

Foreign Constitutional Law and the Courts: Reflections from the South

Henk Botha
University of Stellenbosch
South Africa

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, modeled 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. This is neither the place for a detailed and critical appraisal of the Court's use of foreign law, nor for answering the question whether its general approach can guide constitutional adjudication in other parts of the world. Instead, I will make a few rather general observations about the Court's jurisprudence, which can hopefully elicit further debate about the possibilities and pitfalls of judicial recourse to foreign law. My discussion will be structured around three basic questions: why, what and how to compare?

1. Why compare?

The openness of a legal system to comparative influences depends on a variety of legal-cultural and historical factors. In South Africa, the use of foreign constitutional law by the courts has been facilitated by a number of factors. These include: the lack of a constitutionalist tradition and the history of Westminster-style parliamentary sovereignty before 1994, the fact that South Africa has a hybrid legal system shaped by different legal traditions, the role of foreign and international law in the making of both the interim and final constitutions, and the express constitutional authority given to judges to consider foreign law in their interpretation of the fundamental rights provisions in both constitutions. Although the use made of foreign law in particular cases is often controversial, I know of no South African constitutional lawyer or commentator who would dispute that foreign law can – and often does – play a legitimate role in constitutional interpretation. For constitutionalists in South Africa, acceptance of the role of foreign law in constitutional adjudication coexists quite comfortably with a sense of the uniqueness of South Africa's constitutional experiment.

Not all national legal systems exhibit the same degree of openness to foreign influences. It is nevertheless possible to identify a number of reasons for judges to have recourse to comparative constitutional materials. And while it is true that the precise meaning and persuasive power of these reasons are likely to vary from one national system to another, the burgeoning literature on comparative constitutionalism suggests that at least some justifications for judicial recourse to foreign law transcend the limits of particular national jurisdictions.

Elsewhere, I have identified seven reasons why South African judges have recourse to comparative constitutional materials.¹ For present purposes, four of them should suffice:

- First, judges often invoke the normative weight of an evolving transnational value consensus and/or the currency of a widely followed interpretive approach. The Constitutional Court's finding that judicially imposed whipping 'offends society's notions of decency' and violates human dignity provides an example of the former,² while its embrace of a broader constitutionalist tradition in which notions like dignity, contextual/ purposive interpretation and proportionality take centre stage illustrates the latter.
- Second, comparative constitutional law enables lawyers and judges, through a consideration of the differences between their own constitution and those of others, to develop a more adequate understanding of their own legal system and of the contingency of the legal culture within which it functions. The United States Constitution has, for instance, served as a negative model of constitutional development in South Africa (and elsewhere). 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. Comparative constitutional law can, moreover, be used to challenge deeply ingrained assumptions about our own legal system, as Vicki Jackson so poignantly reminds us.³
- Third, constitutional comparativism can promote substantive reasoning and a culture of justification. The point of constitutional comparison cannot be simply to find the answers to legal questions in comparative materials, or to blindly follow foreign law. The point is, rather, to inquire whether the court can benefit from the reasoning employed by foreign courts – with due regard to similarities and differences in the text and structure of the respective constitutions, the broader legal system and culture, and the social and historical context. The emphasis should therefore be on the persuasiveness of the other court's reasoning and a proper contextualisation of its judgment. By extension, this also requires the court to inquire into the values underlying the own constitution and the social and historical context within which it functions.
- Fourth, recourse to foreign materials opens up new interpretive possibilities while foreclosing others. Comparative analysis will sometimes delegitimize certain interpretive possibilities – for instance, where there is evidence of a growing transnational consensus that a certain practice is unacceptable. At other times, it may allow judges to move beyond their initial impression that a particular interpretation is inescapable, and open up alternative interpretive possibilities.

¹ H Botha 'Comparative law and constitutional adjudication: a South African perspective' (2007) 55 *Jahrbuch des öffentlichen Rechts der Gegenwart* 569.

² *S v Williams* 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) para 39.

³ V Jackson 'Ambivalent resistance and comparative constitutionalism: opening up the conversation on "proportionality", rights and federalism' (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583 at 600-601.

In South Africa, comparative constitutional law has been particularly helpful in providing constitutional 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 conflicting ideals, such as continuity and change, democracy and rights, and equality and freedom. 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.⁴

2. What to compare

It would be a mistake to limit the use of foreign law to a too narrow set of practices. South Africa's experience suggests that comparative influences occur on many different levels. Sometimes they take the form of more or less direct borrowings from foreign law, while at other times they are more indirect, are reflected in the framing of the available interpretive options, or serve as negative models. Sometimes they occur at the level of legal rules, concepts or standards, and at other times they occur at a deeper cultural or cognitive level. In the latter case, what is appropriated from the foreign system are metaphors, modes of legal reasoning or assumptions about the nature, possibilities and limits of law. Sometimes the courts take their cue directly from the Constitutional Assembly by attaching significance to the fact that a particular textual formulation or constitutional model was borrowed by the drafters of the South African Constitution, and by carefully examining the interpretations given to the relevant (foreign) constitutional text. At other times, courts seize the initiative by considering the interpretation of foreign constitutional provisions that are materially different from their own. 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 section 36, the general limitation clause.

A rule that foreign law should be considered only where a constitutional provision corresponds more or less directly to a foreign constitutional text would be too restrictive. Such an approach focuses too narrowly on surface phenomena (textual similarities, rules and concepts) and disregards the various contexts within which law operates. It assumes that foreign law is used as authority for a particular legal outcome, rather than as a source of different constitutional arguments and a means of broadening the constitutional imagination. It assumes too glibly that the relevant similarities and differences between legal systems can be neatly pinned down in advance, and negates the possibility that, upon a careful contextual examination of the relevant legal rules, similarities may emerge in areas where, at first, we saw only difference, and vice versa.

⁴ See H. Botha 'Learning to live with plurality and dissent: the *Grundgesetz* in South Africa' (2010) 58 *Jahrbuch des öffentlichen Rechts der Gegenwart* (forthcoming) and the literature referred to therein.

It could be argued that the use of foreign law should be restricted to fundamental rights adjudication and should play no role in relation to the institutional aspects of constitutional law. On this view, the latter area does not display nearly the same degree of convergence as the former. Rather than involving normative questions that are mediated through an increasingly transnational constitutional vocabulary it concerns a particular institutional design, and forays into comparative law are of limited or no use. This distinction is endorsed by South Africa's constitutional text, which expressly authorizes courts to consider foreign law in their interpretation of the Bill of Rights, but not the rest of the Constitution. However, this has not prevented the Constitutional Court from invoking foreign law in their consideration of issues like federalism,⁵ the separation of powers⁶ and the interpretation of constitutional provisions outside the Bill of Rights.⁷ Indeed, to the extent that foreign law is used to weigh arguments, consider alternative understandings and contextualize one's own constitution, the difference between fundamental rights and institutional constitutional law seems to be one of degree, rather than kind.

The dialogical vision of comparative constitutional law, as Sujit Choudry labels it,⁸ does not demand a particularly tight fit between the constitutional provisions to be compared. It insists that we can learn from the experience in other jurisdictions, despite important textual, structural, cultural and historical differences. What is important is not a (near) perfect match between the provisions to be compared, but the ability of foreign materials to illuminate aspects of the local context which are otherwise neglected, and the way in which the relevant similarities and differences are explained. The question "what to compare" dissolves, then, into the question "how to do it".

3. How to compare

Different uses of foreign law may impose different disciplinary rules. Where foreign law is invoked to provide evidence of an evolving transnational consensus, one would expect the sample of foreign jurisdictions that are consulted to be fairly wide. Where it is argued, based on the close fit between two legal regimes, that the interpretation followed in a foreign country should be emulated in one's own, one would expect a fairly detailed analysis of the relevant similarities and differences in the legal position pertaining in the two countries. Again, slightly different considerations may apply where foreign law is invoked to broaden the scope of interpretive options, to highlight the potentially negative consequences of a particular interpretation or approach, to recast the context within which constitutional norms are to be

⁵ See eg *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) paras 80-83 (recognizing that the second chamber of Parliament, the National Council of Provinces, was modelled on Germany's *Bundesrat*, and that the notion of cooperative government, as entrenched in chapter 3 of the Constitution, resembles the German notion of *Bundestreue*).

⁶ See eg *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

⁷ See *Matatiele Municipality v President of the RSA* 2007 (1) BCLR 47 (CC) para 36.

⁸ S Choudry 'Globalization in search of justification: Toward a theory of comparative constitutional interpretation' (1999) 74 *Indiana LJ* 819.

applied, or to draw attention to unique features of the own constitutional text, structure or landscape.

It should, however, be obvious that these different uses of foreign law cannot be divided into watertight compartments. For instance, in the death penalty case the Constitutional Court relied upon what it perceived to be a worldwide tendency among democratic societies to move away from capital punishment – and then went to great lengths to distinguish South Africa's Constitution from the constitutional texts of democratic societies in which the death penalty is still imposed.⁹ Comparative law can never simply be about the convergence of legal systems, but lies at the dynamic intersection of similarity and difference. Areas of convergence and divergence are, moreover, not simply 'out there' waiting to be discovered, but need to be constructed and explained.

There are certain pitfalls that need to be avoided, regardless of the use made of foreign law in a particular case. These include: a fixation on legal rules and concepts and a neglect of legal culture and context; considering foreign legal rules and judgments in isolation and failing to situate them within a larger legal system and tradition; using foreign law as authority for a certain standpoint rather than as a basis for comparison and a source of constitutional arguments; failing to appreciate that presuppositions and prejudices deeply embedded within our own legal culture may distort our understanding of foreign legal materials; uncritically accepting the distinction between public and private law; and restricting the sample of jurisdictions to be surveyed to those which favour a particular standpoint.

⁹ *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).