

Comparative Constitutional Law in the Classroom: A South African Perspective

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INTRODUCTION

The jurisprudence of South Africa's Constitutional Court is often held up as a model—or a rather extreme example—of the role judges can play in facilitating a global constitutional dialogue. Whether the Court has, in a given case, followed what it took to be an evolving transnational consensus, modelled its jurisprudence on foreign law, or distinguished the position in South Africa from that in foreign jurisdictions, comparative law has played a fundamental—and openly acknowledged—role in the development of its jurisprudence.¹

This openness to foreign influences may have something to do with the role of international and foreign law in the drafting of both South Africa's post-apartheid constitutions.² It must, however, be emphasised that judicial reliance on foreign law is not confined to the interpretation of provisions which bear the direct imprint of foreign law, but also

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1. See Laurie Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV 169 (2005) (discussing the use made by the Constitutional Court of comparative materials); Henk Botha, *Comparative Law and Constitutional Adjudication: a South African Perspective*, 55 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 569 (2007).

2. See generally S. AFR. (Interim) CONST. 1993; S. AFR. CONST. 1996.

extends to other areas.³ Similarly, while the mandate given to judges in section 39(1) of the Constitution to consider international and foreign law has undoubtedly facilitated a comparativist approach,⁴ the point cannot simply be that, in view of this express textual authorisation, recourse to foreign law is felt to constitute less of a judicial usurpation of legislative power or a betrayal of national sovereignty.⁵ The point is, rather, that in South Africa the national constitutional identity is not seen as wholly isolated from international and foreign influences—that, in fact, it arises from an endless process of differentiation in which global constitutional norms intersect with local identities, understandings and struggles.⁶ The boundaries between the national and transnational are thus seen as permeable and constantly changing. For constitutionalists in South Africa, acceptance of the role of foreign law in constitutional adjudication thus coexists comfortably with a sense of the uniqueness of South Africa's constitutional experiment.

Foreign constitutional law experts sometimes assume that the constitutional law curriculum in South African law schools must display the same degree of openness to comparative constitutional learning. I am somewhat embarrassed to confess that this, in my experience, is not the case. I certainly cannot claim to prepare my undergraduate students for the complexities of comparative constitutional research, nor can I pretend to give them anything close to an adequate understanding of foreign legal systems. It is this tension—between the legal order's openness to comparative influences and the continued adherence in law school curricula to a traditional model which borders on the chauvinistic—

3. In some cases, the Constitutional Court's appropriation of foreign and international influences in their interpretation of the interim Constitution even had a direct influence on the formulation of the final Constitution. Examples include the enhanced role of human dignity under the final Constitution and the express inclusion of a proportionality test in § 36, the general limitation clause.

4. S. AFR. CONST. 1996, § 39(1) ("When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."). The wording of § 39(1) deviates only slightly from that of its predecessor, § 35(1) of the Interim Constitution. Despite occasional references to international law, my focus in this article will be mainly on foreign law.

5. It should be noted that, although § 39(1) only authorizes the use of international and foreign law in the interpretation of the Bill of Rights, this has not prevented the Constitutional Court from invoking foreign law in their consideration of issues like federalism. *See, e.g.,* *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (12) BCLR 1399 (CC) ¶ 80-83, (S. Afr.); *Executive Council, W. Cape Legislature v. President of the Republic of S. Africa* 1995 (4) SA 877 (CC) (S. Afr.); *Matatiele Municipality v. President of the RSA* 2007 (1) BCLR 47 (CC) ¶ 36 (S. Afr.).

6. *See* HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (Cambridge Univ. Press 2000) (analyzing ways in which Constitution was shaped by interaction between global constitutional text and local constitutional struggles).

which will frame my discussion of the use of comparative constitutional law in the South African classroom. I will first consider some of the reasons for this failure on the part of South African constitutional law professors, and then argue that, even given the current constraints, comparative law can and often does form part of our teaching.

CONSTRAINTS

What, then, are the causes of the failure to afford comparative law a more prominent part in constitutional law syllabi, if, as I believe, it cannot be ascribed to a resistance on the part of constitutional law professors to the new comparative sensibility?⁷ The reasons are varied, but for present purposes a discussion of four of them must suffice.

The first factor has to do with tradition. It is true that the traditional focus on black-letter municipal law continues to inhibit the emergence of a more overtly comparativist pedagogy. There is, however, also a second sense in which tradition frustrates efforts to accord comparative law a more prominent role in constitutional law syllabi. Many faculties traditionally displayed a strong bias in favour of private law. At a time when public law was widely seen as the handmaiden of apartheid politicians, private law was embraced as something neutral and objective, consisting of principles developed over centuries which have an internal logic and coherence.⁸ Despite the democratic changes, and despite the fact that all law, including private law, now derives its validity from and must be informed by the Constitution,⁹ the traditional private-law bias still lives on in the curricula of many law faculties. Even where more time has been allocated to public law subjects, constitutional law often still plays second fiddle to contract, delict (torts) and other traditionally private law subjects. Professors battling to fit an already over-packed constitutional law syllabus into the time allocated,

7. The contribution of scholars to the emergence of the comparativist paradigm can hardly be overestimated. The use of legal academics as technical advisers during the Constitution-making process promoted the influence of international and foreign law, while a wealth of comparative literature published in the early and mid 1990s helped facilitate the Constitutional Court's forays into comparative law. See RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (Dawid van Wyk et al. eds., Juta 1994); I.M. RAUTENBACH, GENERAL PROVISIONS OF THE SOUTH AFRICAN BILL OF RIGHTS (Butterworths 1995); AZHAR CACHALIA ET AL., FUNDAMENTAL RIGHTS IN THE NEW CONSTITUTION (Juta 1994); A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS (Juta 1999).

8. See A.J. van der Walt, *Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Private Law*, 11 S. AFR. J. HUM. RTS. 169 (1995); A.J. van der Walt, *Dancing with Codes - Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 S. AFR. L. J. 258 (2001) (critiquing these assumptions).

9. Pharmaceutical Mfrs. Ass'n of SA: *in re Ex Parte* Application of the President of the RSA 2000 (2) SA 674 (CC) ¶ 44 (S. Afr.).

often simply cannot see how they are supposed to add comparative law into the mix.¹⁰

The four-year LLB curriculum is a second inhibiting factor. Prior to democratisation, the LLB was a post-graduate degree which was normally preceded by a BA or BCom degree. After 1994 a newly devised four-year LLB degree became the default option, which effectively meant that five years of study had to be condensed into four. This has not only made it more difficult to expand existing constitutional law programmes, but has also, in the opinion of many, led to a decline in the critical reading, writing and argumentative skills of students.

The third reason has to do with the immaturity of students. Many universities offer constitutional law in the second year of the LLB degree. Teaching constitutional law to a class of nineteen-year-olds is not ideal. On the other hand, moving constitutional law to the third or fourth year is likely to perpetuate the primacy of private law, as students' legal consciousness may then, by the time they encounter constitutional law, have already been formed, creating the danger that constitutional law may become something of an afterthought.

Finally, it seems that sixteen years into our constitutional democracy, South African constitutional lawyers (including judges and academics) have become slightly more inwardly focused. While they have not developed a sudden aversion to comparative influences, I think it is fair to say that a sufficient repertoire of styles of constitutional reasoning and arguments and counter-arguments have been developed to give the community of constitutional interpreters the confidence to argue, adjudicate and criticise without always first checking for foreign examples and histories. Added to that, the elaboration and analysis of the fairly substantial South African constitutional jurisprudence built up over a decade and a half have become more time-consuming.

POSSIBILITIES

The factors mentioned above constrain the use of comparative constitutional law in the classroom, but do not, of course, prevent recourse to foreign materials. Comparative law can and does assist us in our teaching, even if we rely on it in a way which is lacking in depth and in rigour. In my experience, references to comparative law may be particularly helpful in:

10. Arguments for the expansion of the constitutional law content of the curriculum to enable more engagement with comparative law typically meet with the objection that colleagues in other disciplines would also like to include more comparative law in their courses, but that, given the constraints of the four-year LL.B., this is a luxury we simply cannot afford.

- a. inculcating in students a broader understanding of the history of constitutional concepts and principles and of the way foreign examples have framed the options available to the Constitutional Assembly and constitutional interpreters;
- b. enabling a better understanding of the structural features of the South African Constitution;
- c. facilitating understanding of the philosophical, political and legal-cultural premises underlying the Constitution; and
- d. making sense of basic constitutional concepts, metaphors and modes of reasoning.

Allow me to unpack some of these points briefly. First, we understand the structural and institutional aspects of our own Constitution in relation to different comparative models. For instance, most explications of South Africa's system of government are prefaced by, or presuppose an understanding of the distinction between parliamentary and presidential systems.¹¹ The Westminster system, which has been so central to the development of constitutionalism in South Africa, naturally remains an important point of reference, while the American presidential system provides a useful counterpoint. Important features of South Africa's system of government—the incomplete separation of powers between the legislature and executive, ministerial accountability and the election of the President by Parliament—are explained with reference to the British parliamentary system, while others—e.g. the combination of the offices of head of state and head of government in a single office—are presented as the introduction of presidential features into a system which is still, for the most part, parliamentary. The juxtaposition of different constitutional models is thus used to facilitate understanding of the South African Constitution, and to underline that there is no single, universally accepted model of separation of powers.¹²

Similarly, understanding South Africa's brand of federalism would be harder without the aid of comparative examples. South Africa's system of cooperative government, where concurrent legislative powers are shared by national and provincial legislatures and a second chamber of Parliament represents provincial interests, clearly invites comparison

11. See, e.g., IAIN CURRIE & JOHAN DE WAAL, 1 THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW 14-15, 17-19 (Juta 2001).

12. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) ¶¶ 106-13 (S. Afr.).

with Germany.¹³ The German model of integrated federalism, in turn, is understood in contradistinction to divided—or competitive—forms of federalism, as exemplified by the United States and Canada.¹⁴ Again, a brief overview of some comparative examples gives the student a better sense of the range of options that were open to the Constitutional Assembly and helps to contextualise the provisions of the Constitution.

A third example relates to the Bill of Rights. Section 36 of the Constitution contains a general limitation clause, which spells out the requirements for a valid limitation of fundamental rights.¹⁵ References to foreign constitutional systems are helpful in explaining to students the meaning and import of this provision. I usually start by outlining two alternative approaches. The first is the approach followed in the Constitution of the United States, where the rights in the Bill of Rights are unqualified by limitation provisions. The second is that of the European Convention on Human Rights, where fairly detailed provisions articulate the requirements for the limitation of specific rights. Against these two approaches a third is juxtaposed, namely the kind of general limitation provision to be found in section 1 of the Canadian Charter on Rights and Freedoms and section 36 of the South African Constitution. Unlike the American approach, where enquiries into alleged rights violations proceed in a single stage, section 36 gives rise to a two-stage approach: the first connoting an inquiry into the content and scope of the relevant right and whether it has in fact been infringed, and the second dealing with the justification of the limitation. A limitation can therefore be justified in terms of a general proportionality test during the second stage, without having to give the particular right a restrictive definition. The juxtaposition of the American and South African approaches is

13. See *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) ¶¶ 80-83 (S. Afr.) (acknowledging National Council of Provinces was modeled on Germany's *Bundesrat* and notion of cooperative government, as entrenched in chapter 3 of the Constitution, resembles German notion of *Bundestreue*).

14. See Richard Simeon, *Considerations on the Design of Federations: The South African Constitution in Comparative Context* 10-13 (Queen's Univ., Working Paper 1998(2)), available at [http://www.queensu.ca/iigr/working/Archive/1998/1998-2Richard Simeon.pdf](http://www.queensu.ca/iigr/working/Archive/1998/1998-2Richard%20Simeon.pdf).

15. S. AFR. CONST. 1996 § 36(1). This section provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Id.

meant to facilitate debate over the nature of fundamental rights, the relation between the interpretation and limitation of rights, and definitional versus justificatory approaches. On the other hand, the contrast between the general limitation clause in section 36 and the specific limitations contained in the European Convention raises questions about the desirability of a uniform approach to the limitation of all rights, whether a general standard can accommodate considerations that are unique to a particular right, and the relationship between the general standard and rights-specific demarcations and limitations.¹⁶

In these examples, the structure of and/or relations between the institutions created by South Africa's Constitution are understood in relation to comparative examples.¹⁷ However, because these different structures and institutional relations are rooted in different histories, power relations and institutional cultures, and because they express different understandings of the role of the state, the division of state power and/or the relation between the individual and political community, the discussion seldom remains confined to the institutional level. Even the blandest comparisons of constitutional rules, structures and mechanisms have the potential to instil in students some sense of the contingency of their own constitutional arrangements, and to hint at alternative interpretive frameworks.

Secondly, formulations, tests, standards and metaphors derived from international and foreign law have been particularly helpful in providing constitutional framers and interpreters with a conceptual vocabulary for the negotiation of conflicting normative and institutional commitments. Unlike under apartheid, the new constitutional order embraces plurality and institutionalizes dissent by committing itself to a variety of often

16. See Stu Woolman & Henk Botha, *Limitations*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 34.1-34.136 (Stuart Woolman, Theunis Roux & Michael Bishop, eds., Cape Town: Juta 2d ed. 2008); GERHARD VAN DER SCHYFF, *LIMITATION OF RIGHTS: A STUDY OF THE EUROPEAN CONVENTION AND THE SOUTH AFRICAN BILL OF RIGHTS* (Wolf Legal Publ'rs 2005).

17. Such comparisons are closer to the foreground in the case of younger constitutions that clearly bear the imprint of comparative models. However, I believe that comparative examples can play a similar role in explicating the structural and institutional aspects of older constitutions—even if the comparative models in terms of which the Constitution is understood may have receded further into the background. See Vicki Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 600-01 (1999) (arguing that even if we believe, like Justice Scalia, that foreign law should not influence development of our own constitutional jurisprudence, our knowledge of foreign systems nevertheless forms part of "the lattice work of assumptions and beliefs that constitute, 'our traditions,' 'common sense,' or 'contemporary understandings'").

conflicting ideals, such as continuity and change,¹⁸ democracy and rights,¹⁹ and equality and freedom.²⁰ The Constitutional Court has found concepts, metaphors and modes of reasoning derived from foreign law helpful in mediating these tensions. Notions like indirect horizontal application, human dignity, proportionality and subsidiarity have enabled the Court to negotiate these tensions on a case by case basis, and thus to keep alive conflicting normative visions. Comparative law has thus helped the South African legal order to come to terms with plurality and dissent, and to remain open to challenges from within to conventional constitutional self-understandings.²¹

While it is not always possible to trace these influences in class, students can be alerted to the fact that the concepts, standards and principles that they encounter form part of a larger, transnational constitutionalist tradition, and that the meaning of these ideas is not fixed, but has undergone various mutations through the years and in different jurisdictions. Hopefully, students get at least some sense of the way constitutional discourse continuously wavers between the transnational and the local, between universality and contingency, and between similarity and difference.

Thirdly, the Constitutional Court's forays into comparative law create useful shortcuts. For instance, although there may be not enough time to prescribe foreign cases dealing with the horizontal application of constitutional rights, the Constitutional Court's judgment in *Du Plessis v. De Klerk*²² creates an opening for introducing students to the state action

18. Compare S. AFR. (Interim) CONST. 1993, § 229, and S. AFR. CONST. 1996, Schedule 6 item 2(1) (decreeing the continued validity of existing law, subject to amendment, repeal or constitutional invalidation), with S. AFR. (Interim) CONST. 1993, epilogue titled "National Unity and Reconciliation" ("This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."). See also A.J. van der Walt, *Tentative Urgency: Sensitivity for the Paradoxes of Stability and Change in Social Transformation Decisions of the Constitutional Court*, 16 S.A. PUBLIC LAW 1 (2001).

19. See e.g. *Prince v. President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) ¶ 155 (S. Afr.).

20. The rights in the Bill of Rights generally bind non-state actors (S. AFR. CONST. 1996 § 8(2)) and "private" discrimination is expressly proscribed (S. AFR. CONST. 1996 § 9(2)), thus raising difficult questions about the balance to be struck between equality and freedom. See e.g. *Ferreira v. Levin* NO and *Vryenhoek v. Powell* NO 1996 (1) SA 984 (CC) ¶ 53 (S. Afr.); L.W.H. Ackermann, *Equality and the South African Constitution: The Role of Dignity*, 63 HEIDELBERG J. INT'L LAW 537, 552-554 (2000).

21. See Henk Botha, *Learning to Live with Plurality and Dissent: The Grundgesetz in South Africa*, 58 Jahrbuch Des Öffentlichen Rechts Der Gegenwart (forthcoming 2010).

22. *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) (S. Afr.). *Du Plessis* dealt with the question whether the rights enshrined in the interim Constitution were directly

doctrine in the United States, the *Liith* decision in Germany,²³ and the ways in which these judgments have helped set the terms of the South African debate. Similarly, the judgment in *S. v. Makwanyane*²⁴ can be used to give students a first introduction to the wealth of comparative materials dealing with proportionality, while cases like *Government of the Republic of South Africa v. Grootboom*²⁵ and *Minister of Health v. Treatment Action Campaign*²⁶ sensitise students to the ongoing debate over the “minimum core” of socio-economic rights, a notion derived from General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights.²⁷

CONCLUDING REMARKS

Even within the constraints of the current four-year LLB, comparative constitutional law can be a useful tool in teaching South African constitutional law. Constitutional comparison, even when it occurs at a rather superficial level, can be helpful in highlighting what is distinct about one’s own system and what it shares with other systems. It can also create a sense of the contingency of dominant understandings and open up alternative interpretive possibilities and avenues of critique.

binding on private and juristic persons. *Id.* Relying on the judgment of the Canadian Supreme Court in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1987] 33 D.L.R. 174 (Can.), the Court found that the omission of the judiciary from § 7(1) had the effect of ruling out the importation of the doctrine developed by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), in which an order of court was equated with state action. *Id.* The Court was also heavily influenced by the German model of indirect horizontal application. *Id.* Noting the resonance between the German approach and the constitutional injunction to have due regard to the spirit, purport and objects of the Bill of Rights in developing the common law, it settled for an approach based on indirect horizontal application. *Id.* *Du Plessis* has been controversial, not least because of the way the Court invoked foreign law as authority for a particular standpoint. See Stuart Woolman, *Application*, in CONSTITUTIONAL LAW OF SOUTH AFRICA 31.23-31.31 (Stuart Woolman, Theunis Roux & Michael Bishop, eds., Cape Town: Juta 2d ed. 2008.).

23. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 198 (F.R.G.).

24. *S. v. Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.).

25. *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

26. *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

27. Office for the U.N. High Commissioner for Human Rights [OHCHR], Committee on Social Economic and Cultural Rights [CESCR], *General Comment 3: The nature of States parties obligations*, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990). The Constitutional Court referred to General Comment 3 in both *Grootboom*, ¶¶ 29-33 and *Treatment Action Campaign*, ¶¶ 26-39, but developed an alternative interpretive framework centering upon the reasonableness of the state’s measures. See also *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) ¶¶ 52-68 (S. Afr.).

We understand constitutional concepts, institutions, standards and principles in relation to other constitutional concepts, institutions, standards and principles. This is so both in a positive and negative sense. Our own constitutional understandings are sometimes forged on the basis of, and sometimes in contradistinction to comparative examples.²⁸ Most of the time, however, positive and negative examples are closely intertwined, and disentangling the relevant similarities and differences is a complex and contested matter.

Comparative constitutional law is fraught with difficulties. Caricatures of other constitutional systems often stand in for proper analysis, and there tends to be a fixation on surface similarities. The classroom situation is likely to exacerbate these difficulties. And yet, it is important to introduce students to the unceasing play of similarity and difference that lies at the heart of comparative law. The point of comparison cannot and should not be to emulate uncritically, but is to engage in a careful construction of the relevant similarities and differences between constitutional systems, having due regard to relevant textual, structural, historical, social and legal-cultural differences. Doing so is not that foreign to law students, whose training already equips them to distinguish precedents from current factual situations, and to negotiate the various tensions arising from conflicting legal rules, standards and policies.

28. The United States Constitution has, in some respects, served as a negative model of constitutional development in South Africa. Judicial understandings of South Africa's Constitution as a transformative, deeply egalitarian document which places a positive duty on the state to protect and promote fundamental rights have, in a number of instances, been articulated by drawing attention to relevant differences with the Constitution of the United States. *See e.g.* Carmichele v. Minister of Safety and Security 2001 (4) SA 938 (CC) ¶ 45 (S. Afr.); Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) ¶ 74 (S. Afr.); Minister of Finance v. Van Heerden 2004 (6) SA 121 (CC) ¶¶ 26, 29, 147-148 (S. Afr.).