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Geo Quinot

PLAN

TEXTE

1. Introduction

1 The comparison of different legal systems as a method of legal scholarship and practice has a long history in South Africa. This is hardly surprising given the mixed nature of the South African legal system where consecutive colonial powers imposed (aspects of) their own legal systems on the country without completely displacing existing law, whether those of the preceding colonial power or local indigenous and religious communities. Prior to the enactment of a supreme constitution in 1994, South African law thus consisted of a complicated mix of legal rules stemming from Roman-Dutch law, English law, localised indigenous law and religious legal systems. Working within this mix, comparative method was almost inevitable at both an internal level, between the different legal traditions represented in the local mix, and externally, between the local system and other legal systems sharing a common heritage. The introduction of constitutional supremacy in 1994[1] and the consolidation thereof by way of the 1996 Constitution,[2] further cemented the importance of comparative legal method. The constitution-making process itself was an exercise in comparative method with the final text of the 1996 Constitution drawing extensively from other legal systems (whether

by inclusion or exclusion of constitutional provisions). The Constitution furthermore explicitly endorses comparative method by stating in section 38 that a court "may consider foreign law" when interpreting the Bill of Rights.

2 It follows that comparative method is an important aspect of both scholarship and practice of law in South Africa today. This applies across all areas of law. However, constitutionalisation has certainly increased the interest in and practice of comparative method in public law. In this contribution, I explore the role of comparative legal method in South African public law with specific reference to constitutional law and administrative law. This is not to suggest that comparative method does not also play an important role in other areas of public law, such as criminal law. It does. My focus, however, is more specifically on constitutional and administrative law. I start by briefly setting out my understanding of the nature of comparative legal method. That is followed by a broad sketch of the comparative background to South African public law prior to the adoption of the 1994 Constitution. In section 4 I explore the influence of constitutionalisation on comparative public law in South Africa, both in constitutional and legislative drafting and jurisprudence.

2. Comparative method in (public) law

3 A comprehensive discussion of comparative law is beyond the scope and purpose of this contribution.[3] In this section, I briefly set out the core concepts and approaches of comparative law to serve as a basis for and relevant to the discussion of the particular practices of comparative public law in South Africa.

4 Comparative law is concerned with the study of different legal systems, but does not equate to the study of one or more "other" legal system. As commentators have noted, to have in-depth knowledge of and thus be familiar with more than one entire legal system is extremely rare, even for comparative lawyers.[4] Comparative law transcends knowledge of different legal systems by focusing on the comparison of particular aspects of different legal systems for particular purposes. Generally, the focus falls on convergence and diver-

gence in the legal treatment of distinct phenomena, issues or problems and an attempt at uncovering why different legal systems would adopt similar or divergent treatments. Such analyses may include a normative element, assessing whether a particular approach is good or bad, better or worse than another, but does not have to. Kischel describes the central question of comparative law as the classification and evaluation of the differences and similarities that exist in the solutions adopted by different legal systems to the problem under review.[5] In its simplest form, comparative law involves placing two objects of comparison in relation to each other with reference to one or more comparative criteria, the so-called *tertium comparationis*.[6] The exact content and nature of the criteria depend largely on the particular method of comparative legal study adopted, often influenced by particular schools of thought on comparative law, and the purpose of the comparative exercise.

5 The criteria could focus on the function being fulfilled by particular legal rules and compare legal treatment in different systems with reference to such function. This is the common approach in functionalism, which is one of the most common methods of comparative law.[7] As a slight variation to this functional approach, the criteria may also focus on the common goal pursued by the relevant objects of comparison, the common problem they are meant to address or a common factual scenario in which they are meant to be applied.[8] A different approach is to compare legal positions with reference to particular basic norms.[9] The comparative criteria could also simply be descriptive of common denominators in the compared systems, however defined, such as institutions, processes, terms, concepts or categories.[10] Beyond positive law, the comparative criteria could be legal traditions, culture, practices, socio-economic context or theoretical constructs.[11] All of these approaches are subject to critique and remain contested in the expansive literature of comparative law method.[12]

6 In the specific context of comparative public law, Hofmann has usefully put forward "approaches to identifying frameworks of comparative research".[13] Such a framework would define "which kind of law should be compared, to which end, and serving which objective." He analyses three categories of comparative frameworks that can be used, namely "law as category", "law as source" and "law

as variable".[14] The law as category framework involves the categorisation of legal systems into distinct categories or legal families using specific factors of divergence or similarity between individual systems that would place them in the same or different categories. A key example is the distinction between common law and civil law legal systems. Given the origins of this framework in private law and civil procedure, its usefulness for comparative public law is doubtful.[15] As Hofmann, for example, shows, the common law/civil law divide does not seem particularly useful when comparing constitutional law as there are seemingly as many similarities between constitutional systems across this divide as there are differences between those within the same category.[16] Another major problem with this framework as applied in the context of comparative public law is the fundamental shifts in public law that occur within individual systems from time to time and often over surprisingly shorts periods. Constitutional reforms may call into question the continued categorisation of a system in terms of an historic label. The law as source framework relies on comparative law to identify legal options to deal with particular challenges.[17] In this sense, comparative law involves the search for "building blocks" for new ways of dealing with particular problems in any given system. An analysis of the possibilities, strengths and weaknesses, successes and failures of particular regulatory interventions can provide a rich source for lawmakers (including courts) to consider when contemplating a new or revised regulatory regime. The law as source framework underlies the notion of legal transplants from one area to another or one system to another and with it the diffusion of legal concepts.[18] The law as source framework is not only relevant for comparison of actual legal treatment of particular problems or issues in different systems, but also for the debates that accompany the adoption or rejection of particular legal treatments in different systems. Such debates can greatly enrich the consideration of particular mechanisms to achieve a policy outcome. The third framework of law as variable utilises law as the factor of comparison between different systems.[19] Unlike the first two frameworks, this one does not aim at producing some outcome in relation to law. That is, the research does not aim to contribute to law itself. Rather, law is just a factor in the comparison of other phenomena. Such a framework may be particularly useful in

regulatory studies where aspects of regulation, other than the legal instruments employed, are of primary concern.

3. The comparative foundations of South African public law

7 The geographical area that would become first the Union of South Africa (in 1910) and later the Republic of South Africa (in 1961), was inhabited by a large number of different communities of varying sizes and institutional organisation before colonisation.[20] These communities ordered their societies according to a multitude of indigenous legal systems, including rules governing their administration and exercise of sovereign power.[21]

8 The colonisation of this area started in the mid-seventeenth century with the establishment of a supply station at the Cape of Good Hope by the *Vereenigde Nederlandsche Geoctroyeerde Oost-Indische Compagnie*[22] ("the VOC").[23] The VOC brought with it Roman-Dutch law, as the legal system governing its operations. While the VOC was in essence a commercial entity, albeit with considerable public interest, it effectively constituted the state administration at the Cape. The result was that Roman-Dutch law constituted the start of European settlement. While the VOC did not formally replace existing indigenous law with Roman-Dutch law, it did apply Roman-Dutch legal rules to the exclusion of indigenous law in its own interactions with indigenous communities, including in its enforcement of administrative and governmental power over such communities.[24]

9 The Dutch was replaced by English colonial masters in 1806. Following the established rules of both English law and international law, the law of the conqueror did not wholescale replace existing law in the conquered territory.[25] English law thus only displaced indigenous and Roman-Dutch law in operation in Southern Africa to the extent that it was either explicitly or by implication applied. While much of indigenous and Roman-Dutch law remained, especially in the private sphere, English law explicitly and by necessary implication governed public administration and governmental functions given that it was formally the British Crown that governed in the Southern African colonies. Post 1806, public law was thus dominated

by English common law as far as it applied to European authorities, but operated alongside indigenous laws governing local communities (in both public and private spheres) and Roman-Dutch law in the private sphere.

10 During this period, comparative law, primarily within the framework of law as source, played an important role in the public law of the emerging independent republics, the Zuid-Afrikaansche Republiek and the Orange Free State Republic. Both these republics adopted constitutions drawing directly on the US Constitution.[26] In the Zuid-Afrikaansche Republiek, this influence went further with the High Court drawing directly on the celebrated US Supreme Court judgment in *Marbury v Madison*[27] to declare that it had the power to judicially review enactments against the constitution and declare them invalid if found to be in conflict with the constitution.[28]

11 When the Union of South Africa came into being in 1910, public law across the new state continued to be dominated by English common law. Firstly, the South African constitutional state was created in terms of English law.[29] Secondly, the British established an English system of public administration.[30] Thirdly, the judicial system was largely modelled on the English example.[31] However, at the same time, some Roman-Dutch law influence remained in certain aspects of public law[32] and indigenous law continued to govern certain public-law dimensions of local communities.[33]

12 The overall legal system in South Africa is thus a so-called mixed legal system with elements from a range of different legal systems and legal traditions existing alongside each other. This is also the case in public law, although, unlike most areas of private law, constitutional and administrative law was largely dominated by English law prior to constitutionalisation in 1994, with the English law doctrine of parliamentary sovereignty at the heart of local public law.[34] The most important point, however, is that comparative law played a key role in the development of South African law right from the outset. From the earliest days of the Union, comparison of the local legal position in public-law matters with at least that in England and often also in other English common law jurisdictions such as Australia, India and Canada, was commonplace.[35] In fact, much of the earliest doctrines in constitutional and administrative law were transplanted from

England in local judgments that relied directly on English precedent. For example, in *Harris v Minister of the Interior*[36] the court relied extensively on precedent from primarily English courts, but also other jurisdictions and comparative law literature, in pronouncing on important doctrines such as *stare decisis*, the mischief rule in statutory interpretation and state sovereignty. The inherent variability of the content of the rules of natural justice as formulated by Tucker LJ in the English Court of Appeal judgment in *Russell v Duke of Norfolk*[37] has repeatedly been endorsed by South African courts.[38] This practice of relying directly on English precedent continued throughout the pre-constitutional era. Thus, in 1989, in *Administrator, Transvaal v Traub*,[39] Chief Justice Corbet applied the doctrine of legitimate expectations in South African law following extensive analysis of the development of the doctrine in English law with reference to key House of Lords judgments such as *Ridge v Baldwin*[40] and *Council of Civil Service Unions and Others v Minister for the Civil Service.*[41] The Chief Justice imported the doctrine into South African law on explicit comparative law basis, noting: "The question which remains is whether or not our law should move in the direction taken by English law and give recognition to the doctrine of legitimate expectation, or some similar principle."[42]

13 The dominance of comparative law use of English law in South African jurisprudence is not to suggest that comparative law beyond the immediate origins of local public law did not occur. Given the pervasive reliance on comparative law methods across most areas of law, systems other than those in the English-common law family were also targeted in public-law comparisons. A notable example is the work of one of the pioneers of administrative law scholarship, Marinus Wiechers. In his doctoral study of 1964, which is widely viewed as the first comprehensive, systematic study of administrative law in South Africa, Wiechers placed much emphasis on French law.[43]

14 The law as category framework also played a notable role in comparative public law in South Africa as a tug of war between Roman-Dutch and English common law unfolded in certain circles. Imbued with ideological and nationalist propensities, some jurists pursued a "purist" agenda in seeking to rid South African common law from English-law influence in order to safeguard a pure Roman-

Dutch basis.[44] These endeavours quite evidently adopted comparative law methods in a law as category framework, viewing common law and civil law, specifically English common law and Roman-Dutch civil law, as clearly delineated, mutually exclusive categories of legal families or traditions. While this movement was most prominent in private law, it also extended to public law with scholars disagreeing on whether South African constitutional common law was premised on Roman-Dutch or English law.[45]

4. The Constitutional dispensation

15 The view of and approach to comparative public law changed dramatically in South Africa with the advent of constitutional democracy in 1994 and in particular under the influence of the 1996 Constitution. This influence is evident in both law-making and jurisprudence. As noted in the introduction above, this is not surprising given 1. that the drafting of both the 1993 and 1996 constitutions relied extensively on comparative law and 2. the 1996 Constitution explicitly endorses reference to foreign law in the interpretation of the Bill of Rights. However, as Constitutional Court Justice Ackermann has noted, the enthusiasm with which especially the Constitutional Court has engaged in comparative public law cannot be solely ascribed to the explicit mandate contained in the Constitution, but was as much influenced by the "comparative law ethos in South Africa".[46]

4.1 Legislative processes

16 Klug has argued, largely within a law as variable framework, that the process of constitution-making in South Africa following the collapse of apartheid from the early 1990s coincided with increasing hegemonization at an international level around desirable liberal constitutional principles.[47] This meant that a set of constitutional principles, or a particular constitutional model, drawing on specific Western liberal systems, became "prerequisites for international constitutional respectability".[48] The process of drafting a new constitution for South Africa, within the transition from apartheid to democratic rule,

was heavily influenced by this international hegemony and consequently involved extensive reliance on comparative law.[49] The adoption of principles and mechanisms from foreign examples by way of comparative law methods in the constitution-making process meant that "South Africa's new constitutional order was shaped by and reflects the post-cold war hegemony of an American-style constitutionalism".[50]

17 There are many examples from the 1996 Constitution that bear testimony to the significant influence of comparative law on its drafting. The particular model of federalism, under the term co-operative government, set out in chapter 3 of the Constitution drew heavily from especially German conceptions of intergovernmental relations[51] as did the creation of the second chamber of the national legislature, the National Council of Provinces.[52] The notion of limitation of fundamental rights in the Bill of Rights was adopted under influence of Canadian law.[53] The newly established Constitutional Court was largely influenced by the model of the German Constitutional Court.[54] The inclusion and particular wording of many rights contained in the Bill of Rights were significantly influenced by comparative law.[55] Rights such as freedom of expression, freedom of religion, belief and opinion, labour rights and the right to housing, for example, were all formulated against the backdrop of extensive comparative law analyses of various foreign constitutions such as those of Canada, the US, Germany, Namibia, India and Japan.[56] The material role of comparative law in the making of the 1996 Constitution is also clearly on display in the Constitutional Court's certification judgments that formed part of the process of adopting the Constitution.[57] Especially the so-called First Certification Judgment, in which the Court declined to certify the draft and sent it back for revision, is littered with comparative references.[58]

18 In the wake of the comparative law influence on the making of the democratic constitutions of South Africa, a similar effect can be seen in the crafting of legislation. This is particularly evident in respect of legislation aimed at operationalising particular constitutional provisions. A prime example is the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

19 PAJA was created on the instruction of the 1996 Constitution itself, which, in section 33(3) states that national legislation must be enacted to give effect to the rights to administrative justice guaranteed in that section.[59] The drafting of PAJA involved notable comparative law influence, which has not been an entirely happy experience. In enacting PAJA, the legislature borrowed notably from Australian and German statutory law. This is most evident in PAJA's definition of "administrative action", which forms the threshold concept for the application of the Act.[60] Part of that definition is the concept of a "decision", which is separately defined in PAJA[61] and which definition was taken over from the Australian Administrative Decisions (Judicial Review) Act of 1977.[62] The definition of "administrative action" furthermore requires a decision to have a "direct, external legal effect" before it will qualify as an administrative action. This concept was taken from the German *Verwaltungsverfahrensgesetz*.[63] Both of these elements of the definition have, unfortunately, caused confusion in South African administrative law. One particular problem is the different functions that the definition serves in PAJA on the one hand and the two foreign statutes from which the definition is derived on the other. While PAJA is meant to be a general statute on administrative justice and the definition of "administrative action" is thus meant to convey the scope of the entirety of the rules of administrative justice, the concept of an administrative action, and particularly the borrowed elements, in the foreign statutes play a more limited role. The Australian statute explicitly only deals with judicial review, not administrative justice generally. In that context, it makes sense to define a decision in specific, individualistic terms, thereby excluding decisions of a generalised nature or having general effect. The same is, however, not true of PAJA. The result of this injudicious borrowing has been to create uncertainty in South African law whether delegated rule-making (e.g. the making of a regulation) is subject to PAJA given that such action does not easily fit into the definition of a "decision". Prior to the enactment of PAJA, the making of delegated rules by administrators was subject to administrative law[64] and PAJA itself seems to target such actions by providing for procedural fairness prescripts in cases where decisions have generalised impact.[65] The German import has been equally problematic. Wolf has argued that the incorrect interpretation of the import of the phrase "direct, external legal effect" in German law has

led South African scholars and courts astray in attaching an effect to the phrase which is not borne out by its German use.[66] Wolf argues that the phrase does not relate to the finality of the decision itself, as has generally been held in South African law, but only to the requirement of communication of an administrative decision for it to take effect.[67]

20 South African courts have, however, been alive to the potential comparative law pitfalls in uncritically following the meaning ascribed in the foreign system to transplanted statutory provisions. In relation to the definition of "administrative action" in PAJA and the above-mentioned borrowings, Chief Justice Chaskalson thus warned as follows in the *New Clicks* matter:[68]

> "In the academic writings on PAJA reference is made to the fact that certain of its provisions have been borrowed from German and Australian law. PAJA must, however, be interpreted by our courts in the context of our law, and not in the context of the legal systems from which provisions may have been borrowed. In neither of the countries is there a defined constitutional right to just administrative action. Transplanting provisions from such countries into our legal and constitutional framework may produce results different from those obtained in the countries from which they have been taken."

21 While South African courts, led by the Constitutional Court, have enthusiastically taken up the invitation to rely on comparative law in constitutional matters, they have generally done so with caution,[69] bearing in mind the well-known risks of comparative (public) law, which Tushnet aptly summarised as follows:

> "Particular institutions serve complex functions in each constitutional system, and there is little reason to think that directly appropriating an institution that functions well in one system will produce the same beneficial effects when it is inserted into another."[70]

4.2 Jurisprudence

22 The extent to which South African courts have utilised comparative law in public-law matters since constitutionalisation in 1994 has far exceeded any prior jurisprudential use of comparative method, in any

area of law.[71] The increase in reliance on comparative public law can be seen in both the volume of cases in which reference to foreign law is made and the systems used in such comparisons.[72] In contrast to the pre-1994 comparative practice, comparisons were now more readily made with systems other than those that had colonial, historic links to South Africa.

23 From the very start, the newly-established Constitutional Court engaged in extensive comparative analyses in its judgments. In its first judgment, in *S v Zuma*, the Court noted in respect of the question at hand that "[f]oreign courts have grappled with the problem … The different solutions which they have suggested are illuminating".[73] The Court consequently made reference to judgments of the House of Lords, the Privy Council (on appeals from Bermuda and from Hong Kong), the Namibian Supreme Court, the Botswana Court of Appeal, the US Supreme Court, the European Court of Human Rights, the Ontario Court of Appeal and the Supreme Court of Canada. In its second judgment, *S v Makwanyane*,[74] in which the Court famously declared the death penalty unconstitutional, the Court continued this extensive use of comparative public law, citing legal positions in the United States (including many of the individual States), United Kingdom, Canada, Germany, Australia, New Zealand, India, the European Union, the Caribbean, Namibia, Mozambique, Angola, Hungary, Tanzania, Zimbabwe, Italy, Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain. In this case, the Court also explained why comparative public law is bound to be an important feature of the new constitutional regime, using a law as source framework: "Comparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw."[75]

24 A decade after the Constitutional Court's first judgment, the reliance on comparative public law remained strong, with the Court stating in *K v Minister of Safety and Security*:[76]

> "As in all exercises in legal comparativism, it is important to be astute not to equate legal institutions which are not, in truth, comparable. Yet in my view, the approach of other legal systems remains of relevance to us.

> It would seem unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems' grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the law of other countries when interpreting the Bill of Rights. It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done."

25 The judicial enthusiasm for comparative public law has, however, also been tempered at times by judicial caution against uncritically accepting foreign positions. In the early judgment in , Justice Ackermann engaged in extensive comparative law analysis in his majority judgment. In response, Justice Kriegler noted in a minority judgment that while he agrees with the majority judgment's conclusion and order he

> "prefer[s] to express no view on the possible lessons to be learnt from other jurisdictions. That I do, not because of a disregard for section 35(1) of the Constitution, nor in a spirit of parochialism. My reason is twofold. First, because the subtleties of foreign jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems … The second reason is that I wish to discourage the frequent - and, I suspect, often facile - resort to foreign authorities. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any

> attempt to explain why it is said to be in point. Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country
> have interpreted their precedential provision … But that is a far cry from blithe adoption of alien concepts or inapposite precedents."

26 In S *v Mamabolo*,[77] Justice Kriegler, writing for the majority, considered freedom of expression in the United States and South Africa and stated his reservations about uncritical comparative public law more forcefully:

> "The difference is even more marked under the two respective constitutional regimes. The United States constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country."

27 Given the dominant law as source framework within which much of the comparative public law jurisprudence has occurred, it is not surprising that the rate of reliance on foreign law has diminished in especially Constitutional Court judgments over the last few years.[78] As local constitutional law jurisprudence grew, the need for comparative law as a source naturally diminished.

5. Conclusion

28 The colonial history of the South African legal system with multiple colonial powers successively imposing different systems of European law on the indigenous and settler communities meant that compar-

ative law became deeply entrenched in South Africa. South African jurists routinely and instinctively turn to comparative law to address particularly complex or novel legal questions. While this "comparative law ethos in South Africa"[79] cut across all areas of law, it was historically most evident in private law. This was at least partially because of the continued dominance of Roman-Dutch law in private law after British colonisation introduced English law as well as the role that indigenous law continued to play in the private sphere despite the imposition of European legal systems. South African private law thus developed within a veritable melting pot of comparative law. In contrast, most of public law (although not all) was dominated to such an extent by English common law that comparative law played a much smaller role beyond reference to English law as the original source. The repressive colonial and subsequent apartheid constitutional systems also meant that there was little scope (or utility) in extensive comparative public law, at least in legal practice. Comparative public law did, however, play a role within the framework of law as variable in struggles against colonialism and apartheid. Within these struggles, comparative public law served to juxtapose the repressive nature of the status quo in South Africa against democratic examples.[80] In a sense, this use of comparative public law in South Africa represented Scheppele's notion of aversive constitutionalism, referring to "a critique of where past (or other) institutions and principles went badly wrong and taking such critiques as the negative building blocks of a new constitutional order".[81]

29 In the post-apartheid South African regime, comparative public law has played a highly visible and material role in shaping the new constitutional regime. The drafting of the new South African constitutions as well as their interpretation and implementation relied heavily on comparative public law. In fact, the 1996 Constitution explicitly mandates reference to foreign law to aid the interpretation of the Bill of Rights.[82] This resurgence of comparative public law was not, however, confined to comparative constitutional law. It is also evident in other public law areas, such as administrative law, where the shift from a common law basis to a largely codified, constitutionalised administrative law was accompanied by considerable comparative law influence.

NOTES

1 By way of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the 1993 Constitution").

2 Constitution of the Republic of South Africa, 1996 ("the 1996 Constitution").

3 Given the breadth of scholarship on comparative law, a comprehensive discussion in any single contribution is of course unrealistic. For some of the most comprehensive recent treatments, see J. Mair and P. Donlan, *Comparative Law: Mixes, Movements, and Metaphors* (2020); M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (2nd ed, 2019); U. Kischel, *Comparative Law* (2019); M. Siems, *Comparative Law* (2nd ed, 2018); C. Valcke, *Comparing Law. Comparative Law as Reconstruction of Collective Commitments* (2018).

4 U. Kischel *Comparative Law* (2019) 4.

5 U. Kischel *Comparative Law* (2019) 6.

6 U. Kischel *Comparative Law* (2019) 5; O. Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32 *Brook J Int'l L* 405; E. Orucu, 'Methodological Aspects of Comparative Law' (2006) 8 *Eur JL Reform* 29; M. Van Hoecke, 'Is There Now a Comparative Legal Scholarship' (2017) 12 *J Comp L* 271.

7 U. Kischel *Comparative Law* (2019) 7-8; O. Brand (2007) 32 *Brook J Int'l L* 409; E. Orucu (2006) 8 *Eur JL Reform* 36.

8 E. Orucu (2006) 8 *Eur JL Reform* 36.

9 M. Van Hoecke (2017) 12 *J Comp L* 275.

10 M. Van Hoecke (2017) 12 *J Comp L* 275. M. Siems *Comparative Law* 40; O. Brand (2007) 32 *Brook J Int'l L* 436.

11 M. Siems *Comparative Law* 41-42; O. Brand (2007) 32 *Brook J Int'l L* 425, 428.

12 See M. Siems *Comparative Law* 39 *et seq.*; O. Brand (2007) 32 *Brook J Int'l L* 412–435; E. Orucu (2006) 8 *Eur JL Reform* 29; C. Valcke *Comparing Law* 1-10; U. Kischel *Comparative Law* (2019).

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14 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1009.

15 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1012.

16 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1013.

17 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1015.

18 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1018.

19 H. C. H. Hofmann *The Oxford Handbook of Comparative Administrative Law* 1021.

20 S. Woolman and J. Swanepoel, 'Constitutional History' in S. Wo*oman* et al (eds) *Constitutional Law of South Africa* (2nd ed, 2008) 2-5 – 2-7.

21 F. du Bois and D. Visser, 'The Influence of Foreign Law in South Africa' (2003) 13 *Transnat'l L & Contemp Probs* 593, 596.

22 Commonly referred to in English as the Dutch East India Company.

23 G. Quinot, *State Commercial Activity. A Legal Framework* (2009) 16.

24 G. Quinot *State Commercial Activity* 18.

25 G. Quinot *State Commercial Activity* 21.

26 D. M. Pretorius, "'What's Past Is Prologue': An Historical Overview of Judicial Review in South Africa – Part 1" (2020) 26(1) *Fundamina* 128 136-139; W. P. M. Kennedy and H. J. Scholsberg, *The Law and Custom of the South African Constitution* (1935) 34-35.

27 5 U.S. 137.

28 *Brown v Leyds* (1897) 4 Off Rep 17.

29 The Union came into being by way of the South Africa Act of 1909, 9 Edw 7, c 9, which was an enactment of the Westminster Parliament. W. P. M. Kennedy and H. J. Scholsberg, *The Law and Custom of the South African Constitution* 66.

30 D. W. Freedman "Constitutional Law: Structures of Government" in W. A. Joubert and J. A. Faris (eds) *Law of South Africa* vol 5 (2nd ed, 2012) para 281; F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 613.

31 H. Corder, 'The Judicial Branch of Government: An Historical Overview' in D. P. Visser (ed) *Essays on the History of Law* (1989) 62, 66; F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 594, 609-610.

32 G. Quinot *State Commercial Activity* 20.

33 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 600. However, as Du Bois and Visser indicate, this version of indigenous law increasingly diverged from pre-existing customs of indigenous communities under the influence of colonial law and power.

34 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 623.

35 L. Baxter, *Administrative Law* (1984) 32; F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 614. This practice was significantly supported by the fact that the Privy Council in London remained the final court of appeal against judgments of South African courts until 1950. B. Beinart, 'The South African Appeal Court and Judicial Review' (1958) 21 *Mod L Rev* 587, 591.

36 1952 (2) SA 428 (AD).

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38 See *Elsworth v Jockey Club of South Africa* 1961 (4) SA 142 (w) at 150; *Bell v Van Rensburg NO* 1971 (3) SA 692 (C) at 727; *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646.

39 1989 (4) SA 731 (A).

40 [1963] 2 All ER 66 (HL).

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42 *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 760.

43 M. Wiechers, *Die Sistematiek van die Administratiefreg* (1964, doctoral dissertation, University of Pretoria).

44 L. I. Coertze, 'Watter Regsisteem Beheers die Verhouding tussen Owerheid en Onderdaan in die Unie, Romeins-Hollandse Reg of Engelse Reg?' (1937) 1 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 34; L. M. Du Plessis *Inleiding tot die Reg* (2nd ed, 1995) 53-59; A. van Blerk, 'The Genesis of the Modernist Purist Debate: A Historical Bird's-Eye View' (1984) 47 *Tydskrif vir*

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45 G. Quinot *State Commercial Activity* 20.

46 L. W. H. Ackermann, 'Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke' (2005-2006) 80 *Tulane Law Review* 169, 175. Also see D. M. Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence – The South African Experience' (2003) 1 *Int'l J. Const. L.* 181, 192 on the role of legal culture in South Africa that favoured comparative law.

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48 H. Klug (1996) 3 *Rev Const Stud* 24.

49 See H. Ebrahim, 'The Making of the South African Constitution: Some Influences' in P. Andrews and S. Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 88.

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51 N. Haysom, 'Federal Features of the Final Constitution' in P. Andrews and S. Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 513; S. Woolman and T. Roux, 'Co-operative Government & Intergovernmental Relations' in S. Wooman et al (eds) *Constitutional Law of South Africa* (2nd ed, 2008) 14-1, 14-5.

52 H. Ebrahim *The Post-Apartheid Constitutions* 88.

53 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 627.

54 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 632, 640.

55 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 633.

56 D. Milo, G. Penfold and A. Stein, 'Freedom of Expression' in S. Wooman et al (eds) *Constitutional Law of South Africa* (2nd ed, 2008) 42-3; F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 632.

57 The Constitutional Court had to certify that the text of the draft Constitution, as adopted by the Constitutional Assembly, complied with the 34 constitutional principles agreed to during the negotiations that paved the way to the first democratic elections in 1994, before the draft Constitution could come into force. Constitution of the Republic of South Africa, Act 200 of 1993, section 71(2); *Certification of the Constitution of the Republic of*

South Africa, 1996 1996 (4) SA 744 (CC); *Certification of the Amended Text of the Constitution of The Republic of South Africa*, 1996 1997 (2) SA 97 (CC).

58 *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

59
Section 33 of the 1996 Constitution reads:
33. Just administrative action.—
(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
(3) National legislation must be enacted to give effect to these rights, and must—
(*a*) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(*b*) impose a duty on the state to give effect to the rights in subsections (1) and (2);
and
(*c*) promote an efficient administration.

60 PAJA s 1(i).

61 S 1(v).

62 J. R. de Ville, *Judicial Review of Administrative Action in South Africa* (2005) 38.

63 Administrative Procedure Act of 1977. De Ville *Judicial Review* 54; R. Pfaff and H. Schneider, 'The Promotion of Administrative Justice Act from a German Perspective' 2001 *South African Journal on Human Rights* 64; L. Wolf, "Implications of the 'Direct, External Legal Effect' of Administration Action for Its Purported Validity" (2018) 4 *South African Law Journal* 678.

64 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 109; G. Quinot & P. Maree, 'Administrative Action' in G. Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2020) 84-86.

65 PAJA s 4 provide for a range of procedures to be followed in such instances, such as notice and comment procedures or public inquiries.

66 L. Wolf (2018) 4 *South African Law Journal* 687.

67 L. Wolf (2018) 4 *South African Law Journal* 687.

68 *Minister of Health and Another* NO *v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 142 (footnotes omitted).

69 See the extra-curial writings of former Constitutional Court Justice Ackermann, L. W. H. Ackermann, 'Constitutional Comparativism in South Africa' (2006) 123 *S African LJ* 497; L. W. H. Ackermann (2005-2006) 80 *Tulane Law Review* 169.

70 M. Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale LJ* 1225 at 1307.

71 F. du Bois and D. Visser (2003) 13 *Transnat'l L & Contemp Probs* 645.

72 C. Rautenbach, 'The Influence of Foreign Judgments on the Development of Post-Apartheid Constitutional Law in South Africa: Judicial Law-Making in Action?' (2020) 7 *J Int'l & Comp L* 99.

73 S *v Zuma* 1995 (2) SA 642 (CC) at para 19.

74 1995 (3) SA 391 (CC).

75 S *v Makwanyane* 1995 (3) SA 391 (CC) at para 37.

76 2005 (6) SA 419 (CC) paras 34-35 (footnotes omitted).

77 2001 (3) SA 409 (CC) at para 40 (footnotes omitted).

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79 L. W. H. Ackermann (2005-2006) 80 *Tulane Law Review* 175.

80 D. M. Davis (2003) 1 *Int'l J. Const. L.* 183.

81 K. L. Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models' (2003) 1 *Int'l J. Const. L.* 296.

82 Constitution of the Republic of South Africa, 1996, section 39.

RÉSUMÉS

English

In South Africa, the study and practice of law involve comparing different legal systems due to the complex historical blend of Roman-Dutch, English, indigenous, and religious laws. Constitutional supremacy since 1994 has amplified the importance of comparative legal method. The 1996 Constitution itself drew from various legal systems, endorsing the use of foreign law

in interpreting rights. Comparative legal method is vital across all legal domains, and has greatly grown in relevance in constitutional and administrative law following constitutionalisation. This contribution explores the use of comparative legal method in South African constitutional and administrative law. It uses Herwig Hofmann's three categories of comparative frameworks, namely "law as category", "law as source" and "law as variable", to consider the continuity and discontinuity between historical reliance on comparative method in South Africa and comparative legislative and judicial practices under the Constitution in the areas of constitutional and administrative law.

Français

En Afrique du Sud, l'étude et la pratique du droit impliquent la comparaison de différents systèmes juridiques en raison du mélange historique complexe de droits romano-hollandais, anglais, indigène et religieux. Depuis 1994, la suprématie de la Constitution a amplifié l'importance de la méthode juridique comparative. La Constitution de 1996 s'est elle-même inspirée de plusieurs systèmes juridiques, consacrant l'utilisation du droit étranger dans l'interprétation des droits fondamentaux. Si la méthode juridique comparative est essentielle dans tous les domaines juridiques, sa pertinence s'est considérablement accrue dans les droit constitutionnel et administratif sud-africains depuis l'avènement du nouvel ordre constitutionnel. Cette contribution explore donc l'utilisation de la méthode juridique comparative dans les droits constitutionnel et administratif sud-africain. Elle utilise les trois catégories de cadres comparatifs mis au jour par Herwig Hofmann, à savoir "le droit en tant que catégorie", "le droit en tant que source" et "le droit en tant que variable", pour examiner la continuité et la discontinuité entre le recours historique à la méthode comparative en Afrique du Sud, ainsi que les pratiques législatives et judiciaires du recours au droit comparé dans les domaines du droit constitutionnel et du droit administratif.

INDEX

Mots-clés

méthode de droit comparé, Afrique du Sud, droit constitutionnel, droit administratif

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