signal a commitment by a society to values such as freedom and equality, and, while the specific instantiation of those values requires evaluative decision-making, judges need to show, by their reasoning, that these instantiations further the broader commitments embodied in the human rights document. At the same time, the deliberative model expects that there will be room for legitimate disagreement: by rejecting the possibility of a universal 'right answer' to human rights questions, the deliberative model regards judicial decision-making in the human rights field as an ongoing process of contestation. As has been emphasized, substantive reasons can include institutional constraints, and it might be a good deliberative reason to state that the issue before the court is one that is better resolved by the legislature.[98] Summers also shows that substantive reasoning should include 'critical reasons', which are used by dissenting judges or council to disagree with the majority decision.[99] While there is a need for closure in the immediate decision, and while stability and settled expectations will generally militate against change, there is still scope for evolution of human rights law.

IV. RESPONDING TO THE CRITICS

If we regard comparative human rights law as a deliberative resource, we can begin to answer some of the challenges posed to it. One of the most difficult methodological issues concerns the choice of comparators. What method

[96] ibid 739. He argues in relation to the common law that 'a judge in our system must give substantive reasons and must make law. Indeed, the most important attributes of a judge are his value system and his capacity for evaluative judgment. Only through the mediating phenomena of reasons, especially substantive reasons, can a judge articulately bring his values to bear (ibid 710).

[97] P Freund, 'Social Justice and the Law' in R Brandt (ed), *Social Justice* (Prentice Hall 1962) 93, 110.

[98] Summers (n 93) 722.

[99] ibid 726.

should be used to select comparative jurisdictions and which judgments should be used? How do we avoid the charge of 'cherry-picking'? In the South African death penalty case *Makwanyane*,[100] Chaskalson P drew both on the concurring judgment of Brennan J in *Furman*,[101] and on his dissenting judgment in *Gregg*.[102] He expressly distanced himself from the more recent US majorities which had upheld the death penalty. On the other hand, the Indian Supreme Court in *Bachan Singh*[103] rejected Brennan's approach and preferred that of the majority. Do these examples simply confirm the suspicion that 'the foreign authorities were cited in the way courts always use comparative law; as a rhetorical flourish, to lend support to a conclusion reached on independent grounds'?[104]

Cram in his valuable analysis of the role played by human rights jurisprudence in judicial reasoning in relation to counterterrorism measures argues that 'until the methodology for selection of foreign norms is made much more explicit, the suspicion will linger that the court's selection of foreign judgments is purely results-driven'.[105] A deliberative approach does not require judges to conduct an empirical survey with strict sampling criteria in order to draw on comparative human rights law to reach their conclusions. Since their function is deliberative rather than binding, comparative materials need only be chosen for the force of their reasoning, rather than for their legal status in foreign countries. Relevant comparative jurisdictions are generally those with similarly worded human rights texts, and which have similar human rights commitments in that they have ratified international human rights documents. Relevant cases are those where judges have faced similar human rights questions. For some such questions, there may be more contextual differences than others: the right to a fair trial, for example, is heavily dependent on domestic legal procedure and institutions. Part of the process of enriching decision-making in a deliberative manner is to demonstrate why outcomes reached on similar human rights questions should diverge. Foreign judgments can even be referred to to demonstrate why they should not be followed. A closer look at *Makwanyane* and *Bachan Singh* reveals that US case law was used for very different reasons. Chaskalson P in *Makwanyane* drew on Brennan J's dicta to support his view of the role of dignity in the South African Constitution. In *Bachan Singh*, the Court was more interested in the balance of power between courts and elected representatives, holding that since Brennan's approach in *Furman* had been rejected by domestic electorates, the Indian Court should not make the mistake of intervening in the decisions of elected representatives. Inevitably, there will be an element of selectiveness, depending on which cases counsel bring to

[100] *S v Makwanyane* 1995 (3) SA 391 (South African Constitutional Court).
[101] *Furman v Georgia* (1972) 408 US 238 (US Supreme Court).
[102] *Gregg v Georgia* (1976) 428 US 153 (US Supreme Court).
[103] *Bachan Singh* (n 81).
[104] L Hoffmann, 'Fairchild and After' in Burrows, Johnston and Zimmermann (n 38) 64.
[105] Cram (n 9).

the court's attention. The deliberative model does not simply accept any citations; it requires the court to justify their relevance, identify their appropriate similarities and differences, and explain their role in reaching the decision at hand.

A second criticism of the use of comparative law is that it is used by judges as confirmatory, in the sense of simply buttressing their own value judgements, thereby giving apparent legitimacy to political decisions. Posner regards the search for a global consensus on an issue as 'an effort to ground controversial Supreme Court judgments in something more objective than the Justices' political preferences and thus to make the Court's political decision seem less political'.[106] For him, citation of foreign law is a fig leaf to cover 'naked political judgment'.[107] Scalia J shares this view, and this is implicit in Cram's suspicion that the court's selection of comparative materials is 'results-driven'.[108] However, it is hard to see why, if judges are looking for ways to hide their personal political beliefs, they should confine themselves to the use of foreign law to do so. Complex human rights cases are not likely to be resolved in a purely technical or formulaic manner. Decisions as to whether to use a particular precedent or to interpret a statute narrowly or broadly all require judicial value judgements. Domestic precedents could just as easily be manipulated to achieve a predetermined 'political judgement'. Such a cynical view of judges and the motives behind their decision making must therefore surely undermine the legitimacy of much judicial decision-making.

Comparative law could be confirmatory or 'results driven' in a much more constructive and legitimate sense. It need not act as a subterfuge for other motives, but a way of checking that the result reached on the basis of the legal reasons in the judge's own jurisdiction is one that is sound. This is how Kennedy J uses foreign law in *Roper*, when he said: 'The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.'[109] It might also be rejected because of relevant textual differences, as we have seen with Dickson CJ's consideration of the US law in the hate speech context; or because of substantive disagreement with the reasoning as in *Horncastle*, or for institutional reasons, as we will see below in the context of the Australian court's approach to the prisoners' right to vote.

A different critique takes the view that comparative human rights law is anti-democratic, entailing a surrender of authority to a legal system which has no democratic accountability in the legal system in question.[110] Why should courts in one jurisdiction give legitimacy to the law of another jurisdiction, when it has none of the fundamental signals of legitimacy, such as constitutional or legislative

[106] Posner, 'A Political Court' (n 19) 85. [107] ibid 90. [108] Cram (n 9) 141.
[109] *Roper v Simmons* (n 3) 578.
[110] Waldron (n 7) 150 citing Roberts CJ at his confirmation hearings.

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endorsement? This assumes that comparative human rights law entails a surrender of authority. However, the deliberative approach does not give foreign legal materials the same authority as domestic law. Instead, it regards them as a means to improve judicial reasoning. Indeed, judges using foreign legal material law frequently stress that they do not regard it as controlling. Kennedy J, one of the foremost proponents of the use of comparative law in the US courts, is quick to stress that, while foreign materials are relevant, 'the task of interpreting the [Constitution] remains our responsibility'.[111] Perhaps the best articulation of this position is that of Sachs J in the SACC:

> If I draw on statements by certain United States Supreme Court justices, I do so not because I treat their decisions as precedents to be applied in our courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/state relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.[112]

It might still be asked where judges get the authority to refer to foreign legal materials, even if they are not binding. Cram argues that 'Parliament has not authorised the judges to go trawling through the decisions of foreign constitutional courts. At the very least, the practice is in need of a modicum of constitutional justification'.[113] Similarly, it could be asked whether the American people gave Kennedy J authority to seek confirmation for his views from the world community. This problem is not, however, confined to foreign sources: beyond a very general authority for courts to interpret constitutions, it is hard to find explicit authorization for any particular mode of interpretation, even in the absence of foreign sources.[114] Bills of rights do not tend to specify precisely what authority apex courts can refer to, or whether apex courts should be bound by their own precedents. Even those who argue that courts are bound by the original intention of the drafters or the natural language of the text would find it difficult to find explicit authorization from 'the people' for remaining bound by drafters in an earlier generation. This is especially so for open-textured terms such as 'equality', 'fair' or 'cruel'. The US Constitution does not even expressly give the US Supreme Court power to strike down legislation: it was the Court itself, in *Marbury v Madison*,[115] which interpreted the Constitution in this way. But the reason that the legitimacy of this role has been broadly accepted ever since is because the Court took care to justify this conclusion in a thoroughly deliberative manner, drawing both on the logic of a written constitution

[111] *Roper v Simmons* (n 3) (Kennedy J). [112] *Lawrence* (n 69) 141–142. [113] Cram (n 9) 140.
[114] See further S Fredman 'Living Trees or Dead-Wood' in N Barber *et al.* (eds), *Essays for Lord Sumption* (forthcoming).
[115] *Marbury v Madison* 5 (US) (1 Cranch) 137 (1803) (US Supreme Court).

which limited the powers of the legislature and the implications of the actual text of the US Constitution.[116]

This is also the key to the legitimacy of referring to foreign decisions, if done in a deliberative manner. Judges' accountability does not derive from elections or even from their responsiveness to elected representatives. Instead, judges are accountable through the explanations they provide for their conclusions. Dyzenhaus argues that this role is inherently democratic: 'What justifies all public power is the ability of its incumbents to offer adequate reasons for the decisions which affect those subject to them.'[117] Where foreign materials are able to improve the quality of the reasoning process used by judges, this enhances their legitimacy in this sense. In the human rights field, this is particularly apt because there is at least a provisional acceptance amongst States of a common core of human rights, through ratification of international human rights instruments and broadly similar domestic human rights provisions. Reasoning used in other jurisdictions to interpret similarly worded human rights texts can enhance the reasoning of a judge facing a similar decision in a domestic context, provided its appropriateness to that context is carefully examined. Thus it is not through express authorization that judges derive their legitimacy in referring to foreign sources; or indeed to any sources. It is through the persuasiveness of the reasons given.

A fourth criticism is based on the difficulty in fully understanding a foreign legal system. Since a different legal system can only be understood in its entirety, this argument goes, simply picking a single case or set of legal materials will inevitably be misleading and mistaken. This criticism certainly has validity. Failure to consider foreign materials can, however, also lead to serious errors. In *Bowers v Hardwick*,[118] the US Supreme Court referred in sweeping manner to the 'shared values' of a wider civilization to support its view that criminalizing sodomy was not a breach of fundamental human rights. In doing so, it omitted any reference to the seminal ECtHR case of *Dudgeon*,[119] which held that Northern Ireland's laws criminalizing sodomy breached the right to privacy in Article 8 ECHR. However, while this example shows some of the risks of comparative human rights law, it also demonstrates that the answer lies in more, rather than less, investment in this project. It was only because of increasing awareness of developments in other countries, and scholarly articles pointing this out, that the US Supreme Court could correct its perception.[120] Thus 17 years later in *Lawrence v Texas*,[121]

[116] ibid 178–179: Noting that in the Constitution 'the powers of the legislature are defined and limited', the court asked: 'To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?' The logical answer to this, in the Court's view, was that the Constitution would be worthless if its limits could be surpassed by legislative action.

[117] D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M Taggart (ed), *The Province of Administrative Law* (Oxford 1997) 305.

[118] *Bowers v Hardwick* (n 2).

[119] *Dudgeon v UK* [1982] 4 EHRR 149 (ECtHR).

[120] *Lawrence v Texas* (n 1).

[121] ibid.

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the Court rejected the *Bowers* court's interpretation of shared values. Citing *Dudgeon*, Kennedy J stated:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. … The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[122]

V. APPLYING THE DELIBERATIVE METHOD

This section tests the deliberative model by taking a brief look at two challenges for comparative human rights law: first, in developing an apparently common substantive conception such as that of dignity; and second, in formulating and applying justifiable limitations. In each case, the value lies in the nature of the reasoning rather than in the expectation of similar outcomes.

A. Interpreting Substantive Principles

A major challenge for comparative law is to determine its appropriate role in interpreting open-textured yet ubiquitous concepts in human rights law. One such concept is dignity.[123] While courts in these contexts rarely attempt to define dignity as such, they might look to each other's jurisprudence on the role of dignity in shaping an understanding of open-textured human rights or in evaluating the acceptability of limitations on the right. The apex courts in South Africa and Canada have tended to share insights on this issue. For example, in the South African prisoners' right to vote case of *August*, Sachs J stated, 'The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.'[124] In the Canadian case of *Sauvé No 2*, McLachlan J referred several times to Sachs J's dictum to support the view that denial of prisoners' right to vote 'countermands the message that everyone is equally worthy and entitled to respect under the law — that everybody counts: see *August, supra*'.[125]

Conversely, the SACC frequently cites the Supreme Court of Canada to support its view of the centrality of the concept of dignity in determining the

[122] ibid 576. The risk of misunderstanding is enhanced when courts use social science evidence rather than legal materials: see *Chaouilli v Quebec (Attorney General)* (2005) SCC 35 (Supreme Court of Canada).

[123] For analyses of the concept of dignity in human rights, see C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' 2008 EJIL 655; D Kretzmer and E Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer 2002); D Feldman, 'Human Dignity as a Legal Value' [1999] PL 682.

[124] *August v Electoral Commission* (CCT8/99) [1999] ZACC 3 (South African Constitutional Court). See also *Haig v Canada* [1993] 105 DLR 4th 577, 613 (Supreme Court of Canada).

[125] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 (Supreme Court of Canada).

meaning of equality. In *Egan v Canada*, the Canadian Court emphasized that the equality guarantee in section 15 of the Charter:

> means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.[126]

In *Prinsloo*, quoting at length from *Egan*, Ackerman, O'Regan and Sachs JJ held that 'Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of [the equality guarantee].'[127] Similarly in striking down the criminalization of sodomy, Ackerman J cited the Supreme Court of Canada's dictum in *Vriend v Alberta*:[128]

> This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.[129]

However the two apex courts have not necessarily remained in step: the Canadian Court has now recalibrated dignity as a background value rather than a legal element in the definition of dignity,[130] whereas dignity arguably remains core to the South African conception.[131]

In the US courts, the role of comparative law in assisting in the determination of such substantive conceptions as dignity has been much more contested. In the early capital punishment case of *Furman v Georgia*, Brennan J identified dignity as the touchstone for determining whether punishments were in breach of the Eighth Amendment's prohibition of cruel and unusual punishments. 'A punishment is "cruel and unusual", therefore, if it does not comport with human dignity.'[132] The role of foreign materials in determining the meaning and applicability of dignity was not central to either his view or later judgments which rejected his conclusion.[133] However, this issue came to the fore in the 2005 case of *Roper v Simmons*,[134] which challenged the infliction of the death penalty on juvenile offenders between 15 and 18 years old. Kennedy J, delivering the opinion of the Court, reiterated that, 'by

[126] *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court).
[127] *Prinsloo* (n 69).
[128] *Vriend v Alberta* [1998] 1 SCR 493 (Supreme Court of Canada).
[129] ibid citing in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (South African Constitutional Court).
[130] *R v Kapp* 2008 SCC 41 (Supreme Court of Canada).
[131] L Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta & Company, 2012); C McConnachie, 'Human Dignity, "Unfair Discrimination" and Guidance' (2014) 34(3) OJLS 609.
[132] *Furman v Georgia* (n 101) 270.
[133] *Gregg v Georgia* (n 102) 173.
[134] *Roper v Simmons* (n 3).

protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.'[135] For him, 'the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'[136] In her dissenting opinion, O'Connor J also carefully considered the relevance of other countries' values in determining the applicability of dignity to this question.

> This Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries — that a particular form of punishment is inconsistent with fundamental human rights.[137]

However, for her, a global consensus was only relevant to confirm the reasonableness of an American consensus. 'The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.'[138] Although reaching the opposite conclusion, her approach is equally deliberative.

It was Brennan J's understanding of dignity that the SACC drew on to support its decision that the death penalty was in breach of the South African Constitution. Nevertheless, Chaskalson J's use of the concept was carefully justified in a deliberative sense. Reiterating that under the South African constitutional order the right to human dignity is specifically guaranteed, he held: 'The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.'[139]

Evaluating the use of comparative law by the Supreme Court of India in relation to dignity is more complex. The Delhi High Court decision in *Naz*[140] can be regarded as a model of the deliberative approach. In supporting its conclusion that the reference to 'sex' as a ground for discrimination in the Indian Constitution included 'sexual orientation', Murhalidur J drew on the use of dignity in the SACC case of *Prinsloo*. There the South African Court held that there would be discrimination on an unspecified ground if the impugned action were based on characteristics with the potential to impair the fundamental dignity of persons.[141] The Court in *Prinsloo* had in turn drawn on the Canadian Supreme Court's decision in *Egan v Canada*.[142] Murhalidur J also drew on the growing resource of comparative materials on

[135] ibid 560. [136] ibid. [137] ibid 604. [138] ibid.
[139] *S v Makwanyane* referring to [1977] 45 BVerfGE 187, 228 (Life Imprisonment case) (German Constitutional Court); *Kindler v Canada* (1992) 6 CRR (2d) 193 (Supreme Court of Canada).
[140] *Naz Foundation v Government of Delhi* Case WP(C) 7455/2001 (High Court of Delhi).
[141] *Prinsloo* (n 69) [152]. [142] *Egan v Canada* (n 126).

decriminalization of homosexuality to support his finding that the impugned provision violated the right to full personhood implicit in the right to life in the Indian Constitution.[143] Importantly, too, he used these sources to underline similar themes in Indian law.[144]

However, the Supreme Court of India has been ambivalent about the value of drawing on understandings of dignity developed elsewhere. In the death penalty case of *Bachan Singh*, the Court was reluctant to hold that 'the acceptance by India of the International Covenant on Civil and Political Rights makes any change in the prevailing standards of decency and human dignity by which counsel require us to judge the constitutional validity of the impugned provisions'.[145] Instead, it concluded that 'it cannot be said that the framers of the Constitution considered death sentence for murder … as a degrading punishment which would defile "the dignity of the individual" within the contemplation of the Preamble to the Constitution'.[146] Similarly, in overturning the Delhi High Court's decision in *Naz* the Court dismissed the use of comparative law and therefore failed wholly to engage with the many dignity-based arguments put to it, preferring to focus on institutional reasons such as the presumption of constitutionality of statutes.[147] As we have seen, however, its reasons for dismissing the comparative dimension were less than convincing. A deliberative framework would not require the Court to adopt the arguments based on dignity; but it would, at the very least, require the Court to fully explain why such an approach, which had found favour in other courts, was not applicable to the status of LGBT people in India.

However, barely three months later a different division of the Court, finding that discrimination against transgender people breached the Indian constitution, centred its decision on the principle of dignity, drawing on comparative law in the best deliberative sense. Beginning with the English case of *Corbett v Corbett*,[148] where the High Court held that the biological sex of a person is fixed at birth, the Court traced the development of a powerful alternative approach in a stream of cases and legislation from New Zealand, Australia, Malaysia, the UK, the EU and the ECHR. The Court emphasized:

> We have referred exhaustively to the various judicial pronouncements and legislations on the international arena to highlight the fact that the recognition of 'sex identity gender' of persons, and 'guarantee to equality and non-discrimination' on the ground of gender identity or expression is increasing and gaining acceptance in international law and, therefore, be applied in India.[149]

[143] Citing extensively from *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1129); *Vriend v Alberta* (n 128) *Dudgeon v UK* (n 119); *Romer v Evans* (1996) 517 US 620, 634 (US Supreme Court); *Lawrence v Texas* (n 1); *Norris v Ireland* (1991) 13 EHRR 389 (ECtHR).

[144] *Naz Foundation* (n 140) [52] (Delhi High Court).

[145] *Bachan Singh* (n 81). The Court noted in any event that the International Covenant did not wholly outlaw capital punishment for murder.

[146] ibid [136].

[147] *Koushal v Naz Foundation* (n 4) (Indian Supreme Court).

[148] *Corbett v Corbett* [1970] 2 WLR 1306 (High Court).

[149] *NALSA* (n 6) [43].

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Most importantly, the Indian Court drew on the ECtHR decision of *Goodwin v UK*, where the ECtHR reiterated that 'the very essence of the Convention is respect for human dignity and human freedom' in holding that the 'unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable'.[150] Reiterating that 'recognition of one's gender identity lies at the heart of the fundamental right to dignity', the Court followed these developments in rejecting the biological test in *Corbett*.[151]

The deliberative model does not expect convergence in outcomes, provided foreign materials are considered and relevant differences and similarities made explicit. In their survey of New Zealand law, Allen *et al.* showed that of the 75 cases which cited foreign materials in a human rights context, 28 (37.3 per cent) cited an overseas precedent to support an opposite conclusion from the one the court eventually reached.[152] They regard this as suggesting that courts have too many options, raising the suspicion of the imposition of their own personal opinions, justified ex post hoc.[153] However, as has been argued above, judges determined to impose their own personal opinions will be equally capable of manipulating citation of domestic authorities. If anything, the fact of citation and rejection could suggest an appropriate use of such authorities. Regarding themselves as bound by foreign materials would be more problematic. A fully deliberative approach to comparative human law would require a close examination of each of these cases to determine what reasons were given for considering and rejecting such authorities but it is outside the scope of this article to do so.

B. Justifying Limitations of Rights

One of the most active issues in comparative law in recent years has concerned prisoners' right to vote. This is a challenging issue because the right to vote is generally not contested. Instead, the cases concern the justifiability of limiting the right, an issue which at first sight seems least apt for comparative scrutiny. Yet courts in Canada, South Africa, Australia and the UK, as well as the ECtHR and the Human Rights Committee, have drawn on each other's jurisprudence. Particularly widely cited is the Canadian Supreme Court decision in *Sauvé No 2*[154] which struck down legislation denying the right to vote to prisoners serving prison sentences of two years or more. *Sauvé* has been cited both for the way in which the limitation test was framed and for its application to the State's claims of justifiability. For McLachlan CJ, the court's role in determining justification was centrally concerned with transparency and accountability. 'At the end of the day', she stated, 'people should not be left

[150] *Goodwin v UK* (2002) 35 EHRR 18 (ECtHR) cited in *NALSA* (n 6) [33].
[151] *NALSA* (n 6) [68].
[152] Allan, Huscroft and Lynch (n 11).
[153] ibid 441.
[154] *Sauvé v Canada (Chief Electoral Officer)* (n 125).

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guessing about why their *Charter* rights have been infringed.' This dictum was quoted in full by Chaskalson CJ to support the SACC decision striking down a blanket ban on prisoners' right to vote in South Africa.[155] As Chaskalson CJ put it: 'In a case such as this where the government seeks to disenfranchise a group of its citizens and the purpose is not self-evident, there is a need for it to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve.'[156] The *Sauvé* case was also influential before the Chamber of the ECtHR in *Hirst* when it held that the blanket ban on prisoners' voting rights in the UK was in breach of the Convention. According to the Chamber judgment: 'Taking due account of the difference in text and structure of the Canadian Charter, the Court nonetheless finds that the substance of the reasoning may be regarded as apposite in the present case.'[157] In this case, *Sauvé* was used not so much for its framing of the proportionality test, but for its application. In particular, the Chamber found 'much force in the arguments of the majority in *Sauvé* that removal of the vote in fact runs counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power'.[158]

Referring to decisions does not, however, mean that they are used in a deliberative sense. When the Chamber decision in *Hirst* was appealed to the Grand Chamber, the UK Government roundly criticized the Chamber decision for its use of foreign law.[159] In upholding the Chamber decision, the Grand Chamber cited these objections but did not address them directly.[160] Having considered the practice of Member States, where fewer than 13 Member States imposed a blanket ban, it held that even if no common European approach could be discerned, this could not be determinative of the issue.[161] Instead, it simply held that 'Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be … .'[162] Similarly, in subsequent ECtHR decisions, such as that in *Scoppola*,[163] the Court stopped short of a deliberative approach, simply setting out the growing body of comparative material on this issue[164] without expressly drawing on them to come to its conclusion. Nevertheless, the *Hirst* decision has been added to the growing resource of comparative

[155] *Minister of Home Affairs* v *National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* Case CCT 03/04 [2004] ZACC 10 (South African Constitutional Court).
[156] ibid.
[157] Cited in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (ECtHR Grand Chamber).
[158] Cited in ibid [46]. [159] ibid. [160] ibid. [161] ibid. [162] ibid.
[163] *Scoppola v Italy (No 3)* [2013] 56 EHRR 19 (Grand Chamber ECtHR).
[164] *Sauvé v Canada (Chief Electoral Officer)* (n 125); *August v Electoral Commission* (n 124); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* (n 155); *Roach v Electoral Commissioner* [2007] HCA 43 (High Court of Australia).

law referred to by Courts facing the question of whether prisoners' right to vote can be curtailed. Thus *Hirst* was referred to by the Human Rights Committee to support its conclusion that 'the State party, whose legislation provides a blanket deprivation of the right to vote to anyone sentenced to a term of imprisonment, did not provide any arguments as to how the restrictions in this particular case would meet the criterion of reasonableness as required by the Covenant'.[165]

Deliberative consideration of foreign material does not necessarily entail that it should be accepted, as long as good reasons, based in textual or institutional differences, are provided. This can be seen in the judgments of the Australian High Court in the case of *Roach*,[166] in which a prisoner challenged the total prohibition on prisoners serving a sentence of imprisonment from voting in any Senate or House of Representatives elections.[167] The Court struck down the total ban but reinstated the previous formula, removing the right to vote from prisoners serving sentences of three years or more. Notably, however, although both *Sauvé* and *Hirst* were cited, the Australian justices were not convinced of their applicability in the Australian context. Gleeson CJ stressed that although the issues were similar, they arose under different legal regimes. 'There is a danger that uncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action.'[168] Nor does the judicial conversation necessarily lead to a convergence in outcomes. Although all the jurisdictions cited here have excluded a blanket ban, there is significant divergence as to the justifiability of curbs on prisoners with more serious sentences. Whereas the Supreme Court of Canada was unwilling to countenance any ban,[169] the Australian High Court accepted a ban for prisoners serving sentences above three years,[170] and the ECtHR in *Scoppola*[171] accepted the Italian regime, which applied to prisoners serving sentences above five years. What is important is not the divergence, but that these divergences themselves be justified in the light of comparative materials and good deliberative reasons be given for difference.

The powerful outlier in this picture is the US. US cases have been cited in both South Africa and the UK for opposite conclusions. Sachs J in *August* cited an early decision, *O'Brien*,[172] for the proposition that a State could not de facto deprive prisoners of the right to vote by refusing to register them or

[165] *Yevdokimov and Rezanov v Russian Federation* CCPR/C/D/1410/2005 (March 2011) (Human Rights Committee).
[166] *Roach v Electoral Commissioner* (n 164).
[167] The Commonwealth Electoral Act 1918 (Cth) section 93(8AA) (Australia). The total ban had been introduced in 2006; previously it only applied to prisoners serving sentences of three years or more. The prohibition had been in place since 1902, but the minimum sentence had fluctuated over the years between one year and five.
[168] *Roach v Electoral Commissioner* (n 164).
[169] *Sauvé v. Canada (Chief Electoral Officer)* (n 125).
[170] *Roach v Electoral Commissioner* (n 164).
[171] *Scoppola v Italy (No 3)* (n 163).
[172] *O'Brien v Skinner* (1973) 414 US 524 (1973) (US Supreme Court).

to apply appropriate polling stations. In *Hirst*, in the UK, by contrast, the UK court cited the US Supreme Court case of *Richardson v Ramirez*,[173] which upheld prisoner voting disqualification, to support the UK blanket ban on prisoner rights to vote. US Courts have not, for their part, ventured into the trans-jurisdictional discussion. One possible reason is the very real textual difference. In *Richardson*, the Supreme Court upheld prisoner voter disqualification on the grounds that this was set out expressly in section 2 of the Fourteenth Amendment, which provides for the denial by States of the right to vote to persons 'for participation in rebellion, or other crime'.[174] However, as the dissent suggested, there is still room for discussion as to the meaning of 'any other crime'. Of course, *Richardson* pre-dated the current comparative interchange. But should similar facts come before the Court, a deliberative approach would require consideration of the comparative materials.[175]

VI. CONCLUSION

The use of comparative materials in human rights adjudication is rapidly increasing. Nevertheless, there is continuing disquiet amongst some judges and scholars of the legitimacy and accuracy of such use, fuelling anxiety that it is simply a cover for judicial preconceptions of the desired result in a case.[176] This article has sought to draw on the insights of deliberative democracy to argue that comparative materials, if used in a deliberative manner, can enrich judicial decision-making in the human rights field. The legitimacy and accountability of court decisions depends on the ability of judges to adduce reasons for their conclusions which are thorough and persuasive. When judges are faced with a difficult human rights case, it makes sense to look at ways in which judges in other jurisdictions with similarly worded human rights texts and commitments have dealt with the issue at hand. Indeed judicial legitimacy and accountability are thereby enhanced. This does not mean that the conclusions reached in other jurisdictions must be followed: the deliberative model does not regard comparative materials in the human rights field as binding in any way. The deliberative model is thus fully compatible with divergent outcomes. But legitimacy and accountability in a deliberative sense require rigour in the way in which decisions on human rights questions are reached: careful and explicit

[173] *Richardson v Ramirez* (1974) 418 US 24, 55 (US Supreme Court).

[174] ibid. See further *Romer v Evans* (n 143) The Court describe principles that States may disenfranchise a convicted felon as 'unexceptionable'.

[175] In *Simmons v Galvin* 130 SCt 2428 (2010) (US Supreme Court) The Supreme Court ordered the Solicitor General to 'express the views of the United States' on whether laws that take away the right to vote from people in prison or on parole can be challenged under the Voting Rights Act as racially discriminatory.

[176] Or indeed allowing academic commentators to accept or reject outcomes on the basis of such preconceptions.

consideration to relevant textual, institutional, or social, political and economic factors which might point in favour or against a similar conclusion. The Australian court's rejection in *Roach* of the relevance of *Sauvé* is just as legitimate as the South African court's endorsement of *Sauvé* because both jurisdictions considered the case and assessed its relevance. The Indian Supreme Court's rejection of the relevance of comparative materials in *Koushal* does not, however, meet these deliberative criteria; and the same might be true of blind acceptance of foreign materials or, in Kriegler J's words, 'blithe adoption of alien concepts or inapposite precedents'.[177] Moreover, rather than being a cover for predetermined outcomes, the use of comparative materials can assist in protecting against illegitimate subjectivity on behalf of judges by insisting that a range of possible solutions are carefully canvassed and explicitly distinguished where appropriate. It may not be possible to meet the expectation of similar answers to fundamental human rights questions, such as whether capital punishment is a breach of the right to life, whether the right to vote can be denied to prisoners, or whether criminalization of homosexuality breaches the rights to equality and privacy. But whether the same or different results are reached, it should be on the basis of a careful consideration of alternatives, and a clear and explicit reasoning process which is capable of demonstrating the basis of the decision even to those who disagree on the merits of the outcome.

[177] *Bernstein v Bester* (n 14).

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