

# The Dignity of Comparative Constitutional Law

## 1. Introduction

The question I want to explore in this presentation is whether there is any non-accidental connection between the two main themes of Laurie Ackermann's constitutional jurisprudence: on the one hand, his concern for human dignity, and, on the other, his often masterful demonstration of the usefulness and relevance of comparative constitutional law. Laurie, as we know, was the foremost exponent of the relevance of human dignity to South African constitutional law, both as a justiciable right and as a value informing the entire Bill of Rights. Is there a connection between that part of his judicial oeuvre and the other main theme that runs through his constitutional jurisprudence – a commitment to taking up the post-apartheid constitutions' invitation to apply foreign law?

Of course, we could simply ask Laurie, or read his published writings on comparative constitutional law,<sup>1</sup> which provide a partial answer to this question. But that would be too easy and, in any case, as the post-structuralists are wont to say (and as Laurie is no doubt in the process of discovering), an author doesn't completely control the interpretation of the texts he generates. If there is a connection between these two preoccupations, therefore, we are as likely to find it in the *ex post* conceptual exposition of Laurie's judicial output as we are in anything that he may consciously have intended. Exploring that connection is both an appropriate task for this conference and also an inquiry that may help to highlight Laurie's unique contribution to the field of comparative constitutional law.

## 2. Laurie's dignity jurisprudence

I will leave to other presenters the task of analysing the different aspects of Laurie's dignity jurisprudence. In this section I want simply to raise and then put aside one obvious but in the end empirically unsupported connection between Laurie's dignity jurisprudence and his interest in comparative constitutional law, namely, the possibility that the former is entirely a function of the latter. That possibility is not far-fetched because, as we know, Laurie is something of a Germanophile, and human dignity is at the centre of much of the German Federal Constitutional Court's jurisprudence.<sup>2</sup> Was Laurie's interest in human dignity simply a case, then, of his

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<sup>1</sup> See Laurie W H Ackermann 'Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke' (2006) 80 *Tulane LR* 169, reprinted in (2006) 123 *SALJ* 497. See especially p. 515 of the *SALJ* version.

<sup>2</sup> Human dignity (*Menschenwürde*) is inviolably entrenched in art 1(1) of the German Basic Law, and is the pre-eminent value in the hierarchy of values in German Constitutional law.

wanting to replicate in South Africa the hierarchical relationship that exists in Germany between human dignity and other values, and thereafter searching for plausible ways of implementing this self-appointed judicial project?

I think this possibility can easily be shown to be empirically false, but to do so I must enter the quicksand of the debate over the Constitutional Court's equality jurisprudence. Those of you familiar with the Court's test for unfair discrimination will know that dignity features prominently in that test, both in the determination of whether a particular differentiation constitutes discrimination, and also in the determination of whether a particular discrimination is unfair. The elevation of human dignity to this position of prominence has no immediate textual basis in the Constitution, and has accordingly been the subject of a lively debate in the academy, with the Constitutional Court variously charged with having deleted equality from the constitutional text,<sup>3</sup> or with having 'proclaimed a connection between unfair discrimination and dignity' that does not in fact exist.<sup>4</sup>

The relevance of this debate to my topic is that one of the subsidiary charges made against the Constitutional Court's equality jurisprudence is that it all started with a bad piece of comparative law, namely, the 'uncritical borrowing' from Canadian jurisprudence of an individualistic conception of dignity.<sup>5</sup> The *éminence grise* of the piece is said to be L'Heureux-Dubé J's minority judgment in *Egan v Canada*,<sup>6</sup> which was cited by Goldstone J in the first major equality case under the interim Constitution, *President of the Republic of South Africa v Hugo*.<sup>7</sup> Laurie did not write a judgment in this case, but was one of the three judges who co-authored the majority judgment in *Prinsloo v Van der Linde*,<sup>8</sup> a decision that was delivered on the same day as *Hugo*, and which incorporates the reference to the *Egan* case.<sup>9</sup> The charge levelled against the Court in respect of *Egan* is not only that it was inappropriate to foreground dignity in its test for unfair discrimination, but that the Canadian conception of the relationship between dignity and equality is in any case not what the Court said it was.<sup>10</sup> So here we have a clear instance where the connection between human dignity and comparative constitutional law is alleged to have been an instrumental one, with comparative law being used wrongly to elevate human dignity to a position in the equality analysis it should never have enjoyed.

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<sup>3</sup> See D M Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398, 414.

<sup>4</sup> Anton Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *SAJHR* 220, 220.

<sup>5</sup> Davis 'Equality' op cit 404.

<sup>6</sup> (1995) 29 CRR (2d) 79 at 104-5. Dennis Davis *Democracy and Deliberation* (1999) 78n26. This chapter is a modified version of D M Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398. For an elegantly reasoned response to Davis, see Susie Cowen 'Can Dignity Guide South Africa's Equality Jurisprudence' (2001) 17 *SAJHR* 34.

<sup>7</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (per Goldstone J, with a concurring judgment by Mokgoro J and dissents by Kriegler and Didcott JJ).

<sup>8</sup> 1997 (3) SA 1012 (CC).

<sup>9</sup> *Ibid* para 32.

<sup>10</sup> This is implicit in Dennis Davis's statement that L'Heureux-Dube J's minority judgment in *Egan* 'does not invoke an individualistic conception of dignity' (Davis *Democracy and Deliberation* op cit 78n26).

The problem with this charge is that the Constitutional Court's equality jurisprudence is the area of its doctrine least influenced by foreign law. The only real attempt to survey foreign law in relation to equality occurs in O'Regan J's concurring judgment in *Brink v Kitshoff*, which concludes that, although an important element of many constitutions, the prohibition against unfair discrimination is interpreted in a range of different ways, and therefore that South Africa's own history and context may be a better guide to the meaning of the equality clause.<sup>11</sup> By the time we come to *Prinsloo* the Court is expressly warning against the relevance of comparative law, noting that:

'In relation to the text and context of the interim Constitution, it would ... seem that a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny might create more problems than it solved.'<sup>12</sup>

As it appeared in *Prinsloo*, the reference to *Egan v Canada* was a judicial afterthought, cited after the real work of justifying the relevance of human dignity to the South African equality clause had already been done. And the real work in this respect was not a comparative-law reading of human dignity, but a consideration of the connection between the denial of equality and the violation of human dignity in South Africa's apartheid past.

The key passage in *Prinsloo* is paragraph 31, which reads as follows:

Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period in our history during which the humanity of the majority of our inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.

South Africa's equality jurisprudence is in this sense a never-again jurisprudence. Human dignity has a central role in that jurisprudence not because the Constitutional Court blindly followed what it thought to be the Canadian approach, but because the Court took the view that the denial of human dignity was at the heart of the apartheid evil, and therefore at the heart of the interim Constitution's vision for a just society. What was so wrong with apartheid, the Court says in this passage, was not just that it treated people differently, but that the basis for this differential treatment was the denial of black South Africans' 'inherent dignity'.

There is nothing in this approach to equality that is necessarily individualistic. At a conceptual level, at least, it is quite possible to talk about group-based disadvantage

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<sup>11</sup> *Brink v Kitshoff* 1996 (4) SA 197 (CC) paras 35-40.

<sup>12</sup> *Prinsloo* (supra) para 19.

in dignitarian terms.<sup>13</sup> Nor is a pre-occupation with human dignity necessarily incompatible with an approach to equality that is sensitive to context and the social power relationships that characterize and perpetuate group-based disadvantage.<sup>14</sup> The real question, as Cathi Albertyn and Beth Goldblatt have pointed out, is whether human dignity as a value is over-emphasized in the Court's equality analysis.<sup>15</sup> Even that question is a little too broadly put, however, because the emphasis placed on human dignity would presumably not matter as much if the conception of human dignity that was being emphasized was properly sensitive to group-based disadvantage.

In the end, therefore, the mere foregrounding of dignity in the Court's test for unfair discrimination tells us nothing about the adequacy of that test in meeting South Africa's transformative challenge. Clearly there is a connection between equality and dignity. Those critical of the Court's current test must either show why the making of that connection in the unfair discrimination test necessarily runs counter to the Constitution's overarching vision for a just society, or why the conception of human dignity that the Court deploys in the course of applying its test for unfair discrimination falls short of that vision in particular cases.<sup>16</sup>

The positive case for the Court's dignity-centred conception of equality has been made by Arthur Chaskalson and Laurie Ackermann in their extra-curial writings.<sup>17</sup> Its relevance to the remediation of group-based disadvantage is also illustrated by Laurie's judgment in the first *National Coalition* case. The equality clause component of this judgment starts by citing a passage from O'Regan J's judgment in *Brink v Kitshoff* on 'patterns of group disadvantage and harm'.<sup>18</sup> Whilst it is true that this passage has been superseded by the *Harksen* test,<sup>19</sup> it remains part of the Constitutional Court's equality doctrine, and was concurred in by all of the other judges who were party to the *Brink* decision. It is unfair on these judges, and strictly speaking inaccurate, to single out O'Regan J's judgment as though it were an aberrational, once-off nod in the direction of group-based disadvantage before the Court got down to the real business of 'individualizing' its unfair discrimination test.

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<sup>13</sup> Laurie's judgments in the two *National Coalition* cases provide further support for this proposition. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC) (sodomy case) and *National Coalition for Gay and Lesbian Equality & Another v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) (immigration case).

<sup>14</sup> See Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 1 SAJHR 1 (showing how the value of human dignity can be interpreted positively in favour of South Africa's transformative constitutional project).

<sup>15</sup> Cathi Albertyn and Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248.

<sup>16</sup> This is one of the virtues of Albertyn and Goldblatt's article, which in other respects repeats some of the charges made in the two pieces by Dennis Davis cited above.

<sup>17</sup> See Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 SAJHR 193; Laurie W H Ackermann 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 SAJHR 597.

<sup>18</sup> *Brink v Kitshoff NO* (supra) para 42, cited in the sodomy case at para 16.

<sup>19</sup> *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 53.

As the rest of Laurie's judgment in the *National Coalition* case shows, it is conceptually possible to consider the impact of discriminatory legislation on gays as individuals, whilst at the same time taking account of how social attitudes, reinforced by law, perpetuate discrimination against gays as a group.<sup>20</sup> Human dignity is, after all, primarily a relational concept, which has less to do with keeping others out than it has with being properly understood and affirmed.

As I read the cases, therefore, foreign law has not exerted very much influence on the development of the distinctly South African conception of human dignity that we are exploring in this conference. The foreign influence, if there is one, is Immanuel Kant, whose conception of human dignity lies behind much of the Court's jurisprudence, and certainly behind Laurie's share of that jurisprudence.<sup>21</sup> But Kant's influence on the South African understanding of human dignity is not mediated through foreign law, but through the relevance of his thought to the Court's understanding of the apartheid evil,<sup>22</sup> and also through its connection to indigenous notions of *ubuntu*, with its quintessentially relational understanding of human dignity.<sup>23</sup>

The fact that foreign law is not the driver for the Court's dignity jurisprudence does not, of course, prove that the connection between human dignity and comparative constitutional law in Laurie's jurisprudence was not instrumental. But it does go some way towards suggesting that the connection between these two aspects of Laurie's judicial output was more complicated than may at first appear. To understand the full complexity of the connection we must examine Laurie's comparative-law jurisprudence itself.

### 3. Laurie's comparative law jurisprudence

It is generally thought that the main textual authorisation for the use of foreign law in South Africa is section 39(1)(c) of the Constitution, which provides that, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum – (a) ... (c) may consider foreign law'. If left at that, the use of foreign law would be an invitation that courts could decline, rather than an injunction to be followed in every case. The key to understanding Laurie's comparative law jurisprudence, however, is to see that he derived his authority to apply foreign law as much from section 39(1)(a) and its

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<sup>20</sup> *National Coalition* (sodomy case) (supra) paras 23-26.

<sup>21</sup> See Stuart Woolman 'Dignity' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Original Service, 2006).

<sup>22</sup> In addition to the passage from *Prinsloo* (supra) just cited, see *Dawood & Another v Minister of Home Affairs & Others*; *Shalabi & Another v Minister of Home Affairs & Others*; *Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC) para 35 ('[t]he Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied').

<sup>23</sup> See, for example, *Dawood* (supra) para 30 ('human beings are social beings whose humanity is expressed through their relationships with others').

cognate provision, section 36(1), as he did from section 39(1)(c). Section 39(1)(a) provides that, when interpreting the Bill of Rights, courts ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. Section 36(1), in turn, states that, when deciding whether a right has been permissibly limited, a court must consider whether that limitation ‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.

These two provisions clearly indicate that both the interpretation of the Bill of Rights and the general limitations analysis are value-laden exercises whose main normative reference point is the standard of an open and democratic society based on human dignity, equality and freedom. But what is the nature of such a society, and how can this concept be concretized so as to become dispositive of particular cases? Laurie – certainly in his post-*Ferreira* phase – thought that the best way to answer this question was not to philosophize in the abstract, but to consult the legal principles and rules of societies generally thought to be open and democratic. In this way he developed an alternative normative justification for comparative constitutional law in South Africa. As Laurie understood the post-apartheid constitutions, reference to foreign law was not an optional device that could be utilized at the whim of the deciding judge, but an integral part of any constitutional inquiry where there was no controlling precedent or simple procedural answer.<sup>24</sup>

Reading through Laurie’s judgments, it is immediately apparent that the inspiration for all of his major decisions, from *Ferreira*<sup>25</sup> to *First National Bank*,<sup>26</sup> was an exhaustive (and occasionally, exhausting) analysis of foreign law. Quite correctly, this exercise is usually conducted both at the rights delineation stage of the constitutional inquiry and at the limitations stage.<sup>27</sup> Thus, in *Ferreira*, Laurie consults foreign law for guidance on the appropriate scope of the right against self-incrimination, and also for information on how other countries have sought to balance this right against the state’s legitimate interest in ‘investigative procedures of various kinds’.<sup>28</sup> Given the Constitutional Court’s now entrenched habit of developing

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<sup>24</sup> Laurie did not employ the comparative method in all of his judgments. See, for example, *Rudolph & Another v Commissioner for Inland Revenue & Others* 1996 (4) SA 313 (CC); *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC); *Parbhoo & Others v Getz NO & Another* 1997 (4) SA 1095 (CC); *Hekpoort Environmental Preservation Society & Another v Minister of Land Affairs & Others* 1998 (1) SA 349 (CC).

<sup>25</sup> *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC).

<sup>26</sup> *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>27</sup> On the use of foreign law at limitations stage, see *National Coalition* (sodomy case) (supra) paras 39-57 (comparative survey of changing attitudes towards, and legal regulation of, consensual sodomy in western Europe, North America, Australia and New Zealand); *S v Dodo* 2001 (3) SA 382 (CC) paras 27-34 (comparative survey of countries that permit legislature to limit the judiciary’s power to impose punishments).

<sup>28</sup> *Ferreira* (supra) para 102.

internal limitations tests at the expense of explaining the content of rights,<sup>29</sup> it is tempting to think back on Laurie's major judgments as belonging to a golden age in which the Court still cared about the distinction between the scope of a right and its limitation.<sup>30</sup> But, of course, the story is more complicated than this, and Laurie himself, in one of his later judgments – perhaps giving in to peer-pressure – did something similar in developing the test for arbitrary deprivation of property.<sup>31</sup>

Despite its Supreme Court's stubborn refusal to return the compliment, Laurie's comparative surveys almost always began with the United States, before moving on to Canada, the United Kingdom, Ireland, Australia, New Zealand, India and Sri Lanka. The last country in the mix, of course, was invariably Germany – the other continental European countries suffering the twin defects of (a) not having contributed very much to the text and structure of the post-apartheid constitutions, and (b) persistently failing to write their laws in a language that Laurie could understand.<sup>32</sup>

If Laurie declined to justify his choice of open and democratic societies, he never failed to explain both the importance and limitations of the comparative-law method. He typically did this through a combination of cautionary disclaimers – implying that there is a separation of powers dimension to comparative constitutional law – and principled reason-giving.

The separation of powers dimension, of course, lies in the idea that, if the enforcement of constitutional rights by an unelected judiciary is thought to be counter-majoritarian, then how much more so the enforcement of rights whose meaning and content is partly derived from the received judicial wisdom of other countries. Laurie's response to this dilemma – the classic particularist challenge to the practice of comparative constitutional law<sup>33</sup> – was to downplay the precedential value of foreign law in favour of its educational function. There can be no harm, Laurie was fond of reassuring us, in engaging in a little detour through the intricacies of another legal system, provided that we are prepared to discard it all in favour of our own text and traditions once we are done. No harm, of course, except for the losing litigant, who – in Laurie's judgments – tended to find that the die was cast

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<sup>29</sup> This is most evident in the Court's socio-economic rights jurisprudence, but also occurs in its property rights jurisprudence. See David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) and Theunis Roux 'Property' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Original Service, 2003).

<sup>30</sup> See Stuart Woolman's critique of the Court's jurisprudence in Stuart Woolman 'Limitations' in Stuart Woolman et al *Constitutional Law of South Africa* 2ed (Original Service, 2006).

<sup>31</sup> See *First National Bank* (supra), discussed below.

<sup>32</sup> Laurie also frequently referred to the jurisprudence of the European Court of Human Rights, of course, but only to judgments in English and with due regard to the way in which the Court's margin of appreciation doctrine reduces the value of foreign borrowing in this case.

<sup>33</sup> See Sujit Choudhry 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1.

somewhere between a seemingly innocuous discussion of a dissenting opinion written in 1923 and the latest academic writing on the interpretation of the BGB.

Laurie's principled justification for resorting to foreign law, therefore, was that it was an essential part of the inquiry into the values underlying an open and democratic society. In the end, however, the best justification for Laurie's use of foreign law was always the practical demonstration, in his judgments, of its sheer usefulness. Simplifying terribly, there seem to be three basic guidelines that one can draw from Laurie's comparative-law method. First, always pay careful attention to the textual, political, and legal-systemic differences between South Africa and the country chosen for comparison; secondly, look for good, applicable reasons in the judgments of foreign courts, including minority judgments, that either support or contradict the proposition contended for; and, thirdly, look for points of convergence at the level of principle between the open and democratic societies chosen for comparison. In the remainder of this presentation I propose briefly to consider each of these three guidelines before drawing some connections between Laurie's comparative-law method and his concern for human dignity.

### 3.1. Pay careful attention to textual, political, and legal-systemic differences

Laurie's comparative-law jurisprudence begins with his concurring opinion in *S v Makwanyane* on the constitutionality of the death penalty.<sup>34</sup> What distinguishes Laurie's judgment from the other judgments in this case is that it immediately dives into a comparison between the text of the US Fifth and Fourteenth Amendments and the interim Constitution's right to life, which Laurie notes is not qualified by any reference to 'due process'.<sup>35</sup> The rhetorical force of this beginning is immediately apparent: start with the only open and democratic society in which the death penalty has not been abolished, and endeavour to show why South Africa, because of differences in the text of its Constitution, is not 'constrained' to follow this negative example.<sup>36</sup> In South Africa, Laurie argues, there is no constitutional suggestion that the death penalty could ever be rationally applied, and hence we are free to make the 'inevitably arbitrary nature' of the death penalty the main basis for its invalidation.<sup>37</sup>

In his first full-length judgment, *Ferreira*, Laurie's part-majority, part-minority opinion famously came under attack from his fellow judges for failing to appreciate the lessons of *Lochner* on the dangers of a too expansive conception of the right to freedom.<sup>38</sup> Laurie's response, anticipating the attack, was to reject the relevance of *Lochner* for reasons of socio-economic situation and constitutional text. As to the

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<sup>34</sup> 1995 (3) SA 391 (CC) paras 152-172.

<sup>35</sup> *Ibid* paras 154, 157.

<sup>36</sup> *Ibid* para 154.

<sup>37</sup> *Ibid* para 153.

<sup>38</sup> *Lochner v New York* 198 US 45 (1905), discussed in Chaskalson P's judgment at paras 182-183.

former, he argued that South Africa in 1995 found itself in a vastly different situation from early twentieth-century America, where the welfare state was still being developed and where laissez-faire thinking still had some hold over contemporary notions of freedom. Today, Laurie argued, no judge anywhere in the world would interpret 'liberty' as meaning 'liberty of contract', and hence there could be no danger in developing an expansive conception of freedom. In any case, there was an obvious textual reason why the fallacy of *Lochner* could not be repeated in South Africa – the existence of a general limitations clause, which would ensure that any limitations of an overbroad freedom right could easily be justified.<sup>39</sup>

Laurie lost this particular battle, of course, but his point about *Lochner*, and the deeper point encapsulated in it about the proper use of comparative law, remain. Foreign judgments should not be used for judicial scare-mongering, but as a basis for the careful sifting through of the reasons for and against a particular principle or rule.

The danger of facile legal transplantation in the face of profound legal-systemic differences came to the fore in *Fose*, where Laurie acknowledged that '[m]ore than the usual caution [was] necessary'.<sup>40</sup> The question in this case, it will be recalled, was the availability in South African law of a claim for constitutional damages. Sensing that the answer would have profound implications for the efficacy of the new constitutional order, but also the efficiency of government under that order, Laurie began his judgment by carefully restricting the question to the availability of constitutional damages on the facts of the case – a vicious assault on the plaintiff by members of the South African Police Services. The judicial minimalism evident in this approach has now become one of the major themes of the Constitutional Court's jurisprudence. To his credit, Laurie's judgment in *Fose* is the only judgment that expressly acknowledges the downside of this approach – namely, its restraining influence on the development of constitutional law doctrine. Fortunately, or perhaps precisely because of his sensitivity to minimalism's downside, Laurie's somewhat cautious approach to the recognition of constitutional damages did not foreclose the recognition of this remedy in *Modderklip*,<sup>41</sup> or the constitutionally-driven development of the common-law of delict relating to vicarious liability and the duty to act, which has partially made up for the caution the Court showed in *Fose*.<sup>42</sup>

The important point about *Fose* for present purposes was its recognition that the availability of constitutional damages is inevitably tied to the adequacy of common-law remedies for the violation of human rights. This in turn means that any

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<sup>39</sup> *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC) para 65-66.

<sup>40</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 24.

<sup>41</sup> *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (citing *Fose* (supra) at para 57).

comparative survey of the law in this area must take account of the system of torts in the country concerned – a formidable task that would have daunted most constitutional judges. Not Laurie. In 31 meticulously reasoned paragraphs, spanning 18 pages of the law reports, Laurie proceeded to write a veritable comparative-law treatise on constitutional damages.<sup>43</sup> To an outsider, his treatment of the United States is particularly impressive, factoring in as it does the difference between federal and state violations of the federal Constitution, and various deficiencies in the law relating to state liability.<sup>44</sup> ‘While these features certainly counsel considerable caution when seeking guidance from United States Supreme Court jurisprudence regarding the *content* of a suitable constitutional damages remedy,’ Laurie concludes, ‘the views expressed concerning the essential *nature* of the remedy might, in a more general normative sense, be instructive.’<sup>45</sup>

Passages and displays of comparative-law scholarship like these are scattered throughout Laurie’s judgments like splashes on a Jackson Pollock painting. Like Pollock’s splashes, they sometimes look casual, but on closer inspection one sees that, behind each remark, there is an artistry born of a profound dedication to legal scholarship and the comparative-law method.

### 3.2. Look for good, applicable reasons in foreign legal judgments

Laurie’s second guiding principle was to look for good, applicable reasons in foreign legal judgments, which either supported or contradicted the proposition he was testing. Because his concern was for the reasons supporting a decision rather than the outcome, Laurie had no compunction about citing minority judgments if he thought that the reasoning was persuasive. He also cited minority judgments where he thought that, because of differences in the text of the Constitution concerned, the minority judgment was likely to be more persuasive in South Africa than it had been in its own legal context. This aspect of Laurie’s guiding principle was immediately on display in *S v Makwanyane*, where he quoted with approval several passages from Blackmun J’s dissenting opinion in *Callins v Collins*.<sup>46</sup> The passages Laurie was interested in had to do with Blackmun J’s argument that it was not possible to satisfy the principle of non-arbitrariness and the principle of individualized sentencing at the same time. The first principle, Blackmun J reasoned, could only be satisfied by reducing judicial discretion in death penalty cases, whereas the second principle required judicial discretion to be maximized. That being the case, the death penalty

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<sup>42</sup> See *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (duty to act) and *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (vicarious liability).

<sup>43</sup> *Fose* (supra) paras 25-55.

<sup>44</sup> *Ibid* paras 25-37.

<sup>45</sup> *Ibid* para 33.

<sup>46</sup> 114 S Ct 1127, 127 L Ed 435 (1994), cited in *Makwanyane* (supra) para 161.

should not be administered at all. As we have seen, Laurie began his judgment in *Makwanyane* by focusing on the textual differences between the US and South African Constitutions. In the absence of a due process provision, Laurie held, Blackmun J's dissenting opinion in *Callins v Collins* was even more compelling, since the balance then tilted wholly in favour of the principle of non-arbitrariness, which Laurie thought was incompatible with the inevitably discretionary and subjective nature of judicial sentencing.<sup>47</sup>

In *Ferreira*, Laurie devoted almost as much attention to the dissenting judgments of Wilson and Sopinka JJ in the Canadian Supreme Court case of *Thomson Newspapers*<sup>48</sup> as he did to the majority judgment of La Forest J. The majority in *Thomson Newspapers* decided that, where the right against self-incrimination is abolished by statute it is sufficient to confer on the examinee a direct use immunity, leaving it to the trial court in subsequent proceedings to decide whether or not derivative evidence may be used. Wilson and Sopinka JJ disagreed, arguing that both a direct and a derivative use immunity were required. After analyzing their judgments, Laurie wrote:

I have referred somewhat extensively to the judgments of Wilson and Sopinka JJ, although their judgments were in dissent, because they represent the high-water mark in the judgment for striking down a provision which compels self-incrimination and only affords a direct use immunity.<sup>49</sup>

What Laurie meant by this was that, in the search for judicial truth, one should consider the best arguments for the other side, always remaining open to the possibility of having one's initial judicial hypothesis contradicted. As it turned out, Laurie decided to follow the majority's approach in *Thomson*, but no one reading his judgment could gain the impression that he did so without giving full consideration to the more 'absolutist' line taken by the dissenters.

### 3.3 Look for points of convergence at the level of principle between the law of open and democratic societies

The principled reason for Laurie's use of foreign law, as we have seen, was that both section 39(1)(a) and section 36(1) of the Constitution require a court, when interpreting the Bill of Rights or considering the limitation of a right, to have regard to the values underlying an open and democratic society based on human dignity, equality and freedom.<sup>50</sup> One way of working out what such a society entails is to

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<sup>47</sup> *Makwanyane* (supra) para 166.

<sup>48</sup> *Thomson Newspapers Ltd et al v Director of Investigation and Research et al* (1990) 67 DLR (4th) 161.

<sup>49</sup> *Ferreira* (supra) para 109.

<sup>50</sup> The equivalent provisions under the interim Constitution, which was the applicable Constitution for Laurie's early judgments, are sections 35(1) and 33(1) respectively.

develop an account of human dignity, equality and freedom based on South Africa's history and the meaning of these values in indigenous African philosophy and the Western liberal tradition. The Constitutional Court has done this in fits and starts throughout its jurisprudence, perhaps wisely refraining from bold statements of the content of these values unnecessary for purposes of deciding particular cases.<sup>51</sup> After his decision in *Ferreira* on the meaning of freedom,<sup>52</sup> Laurie tended not to do very much philosophizing from the bench, preferring instead to give content to the values underlying an open and democratic society by looking at how these values have been concretized in the law of countries generally considered to be open and democratic.

The primary challenge that Laurie faced in pursuing this approach was, of course, the great variety of legal rules on any one topic, and the sometimes contradictory ways in which different open and democratic societies have sought to regulate the same issue. Laurie responded to this challenge in much the same way as a common-law judge would respond on discovering a thicket of seemingly divergent rules in his or her own legal system: he looked for points of convergence at the level of principle. An early statement of this method occurs in *Ferreira*, where Laurie wrote:

In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character. When, for example, the United States Supreme Court finds that a statutory provision is or is not in accordance with the 'due process of law' or when the Canadian Supreme Court decides that a deprivation of liberty is not 'in accordance with the principles of fundamental justice' ... we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality.<sup>53</sup>

The *Ferreira* case concerned a constitutional challenge to the legislative abolition of the right against self-incrimination in s 417(2)(b) of the Companies Act.<sup>54</sup> The main challenge had been brought in terms of the right to a fair trial in section 25(3) of the interim Constitution. Laurie's judgment, which was a minority opinion in this respect, held that the applicants, who were not yet the subject of criminal prosecution, did not have standing to sue under section 25(3), but did have standing under a broadly conceived, residual right to freedom based on section 11(1) of the interim Constitution. Having decided that s 417(2)(b) infringed section 11(1) so conceived, the stated purpose of Laurie's first comparative-law survey in *Ferreira* was to 'consider whether comparable foreign case law would lead to a different conclusion'.<sup>55</sup> Deciding that it would not, Laurie conducted a second comparative-law survey in relation to the general limitations clause inquiry, this time looking for

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<sup>51</sup> See Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

<sup>52</sup> *Ferreira* (supra).

<sup>53</sup> *Ibid* para 72.

<sup>54</sup> Act 61 of 1973.

<sup>55</sup> *Ferreira* (supra) para 72.

guidance in the balance struck in other jurisdictions between the right against self-incrimination and 'the interest of the state in investigative procedures of various kinds'. The pay-off for all of this scholarship eventually came in paragraph 127 of Laurie's judgment, in which he held that there were less restrictive means available to the South African legislature than those used in the Companies Act. In particular, Laurie's comprehensive survey of foreign law showed that, where the common-law right against self-incrimination is abolished by statute, such a measure is usually tempered by the provision of a direct use immunity, or by the provision of both a direct and a derivative use immunity. Since the Companies Act provided neither of these safeguards, it failed to satisfy the minimum comparative-law standard.<sup>56</sup>

In his main judgment on the separation of powers, *De Lange v Smuts*,<sup>57</sup> Laurie used much the same strategy in upholding a freedom and security of the person challenge to section 66(3) of the Insolvency Act.<sup>58</sup> Section 66(3) empowered an officer of the state to impose a sentence of imprisonment on persons who failed to produce books of account or answer questions lawfully put during the winding up of a company. In this instance, Laurie found that the law of the United States, Canada, Germany, the United Kingdom and Australia, despite differences at the level of rules, converged on the principle that only a judicial officer, with the requisite independence from the executive, could commit a recalcitrant witness to prison.<sup>59</sup>

As with any attempt to state a general principle at common law, the comparative-law strategy of searching for general principles can be hazardous, and may do injustice to particular rules, and the nuances of different legal systems. This was arguably the case in Laurie's judgment in *First National Bank*, in which he surveyed foreign legal approaches to the deprivation of property.<sup>60</sup> The case concerned a challenge under section 25 of the 1996 Constitution to section 114 of the Customs and Excise Act.<sup>61</sup> As it was then worded, section 114 authorized the Commissioner of the South African Revenue Service to detain and eventually sell property 'in the possession or under the control of' a customs debtor, even where such property belonged to a third party. The *First National Bank* case was the first case heard under section 25, and Laurie accordingly took the opportunity to 'go big' and set out the framework for the constitutional property clause inquiry, in much the same way that the Constitutional Court had done in relation to the equality clause in *Harksen*.<sup>62</sup> After giving what were, for him, relatively concise summaries of the position in the United States, Australia, the Council of Europe, the United Kingdom and Germany, Laurie remarked, with his usual caution, that '[c]omparative law cannot, by simplistic

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<sup>56</sup> *Ferreira* (supra) para 127.

<sup>57</sup> *De Lange v Smuts NO & Others* 1998 (3) SA 363 (CC).

<sup>58</sup> Act 24 of 1936.

<sup>59</sup> *Ibid* para 63.

<sup>60</sup> *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>61</sup> Act 91 of 1964.

transference, determine the proper approach to our property clause that has its own context, formulation and history.’ Nevertheless, Laurie continued, ‘the comparative perspective does demonstrate at least two important principles’: (1) that ‘there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation’; and (2) that the validity of deprivations of property in foreign law typically depends on the existence of an appropriate means-end relationship between the impact of the deprivation on the property rights holder and the public purpose being pursued.<sup>63</sup>

The problem with the first principle is not that it is inaccurate, but that it is strictly speaking redundant since section 25 clearly distinguishes mere deprivations of property from expropriations, and provides for the payment of compensation only in respect of the latter. Even if Laurie’s comparative-law survey had come to the opposite conclusion, therefore, it would have been trumped by the plain meaning of section 25. The real value of foreign law in this area is the guidance it could potentially provide on the distinction between expropriations and deprivations, but by this stage of the judgment Laurie had already decided that expropriations should be subsumed under the broad category of deprivations, with both types of state action being subject to the test for arbitrary deprivation in section 25(1).<sup>64</sup> In the result, there was very little work for the comparative survey to do.

The second principle enunciated in *First National Bank* is also broadly true, but inevitably misses the nuances of some of the legal systems surveyed. For example, in his summary of the US Supreme Court’s regulatory takings jurisprudence, Laurie refers to *Dolan v City of Tigard* as authority for the proposition that the American ‘Courts do appear to employ some sort of proportionality test’.<sup>65</sup> The problem with this reference is that *Dolan* forms part of a small sub-component of US regulatory takings jurisprudence, namely that part of it having to do with the conditioning of municipal planning approval on the dedication by the property owner of part of his or her land for public use. In such cases, the US Supreme Court applies a ‘rough proportionality’ test to assess the constitutionality of the condition. In its regulatory takings jurisprudence as a whole, however, the approach is different, with a conceptual test that accords greater weight to the nature of the property vying for prominence with the ‘ad hoc balancing test’ first laid down in *Penn Central Transportation Co v City of New York*.<sup>66</sup>

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<sup>62</sup> *Supra*.

<sup>63</sup> *Ibid* paras 97-98.

<sup>64</sup> *Ibid* para 58.

<sup>65</sup> 129 L Ed 2d 304; 114 S Ct 2309 (1994), cited in *First National Bank* (*supra*) para 75.

<sup>66</sup> 438 US 104, 123-28 (1978). In its most recent judgments, the Supreme Court has moved towards a combination of tests, employing a ‘per se takings rule’ in cases where property is permanently physically occupied, and the ad hoc balancing test for other alleged regulatory takings. See *Yee v City of Escondido* 503 US - (1992) and *Concrete Pipe and Products of California v Construction Laborers Pension Trust for Southern California* 508 US - (1993).

A Herculean judge would have had the time and the inclination to uncover these nuances. But, as Laurie acknowledged, actual judges must work within the constraints of time and the limits of their existing knowledge.<sup>67</sup> For some members of the Constitutional Court, this meant that foreign law should be consulted only in those exceptional cases where the text of the provision and the surrounding law were so similar to the South African materials being considered that there was no risk of distortion.<sup>68</sup> Laurie respected this view, but believed that, with a lot of work and the necessary caution, the risk of distortion could be minimized, or at least reduced to the point where it was outweighed by the benefits to be gained from comparative-law scholarship. Even in the *First National Bank* case, where some distortion occurs, the conclusion must be that, on balance, the use of foreign law assisted the Court more than it hampered it, and that South African constitutional property law is therefore the richer for having been exposed to outside influence.

4. The connection between Laurie's interest in human dignity and his commitment to comparative constitutional law

The conceptual connection between Laurie's interest in human dignity and his commitment to comparative constitutional law should by now be clear. It is a connection that Laurie initially derived from the constitutional text, but which he then proceeded to demonstrate in a way that was uniquely his own. The textual prompts were sections 39(1)(a) and 36(1) of the 1996 Constitution, and their predecessors in the interim Constitution,<sup>69</sup> which enjoin a court to promote the values underlying an open and democratic society when interpreting the Bill of Rights and when considering whether a right has been permissibly limited. Laurie saw in these provisions a much firmer basis for comparative constitutional law than that contained in section 39(1)(c). Not only that, but sections 39(1)(a) and 36(1) make it clear that, when using foreign law to give content to the notion of an open and democratic society, human dignity must feature, along with equality and freedom, as one of three core values informing that standard.<sup>70</sup>

On Laurie's reading, therefore, sections 39(1)(a) and 36(1) contain a hypothesis about comparative constitutional law that he sought to explore in his judgments. The hypothesis is that, despite their differences at the level of rules, there is enough in common between the major liberal democracies as to make a comparative consideration of their human rights regimes meaningful. What they have in common is a core set of shared values, the essence of which is impervious to regional

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<sup>67</sup> *Makwanyane* (supra) para 165.

<sup>68</sup> See Kriegler J's judgment in *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) paras 132-33.

<sup>69</sup> Sections 35(1) and 33(1) of the Constitution of the Republic of South Africa, 1993.

<sup>70</sup> Note that human dignity is not mentioned in sections 35(1) and 33(1) of the interim Constitution.

variations in political context, level of economic development, and cultural and legal tradition.

Laurie never put it this way, but I imagine that he saw a conceptual link between the idea that different domestic human rights regimes are founded on a shared set of values and the provision in article 19(2) of the German Basic Law guaranteeing the essence of basic rights against legislative encroachment. In the same way that rights, if they are to be rights at all, must be absolutely protected against certain types of legislative override, so too must the values of human dignity, equality and freedom inform our understanding of the inviolable core content of different domestic human rights regimes. The purpose of comparative constitutional law, in Laurie's view, was to discover this core content, by stripping away the superficial differences to get at the common essence beneath.<sup>71</sup>

For Laurie, the most important value from this perspective – the value of values – was human dignity, for it is this value that proclaims our common humanity in the midst of our difference. Human dignity was not included in the list of values informing the interpretation of the Bill of Rights and the general limitations clause in the interim Constitution. This perhaps explains Laurie's somewhat forced attempt in *Ferreira* to connect human dignity to an expansive conception of freedom.<sup>72</sup> By the time of the 1996 Constitution, however, human dignity had been added, and Laurie was thus textually free to find in human dignity one of the three shared values underlying open and democratic societies that make meaningful comparison possible.

Looking back on Laurie's jurisprudence, it is clear that all of the major doctrines for which he was responsible depend to a large extent on this comparative approach. Thus the doctrine of objective unconstitutionality in *Ferreira* was drawn from Canadian and German law,<sup>73</sup> and the principle, articulated in *Carmichele*,<sup>74</sup> that our Constitution embodies an 'objective, normative value system', was likewise derived from the German Federal Constitutional Court's jurisprudence. Laurie's separation of powers judgments, though stressing the uniqueness of each country's own model, were founded on the notion that there are certain general principles of separation of powers that may not be violated if that doctrine is to mean anything at all.

Perhaps I am imagining things, but my sense is that the use of foreign law by the Constitutional Court has declined disproportionately since Laurie's departure. This may have to do with the fact that the current judges place more emphasis on section 39(1)(c), in which the use of foreign law appears to be an optional extra. It may also

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<sup>71</sup> Further support for the importance of this notion in Laurie's jurisprudence may be found in his privacy decisions, most notably in *Bernstein* (supra).

<sup>72</sup> See *Ferreira* (supra) para 49: 'Freedom and dignity are inseparably linked.'

<sup>73</sup> *Ferreira* (supra) para 29.

<sup>74</sup> *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC) para 54.

have to do with the maturation of the Court's jurisprudence, such that it has become less necessary nowadays to rely on foreign law in order to give rights content, and in order to understand the circumstances under which they may permissibly be limited. Nevertheless, a note of caution is in order. The world's oldest constitutional democracy, the United States, is at once both the only open and democratic society not to have abolished the death penalty and the country whose Supreme Court is least inclined to refer to foreign law. As with Laurie's commitment to human dignity and his interest in comparative constitutional law, there may only be an accidental connection between these two facts, but I am inclined to think not. Conceptions of human rights and the values that underpin them are not static. Whilst there would have been few people in the last quarter of the eighteenth century who would have questioned the US Constitution's failure to abolish the death penalty, the incompatibility of this penalty with the right to life and the freedom from cruel and unusual punishment is now conventional wisdom, at least in the international human rights community. The fact that the US Supreme Court has not yet moved to abolish the death penalty is, as Laurie pointed out in *Makwanyane*, partly a function of that country's constitutional text and the extreme difficulty of securing its amendment. It is also partly a function of the way in which domestic human rights norms become ossified as judicial precedent, making large-scale adjustments impossible. But the US Supreme Court's failure to abolish the death penalty must also in part have to do with its imperviousness to outside influence, and its stubborn refusal to re-interpret rights in light of foreign experience. If that is correct, the US experience is a salutary warning to those who think that the work of comparative constitutional law in South Africa is done. Had Laurie still been on the Court, I am sure that he would have taken the view that there are still many gaps left in South African constitutional law that need to be filled. And had he still been there to do so, I am sure that he would have filled these gaps in the only way he knew how – through recourse to foreign law, guided by an unshaken faith in the inherent dignity of all human beings.

THEUNIS ROUX  
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