

COMPARATIVE LAW AND CONSTITUTIONAL ADJUDICATION

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SUMMARY: I. *Introduction*. II. *Comparative law and the “globalisation of constitutionalism”*. III. *What does comparative analysis have to offer constitutional adjudication?* IV. *Concluding remarks*.

I. INTRODUCTION

The “rise of world constitutionalism”,¹ the “globalisation” of human rights, the rule of law and judicial review,² “transnational constitutional discourse”,³ the emergence of a “transcultural, normative value system”⁴ these are some of the terms that are being bandied about in the literature on comparative constitutional law. The use of these terms suggests that something greater is at work than the revival of “mere academic” interest in the similarities and differences between constitutional systems. Renewed interest in comparative constitutionalism is linked to the emergence of a transnational value consensus or legal orthodoxy, and/or

1 Ackerman *The rise of world constitutionalism*, 83 *Virginia LR* 771, 1997.

2 See eg Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (2000).

3 Jackson and Tushnet “Introduction”, Jackson and Tushnet (eds.), *Defining the Field of Comparative Constitutional Law*, 2002, XII. See also Scott and Alston “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney’s* Legacy and *Grootboom’s* Promise”, 16 *SAJHR*, 2000, pp. 206 at 213 (referring to the creation of “a pan-constitutional law of human rights through inter-constitutional dialogue”).

4 Kommers “Comparative Constitutional Law: Its Increasing Relevance”, Jackson and Tushnet (eds.), *Defining the Field of Comparative Constitutional Law*, 2002, pp. 61 at 65.

processes of economic globalisation. The “new comparativism”,⁵ so it seems, does not leave the conceptual framework of constitutional law untouched, but goes hand in hand with processes and ideas that call into question some of the key concepts and distinctions that constitute constitutional law.

The distinction between the national and transnational is one area in which traditional ideas are being challenged⁶. The “new comparativism” does not fit easily with traditional notions of state sovereignty and exceptionalism or with rigid distinctions between one’s own legal system and those of foreign jurisdictions. Today, it is increasingly asserted that comparative analysis is indispensable to a proper understanding of one’s own constitutional system⁷. Consider the following statement by Lorraine Weinrib: “Where this “new comparativism” has taken hold, comparative analysis is regarded as internal to the activity of constitutional adjudication or as supplying commentators with insights appropriate to the internal workings of specific constitutional regimes”⁸.

The point should, however, not be overstated. While there is an emphasis on shared values and interpretive practices and a recognition that different national constitutional systems are related to each other, there is, as yet, no indication that the differences between national constitutions are about to dissolve.⁹ On the contrary, constitutional comparison is often used to highlight the differences between national and foreign constitutions, and to draw attention to certain distinctive features of a coun-

5 To borrow a term from Weinrib “Constitutional Conceptions and Constitutional Comparativism”, Jackson and Tushnet (eds.), *Defining the Field of Comparative Constitutional Law*, 2002, p. 3.

6 Fitzpatrick “«The New Constitutionalism»: Globalism and the Constitution(s) of Nations”, unpublished paper read at the University of the Western Cape, september 2003. Other areas include assumptions about the meaning of democracy, popular sovereignty and the separation of powers; ideas about the role of a bill of rights and methods of constitutional interpretation; and the distinction between public and private law.

7 See eg Venter *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states*, 2000, p. 256.

8 Weinrib, *op. cit.*, nota 5, pp. 3 and 4.

9 Some commentators foresee that the boundaries between national and foreign law will still become far more fluid. Weinrib writes: “The comparative engagement is so pervasive and so important that its characterization as comparative reference or analysis is inadequate and award. In the early decades of this practice, we see a variety of separate and disparate legal systems cross-fertilizing each other; later generations will perceive the decentralized operation of cognate legal systems”. *Ibidem*, p. 22.

try's constitution, history, socio-economic context and national identity.¹⁰ The point is not to follow blindly, but to compare, to identify similarities and differences, to study and evaluate the reasoning of foreign courts, having due regard to the national constitutional text and context.

In this paper, I consider the possibilities of comparative constitutional law; the ways in which it can enrich constitutional argument and adjudication. I argue that comparative analysis can, inter alia, help to create a space within which different constitutional imaginations can contend with each other. It also serves to promote substantive legal reasoning and a culture of justification, and provides constitutional interpreters, in the suggestive phrase of André Van der Walt, with a "history of examples", a "history of errors" and a "history of possibilities".¹¹ At the same time, however, I caution against a too idealistic vision of comparative constitutionalism. I argue that the "new comparativism" should not be turned into a new orthodoxy; that we should be mindful of the historical and social contingency of supposedly universal norms.

I rely heavily on South Africa's experience of the past ten years. South African judges regularly refer to and analyse foreign law in constitutional decisions. This is so for a number of reasons. In the first place, the drafters of both South Africa's interim and final constitutions¹² drew upon the constitutions and experience of other constitutional democracies. There are many provisions in these constitutions which bear the stamp of German, Canadian or some other influences.¹³ The role of for-

10 Häberle "Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat", *Juristen Zeitung*, 1989, pp. 913 at 917-918 writes that the point of comparative constitutional analysis is to enrich constitutional argument, not to impoverish it through the elimination of the differences between legal cultures.

11 Van der Walt, *Constitutional Property Clauses: a Comparative Analysis*, 1999, p. 38.

12 Respectively the Constitution of the Republic of South Africa, 1993 and the Constitution of the Republic of South Africa, 1996.

13 The following academic contributions shed light on foreign influences on South Africa's interim and final Constitutions: Woolman "Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation clause", 10 *SAJHR*, 1994, p. 60; Van Wyk *et al.* (eds.), *Rights and Constitutionalism: the New South African Legal Order*, 1994; De Waal "A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights", 11 *SAJHR* 1, 1995; Van der Walt *The Constitutional Property Clause*, 1997; Hogg "Canadian Law in the Constitutional Court of South Africa", 13 *SAPR/PL* 1, 1998; Simeon "Considerations on the Design of Federations: the South African Constitution in Comparative Context", 13 *SAPR/PL* 42, 1998.

eign examples in the negotiations and deliberations preceding the adoption of these constitutions already created a sense that South Africa was becoming part of a broader constitutionalist tradition. Secondly, it was to be expected that South African judges would have turned to foreign law for guidance in the absence of an indigenous constitutional jurisprudence. Before the introduction of the interim Constitution in 1994, South Africa followed a system of parliamentary sovereignty, and the majority of judges had no experience in adjudicating a supreme constitution. Thirdly, both the interim and final constitutions expressly authorise reliance on foreign law in constitutional interpretation. Section 39(1) of the final Constitution provides: “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”.

II. COMPARATIVE LAW AND THE “GLOBALISATION OF CONSTITUTIONALISM”

In this section, I examine two accounts of the relation between the new comparativism and the globalisation of constitutionalism. The first is Weinrib’s account of the postwar constitutionalist tradition; the second Heinz Klug’s analysis of the role of globalisation in South Africa’s transition to constitutional democracy. Weinrib conceives the globalisation of constitutionalism in terms of an emerging transnational value consensus and shared interpretive method; Klug, on the other hand, focuses more on the interaction between global constitutionalism and local democratic struggles.

1. *The postwar conception of constitutionalism*

Weinrib contrasts the new comparativist sensibility to the narrow, nationalist perspective of Justice Scalia of the United States Supreme Court. Justice Scalia has insisted, in cases concerning the constitutionality of the death penalty, that constitutional practice in other democracies is irrelevant to an inquiry into standards of decency under the United States Constitution. His exclusive focus on American conceptions of de-

cency goes hand in hand with his insistence that such conceptions could be gathered reliably only from domestic legislation and jury practice, that judges should show extreme deference to expressions of the people's will through legislation, and that they should avoid imposing their own subjective values upon the democratic process. Weinrib's analysis shows that, despite the rhetoric of popular sovereignty, legislative supremacy and judicial objectivity, Justice Scalia's judgment "ventures at will beyond the confines of the reliable, objective legislated record. It rests on questionable analogies, inconsistent approaches to statutory interpretation, and unsupported and nonlegitimated value judgments".¹⁴ His "rejection of comparativism arises as part of a constitutional conception that offers only an illusory flight from substantive values and judicial authority",¹⁵ and is rooted in a value system that favours stability and moral stasis over social transformation and change.

The postwar constitutional conception which informs the constitutions of Germany, Canada, South Africa and a range of other countries stands in sharp contrast to the nationalist, positivist, deferential and morally static constitutional conception of Justice Scalia. According to Weinrib, these constitutions "invite comparative reflection and analysis because they rest on a shared constitutional conception that, by design, transcends the history, cultural heritage, and social mores of any particular nation-state".¹⁶ Central to this constitutional conception is the notion of human dignity. Failure to respect dignity cannot be justified with reference to any particular national or religious tradition, or in the name of majoritarian political processes. This emphasis on dignity recalls Kant's notion of "cosmopolitan right": the idea that "a violation of a right on one place of the earth is felt in *all*".¹⁷

The postwar conception of constitutionalism rests further upon shared understandings of interpretive methodology and of the judiciary's role vis-à-vis that of the legislature and executive. The interpretation of rights guarantees is expressly value-laden, and the inquiry into the justification of fundamental-rights limitations involves courts in proportionality analysis which is, equally, a form of substantive reasoning. In terms of the

14 Weinrib, *op. cit.*, nota 5, p. 13.

15 *Ibidem*, p. 8.

16 *Ibidem*, p. 15.

17 *Ibidem*, pp. 3, 15 (quoting Kant "Toward Perpetual Peace", in Gregor and Wood (eds.), *Immanuel Kant: Practical Philosophy*, 1996, pp. 317 at 330-331).

postwar conception, the flight from substantive values and deference to the will of legislative majorities that characterise the judgment of Justice Scalia amount to an evasion of the court's responsibility to uphold a supreme Constitution and give substantive reasons for its decisions. However, insists Weinrib, inquiry into substantive value is not to be equated with the imposition of judge's subjective beliefs. Judges who adhere to the postwar constitutional conception are constrained by an established methodology. Weinrib clearly regards this methodology, with its emphasis on purposive interpretation and proportionality analysis, as more constraining than the supposedly value-neutral interpretive methodology espoused by Justice Scalia. Moreover, judicial vigilance in the face of fundamental-rights violations is not tantamount to a usurpation of legislative power. Under the postwar constitutional conception, democracy is not equated with the supremacy of expressions of the will of legislative majorities. Legislatures, like all other bearers of public power, are subject to the constitutional demand to respect human dignity. Far from negating democracy, judicial findings of unconstitutionality often "intensify... democratic engagement" and promote more "focused deliberation".¹⁸

Weinrib's account of the postwar constitutional conception provides valuable insights into the similarities between postwar constitutions, as well as similarities in the conceptions of rights, democracy and judicial role that inform their interpretation. It also demonstrates how engagement with comparative materials can broaden the judicial imagination, constrain judicial decision-making, and facilitate substantive reasoning and democratic dialogue.

However, it may well be asked whether Weinrib's focus on shared values and interpretive methods takes sufficient cognizance of the power relations within which "global constitutionalism" has taken root. Because she takes the aftermath of the Second World War as the defining moment in the development of the new conception of constitutionalism, she is able to describe the new constitutionalism in terms of an evolving value consensus which exists independently of current power relations. She thus manages to avoid inquiring into the more immediate causes of the latest wave of constitution-making and constitutional interpretation. More specifically, she avoids issues such as the role of international

¹⁸ *Ibidem*, p. 21.

power in framing constitutional options, and the links between the new comparativism and economic globalisation.¹⁹

A second possible criticism relates to Weinrib's emphasis on the similarities between constitutional systems. One line of criticism may focus on the differences between national systems in order to show that she overestimates the degree of convergence. Another may question the idea of an emerging value consensus by pointing not so much to the differences between individual countries, but to the persistence of ideological differences and reasonable interpretive disagreement within those countries. For instance, it may be pointed out that, even in countries such as South Africa which seem to have espoused dignity as a central value which animates the interpretation of all rights²⁰, there is concern that a dignity-based approach may, in some areas, impair the capacity of the legal system to develop adequate responses to inequality and disadvantage²¹. Yet another, closely related, line of criticism may question the desirability of the type of "grand narrative" which emphasises similarity at the expense of difference²², and progresses steadily towards the esta-

19 See Scheiderman, "Comparative constitutional law in an age of economic globalization", Jackson and Tushnet (eds.), *Defining the Field of Comparative Constitutional Law*, 2002, p. 237.

20 In *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 144, the rights to life and human dignity were described as "the most important of all human rights, and the source of all other personal rights" in the *Bill of Rights*. The Constitutional Court further stated in *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) para 35 that the value of human dignity 'informs the interpretation of many, possibly all, other rights'. Among the rights that have been interpreted in the light of human dignity, are the guarantee against cruel, inhuman or degrading punishment (*Makwanyane*; *S v Williams* 1995 (7) BCLR 861 (CC)) and the rights to equality (eg *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) paras 21-26, 120-129) and privacy (*National Coalition for Gay and Lesbian Equality v Minister of Justice* paras 30, 120). See also Chaskalson "The third Bram Fischer lecture: Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193; Ackermann 'Equality and the South African Constitution: the role of dignity', (2000) 63 *ZaöRV* 537.

21 See eg Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality", 14 *SAJHR* 248, 1998; Davis *Democracy and deliberation: transformation and the South African legal order*, 1999, pp. 69-97.

22 Cf Cotterrell's comment that, even though comparative law is concerned with difference and similarity, it generally privileges unity and consistency of legal meaning over

blishment of a constitutional *ius commune*.²³ It may be argued that such an approach is dangerous, as it portrays certain trends and tendencies as natural and necessary when they are, in fact, socially and historically contingent.²⁴

In her defence, it must be said that Weinrib does not seek to erase differences among different constitutional systems. The conception of constitutionalism she advocates leaves room for the consideration of particular social and historical contexts: it is “sufficiently general to allow different constitutions to develop in accordance with their own histories, constitutional arrangements, and challenges”.²⁵ It may even allow departures from the general norm in areas in which an emerging transnational consensus can be discerned provided, however, that such departures are adequately justified, and “rest on reasoning rooted both in the general constitutional conception as well as the particularities of national context compatible with that conception”.²⁶ Moreover, the postwar constitutional conception, while constraining the range of arguments and justifications that may be legitimately raised, does not predetermine the outcomes of constitutional cases in an unyielding manner, nor does it preclude the possibility of reasonable interpretive disagreement.

And yet, I cannot help feeling that, unless accompanied by a more rigorous analysis of the power relations at work and of the contradictions inherent in “global constitutionalism”, narratives of an unfolding value consensus or a transnational constitutional conception may too easily turn into an uncritical stance towards a new legal orthodoxy or an apology for economic globalisation. A better understanding of the political and economic forces that have helped shape the new comparativism, and thus of its social and historical contingency, may assist, in the words of David Schneiderman, in “opening up spaces for critique and democratic

difference. This is particularly true in the current socio-political climate, in which comparative law is driven to harmonisation by economic globalisation, European integration, etcetera, Cotterrell “Seeking similarity, appreciating difference: comparative law and communities”, Harding and Örüçü (eds.), *Comparative Law in the 21st Century*, 2002, pp. 34 at 38-39, 44-45.

²³ Cf the critical comments of Van der Walt “Resisting Orthodoxy - again: thoughts on the Development of post-apartheid South African Law”, 17 *SAPR/PL* 258, 2002.

²⁴ See Van der Walt *Constitutional property clauses: a comparative analysis*, 1999, pp. 37 and 38.

²⁵ Weinrib, *op. cit.*, nota 5, p. 4.

²⁶ *Ibidem*, p. 6.

self-government”.²⁷ It is for this reason that I now turn to Klug’s analysis of the role of globalisation in South Africa’s transition to democracy.

2. *Global constitutionalism and local democratic struggles*

Klug locates South Africa’s shift to constitutionalism and judicial review within the dynamics of globalisation. He suggests that the timing of South Africa’s political transition was crucial: it happened at a time when the rule of law, fundamental rights and a market economy came to be regarded as essential components of democratic governance. The fact that political negotiations in South Africa had become part of the international agenda, combined with the international hegemony of the rule of law and fundamental rights, placed local contestants under pressure to adopt the vocabulary of constitutionalism and justiciable rights.²⁸

Klug shows how international political culture and the globalisation of constitutionalism facilitated political dialogue both by narrowing down the range of legitimate constitutional alternatives, and by providing a shared vocabulary for the articulation of often conflicting interests. On the one hand, it defined the outer limits of what would be regarded as an internationally acceptable settlement. For instance, the policy of nationalisation, as initially favoured by the ANC, was effectively silenced by developments within the international arena. The apartheid government’s proposals for “power sharing” suffered a similar fate. On the other hand, there are a whole range of constitutional options that are compatible with prevailing international standards. The plasticity of constitutional concepts, the tensions inherent in democratic constitutionalism, and the dynamic interplay between global constitutional culture and local contexts and histories enabled protagonists from widely divergent backgrounds and ideological bents to appeal to the same vocabulary of constitutionalism and fundamental rights.²⁹

27 Schneiderman, *op. cit.*, nota 19, p. 244.

28 See Klug, *op. cit.*, nota 2, pp. 76-85 for a discussion of the resultant shifts in the policies of both the ANC and the apartheid regime.

29 See the discussion at 85-92 of the proposals of the ANC and the South African Law Commission, which were informed by fundamentally different assumptions about the purpose of a bill of rights, the role of the state, the nature of equality and the protection and redistribution of property.

He describes this process in terms of a dialectical interaction between (or “hybridization” of) a global “text” of constitutionalism and local struggles. The global text is indeterminate and contains hegemonic and counter-hegemonic strains. Because of its normative power, it “defines the outer limits of constitutional legitimacy and thus shapes the imaginations of those seeking alternative forms of governance in the context of their own very specific struggles for political and constitutional change”.³⁰ At the same time, however, the global text is constantly reformulated through these struggles, and depends for its meaning on its application within particular local contexts.

Klug locates the “universal element” of global constitutionalism that is received into national constitutional systems not in a universally accepted value such as human dignity, but in a series of tensions inherent in constitutional democracy: between property and participation, between individual autonomy and equality, between fundamental rights and democracy. These contradictions, it seems, are constitutive of constitutional democracy. They provide a space within which different attempted mediations can contend with one another. Put differently, the essence of constitutional democracy lies in its contradictory nature, which allows different constitutional imaginations to coexist and which accords a vital role to local democratic struggles in the (always temporary) reconciliation of these tensions.³¹

It is interesting to compare Klug’s account of global constitutionalism with that of Weinrib. The two accounts have in common a rejection of the legal formalist idea that judges can extract the meaning of constitutional provisions from the relevant legal materials, without having recourse to their own conceptions of the constitution and of constitutional morality. Both recognise the central role of human actors in the construction of legal meaning; the element of choice in constitutional adjudication. At the same time, both acknowledge that constitutional interpreters are not radically free to put their own meanings into the text, but are constrained by, *inter alia*, the text, context and structure of the Constitution and the weight of comparative examples and international opinion. Moreover, both appear to recognise that, in that respect, the difference between constitutional founders and interpreters is but one of degree. As Frank

³⁰ *Ibidem*, pp. 48 and 49.

³¹ *Ibidem*, pp. 22 and 23.

Michelman states in his foreword to André van der Walt's work on constitutional property clauses:

As Van der Walt sees them, the drafters of constitutional clauses act contingently, in pursuit of politically chosen ends, but they are not Humpty-Dumpty. They are not totally, existentially free to reinvent a currently circulating, trans-national language of the law, historically accidental as that, too, may be. Rather, the drafters of bills of rights... exercise their choices by entering into pre-existent language games. They adopt cognizable broad textual structures. They noticeably follow, or they unmistakably decline to follow, certain broadly familiar textual arrangements. They use, or they unmistakably decline to use, certain broadly familiar terms and terminological oppositions in certain conventional ways.³²

There are, however, important differences. Whereas Weinrib defines the postwar constitutional conception in terms of an evolving value consensus and the emergence of a common interpretive methodology, Klug emphasises the indeterminacy of the global text and the contradictions inherent in it. Weinrib's argument contains a definite universalist streak (her emphasis on the centrality of human dignity and reliance on Kant's notion of "cosmopolitan right"); Klug, on the other hand, is more interested in the interaction between global text and local context. Moreover, Klug, unlike Weinrib, does not treat the globalisation of constitutionalism in abstraction from questions about international and economic power. Unlike Weinrib's somewhat a historical approach, Klug's account enables us to see constitutionalism as socially and historically contingent: the result of the interaction between a global text of constitutionalism (which is itself the product of constantly shifting power relations) and local democratic struggles. Current constitutional forms and trends are not viewed as the result of an evolutionary process but, rather, as the contingent product of past struggles, which are embraced for a variety of ideological reasons and that often undergo adaptations and transformations when applied in new contexts.³³

³² Michelman "Foreword", in Van der Walt *Constitutional Property Clauses: a Comparative Analysis*, *cit.*, nota 11, p. XVIII.

³³ See also Du Pré "The importation of law: a new comparative perspective and the Hungarian Constitutional Court", in Harding and Örücrü *Comparative law in the 21st. century*, 2002, p. 267 (adopting a perspective of "importation", which focuses on the ways in which local actors use comparative law for their own purposes).

Yet another difference relates more directly to the use of comparative law in constitutional adjudication. Where Weinrib is interested primarily in the emergence of a common interpretive methodology, Klug focuses on the interpretive strategies by means of which courts negotiate conflicting normative and institutional demands and thus secure their own institutional legitimacy.³⁴ What is interesting from this perspective, are the ways in which courts draw upon comparative law and global constitutional culture to legitimate certain interpretive possibilities and delegitimize others, and to assert and circumscribe their institutional authority.

I believe that both Weinrib's normative-*cum*-interpretive and Klug's political-*cum*-institutional perspectives are important in trying to understand the uses of comparative law in constitutional adjudication. I will draw upon both these perspectives in the remainder of this paper. My aim is not to arrive at a synthesis of or reconciliation between these perspectives, but rather to use them to illuminate different aspects of the same problem and, occasionally, to interrogate each other.

III. WHAT DOES COMPARATIVE ANALYSIS HAVE TO OFFER CONSTITUTIONAL ADJUDICATION?

In this section, I argue that comparative analysis can enrich constitutional argument and adjudication by: offering examples of the interpretations given by other courts to more or less similar provisions; exposing judges to the normative weight of an evolving transnational value consensus and/or the currency of a widely followed interpretive approach; enabling 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 system and of the contingency of the legal culture within which it functions; promoting substantive reasoning and a culture of justification; opening up certain interpretive possibilities and foreclosing others; warning judges of past errors and wrong turns; and assisting courts in securing their institutional role.

1. *The value of previous judgments, or: a history of examples*

Judges are in the habit of consulting case law. The authority and weight attached to previous court decisions will, of course, depend on

34 See Klug, *op. cit.*, nota 2, pp. 139-177.

factors such as the particular legal system (whether it forms part of the common-law or civil-law tradition), whether a centralised or decentralised system of review is followed, and the place of a court within the judicial hierarchy. However, judges often find it valuable to consult previous decisions, even if they are not bound to follow them. An examination of previous interpretations of the same or similar legal rules and of the reasoning process employed by other judges has obvious benefits: it serves to shape the judge's perception of the range of legitimate interpretations and outcomes, confirm and add authority to her own views on the matter, refine her thinking, and/or alert her to potential gaps and weaknesses in a particular interpretation or line of argument.

The same considerations apply to the consultation of comparative constitutional case law. The value of comparison is most obvious in the interpretation of constitutional provisions which have clearly been influenced by the law of foreign countries. For example, this would be the case where the provision to be interpreted in the South African Constitution bears a clear resemblance to provisions in the German or Canadian Constitution, or has been influenced by judicial interpretation in those countries. But even in the absence of evidence of such direct influence, foreign case law may facilitate the court's task by providing it with a "history of examples"³⁵ and a conceptual framework for the interpretation of constitutional provisions.

2. *Embracing a larger constitutionalist tradition*

Constitutional comparison exposes judges to the normative weight of a perceived emerging transnational value consensus. It affords them the opportunity to embrace international conceptions of "evolving standards of decency", and to legitimate their decisions with reference thereto. The South African Constitutional Court has, in cases dealing with the constitutionality of the death penalty,³⁶ corporal punishment³⁷ and the prohibition of homosexual sodomy,³⁸ referred extensively to the position in other democratic societies. In each of these cases, the court came to the

35 Van der Walt, *op. cit.*, nota 11, p. 38.

36 *S v Makwanyane* 1995 6 BCLR 665 (CC).

37 *S v Williams* 1995 (7) BCLR 861 (CC) paras 26-50.

38 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) paras 39-57.

conclusion that the laws and practices in question infringed constitutional rights, and could not be justified in an open and democratic society. In the corporal punishment case, the Court noted a “growing consensus in the international community” that judicially imposed whipping “offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity”.³⁹ The Constitution, in the view of the Court, offered South Africans the opportunity to “join the mainstream of a world community that is progressively moving away from punishments that place an undue emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights”.⁴⁰

Reliance on international trends carries certain risks —particularly in a country where there is a strong sense of the distinctiveness of its constitutional history and tradition, or where socio— economic conditions or religious and cultural value systems are believed to be different from those obtaining in constitutional democracies which are usually held up as exemplary. That the South African Constitutional Court is alive to these dangers, is evident from the careful manner in which it has negotiated the gap between the global text of constitutionalism and the local context. The Court regularly stresses that, while due regard must be had to foreign law, it is the South African Constitution which must be interpreted, and that its provisions must be placed within the context of South African society.⁴¹ In addition, the Court has been careful not to be seen as privileging “Western” conceptions of decency over, say, African conceptions. For instance, in the death penalty case, the Court’s references to the reasoning of foreign courts and tribunals was held in balance by its reliance on the indigenous African concept of *ubuntu*, which was taken to signal values of respect, dignity, compassion and solidarity.⁴² The

39 *S v Williams* para 39.

40 Para 50.

41 See eg *S v Makwanyane* para 37; *S v Williams* paras 50, 51.

42 *S v Makwanyane* paras 130-131 (Chaskalson P), 223-227 (Langa J), 243-245, 250, 260 (Madala J), 263 (Mahomed J), 307-309, 311, 313 (Mokgoro J). See also paras 258 (Madala J), 300, 304, 306 (Mokgoro J) and 371-383, 386-387 (Sachs J) on the importance of indigenous and African values. In *S v Williams* paras 31-32, 34, the Court was able to draw upon decisions of the Supreme Courts of Namibia and of Zimbabwe, in which it had been held that corporal punishment constitutes inhuman or degrading punishment. See also *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) paras 45-47.

Court was thus able to downplay the perceived tension between its own construction of evolving standards of decency and the wishes of the majority of South Africans who, it had been argued, favoured the retention of the death penalty.⁴³

3. *Contingency and difference*

It is sometimes claimed that judicial consideration of comparative law is defensible only to the extent that such law is comparable to that of the home country⁴⁴. This is true to the extent that courts should not place uncritical reliance on foreign case law, but should carefully consider the similarities and differences between the relevant constitutional provisions, as well as the place they occupy within the broader context of their respective constitutional systems. However, it would be a mistake to assume that it serves little or no purpose to consult interpretations of constitutional provisions that appear to be substantially different from one's own. This is so for at least two reasons. In the first place, if it is true that all identities are relational, that we understand concepts (*eg.* equality or constitutional supremacy) in terms of what they are not (*eg.* arbitrariness or parliamentary sovereignty), we may often find it helpful to consider constitutions and constitutional provisions quite different from our own. Consider, for instance, the role of the Constitution of the United States in shaping understandings of the South African Constitution. I think it is fair to say that the Constitution of the United States has, in many respects, served as a negative model for constitutional development in South Africa. The meaning of constitutional provisions and the spirit and ethos of the South African Constitution are often defined in contradistinction to the meaning and underlying philosophy of the United States Constitution. It is, for instance, often asserted that, unlike the United States Constitution, the South African Constitution does not seek to erect a wall of separation between church and state;⁴⁵ does not treat freedom of expression as a preferred freedom which necessarily trumps

43 See paras 87-89 (holding that public opinion is not decisive of the constitutionality of the death penalty). See also Klug, *op. cit.*, nota 2, pp. 164-166.

44 See *eg.* Van der Vyver "Constitutional Free Speech and the Law of Defamation", 112 *SALJ*, 1995, 572 at 594-595; Malan "Regsvergekyking in Fundamentele-Regte Liti-gasie", 60 *THRHR*, 1997, p. 214.

45 *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 10 BCLR 1348 (CC) paras 99-102.

conflicting rights;⁴⁶ is not a “charter of negative liberties”, but imposes positive duties on the state,⁴⁷ should not be interpreted to afford different levels of scrutiny to different rights;⁴⁸ and cannot be interpreted to sanction the criminal prohibition of gay sodomy.⁴⁹ Paradoxically, comparison with the United States often serves to sensitise South African constitutional interpreters to the unique features of their own constitutional text and context. To paraphrase Michelman,⁵⁰ the fact that the drafters of a constitution declined to adopt a certain familiar formulation or textual structure, can be just as revealing as the reception of elements of a foreign constitution into one’s own.

Secondly, comparison with legal systems that are materially different from our own, gives us a better sense of the contingency of our own legal culture. It enables us to unearth some of the hidden assumptions and unarticulated premises that shape our responses to legal problems, and to question the logical necessity of certain links or inferences that we normally take for granted.⁵¹ This is particularly important in a country like South Africa, where the Constitution’s transformative aspirations are often frustrated by the legalistic and conservative mindset of lawyers and judges.⁵²

4. *Substantive reasoning and justification*

Lorraine Weinrib’s analysis of the postwar constitutional conception suggests that the new comparativist sensibility is part and parcel of a broader interpretive approach, which is characterised by a commitment to substantive —as opposed to formalistic— legal reasoning and which subjects exercises of public power to the demand for justification. The

46 *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC) para 41; *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) paras 25, 42-44.

47 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) para 45.

48 *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) paras 29-31.

49 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) paras 53-55.

50 P. XVIII.

51 See Curran “Dealing in difference: comparative law’s potential for broadening legal perspectives”, 46 *American Journal of Comparative Law*, 1998, p. 657.

52 See Klare “Legal Culture and Transformative Constitutionalism”, 14 *SAJHR*, 1998, p. 146.

point of constitutional comparison cannot be to find the answers to legal questions in comparative materials, or to blindly follow foreign law. (This is evident from the fact that decisions of foreign courts do not constitute legally binding precedent, and that courts often find the reasoning of a foreign court that is lower down in the judicial hierarchy of its country, more persuasive than that of a higher court).⁵³ 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.

Comparative law is also relevant to an inquiry into the justification offered for a fundamental-rights limitation. A showing that similar restrictions are in place in other constitutional democracies may facilitate the state's task of establishing the proportionality of the limitation. Conversely, it will be more difficult for the state - or other party relying on the justifiability of the limitation - to justify it if less restrictive means are used to achieve the same purpose in a number of other democratic societies.⁵⁴

5. *Possibility and constraint*

It should be clear from the discussion so far⁵⁵ that comparative law serves both to constrain the range of legitimate interpretations and outcomes, and to create different interpretive possibilities which enable different constitutional imaginations to contend with each other. 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

⁵³ See Malan, *op. cit.*, nota 44, p. 229.

⁵⁴ Cf the dissenting judgment of O'Regan J in *Harksen v Lane NO 1997 11 BCLR 1489 (CC)* paras 105-110 (fact that all the jurisdictions surveyed, except one, regulate the law of insolvency without reliance on similarly invasive measures, taken as an indication that limitation is not justifiable).

⁵⁵ See 2.2 above. See also 3.2 above on the constraining role of comparative law.

judges to move beyond their initial impression that a particular interpretation is inescapable, and open up alternative interpretive possibilities⁵⁶.

Häberle provides important insights into the capacity of comparative law to enrich constitutional argument and to open up new interpretive possibilities⁵⁷. He refers to comparative law as a “fifth method” of constitutional interpretation which, in the modern constitutional state, supplements the four “classical” methods of interpretation identified by Savigny, namely textual, systematic (or contextual), historical and teleological (or purposive) interpretation. The dynamic interaction between these modes of interpretation—and the impossibility of systematising them within a strict hierarchy—results in interpretive pluralism and enables communities and interest groups to advance different social visions as constitutionally compatible. It is to be expected that the addition of comparative analysis to the existing modes of interpretation will result in a shift of forces in the “forcefield” of constitutional law. This may further result in challenges to the interpretive complacency of lawyers, academics and judges, and rekindle a sense of the openness of legal meaning and the contestability of received wisdom.

6. *A history of errors*

André Van der Walt argues that comparative law provides us with a “history of errors”: while it cannot tell us definitely what we should do, it often alerts us to the mistakes made by others, and thus provides valuable guidance as to what we should not do.

Courts are generally less inclined to follow foreign decisions that are discredited in their home countries, or are thought to rest upon standards that are unprincipled or difficult to apply.⁵⁸ They are even less likely to follow decisions or interpretive approaches that are believed to have sparked a constitutional crisis in their home countries. Such decisions often exercise a powerful hold on the constitutional imagination, and are turned into a negative model of constitutional development.

56 Van der Walt *Constitutional Property Clauses* 38 writes that comparative analysis can provide us with a “history of possibilities”. See also Michelman, “Foreword”, in Van der Walt *Constitutional Property Clauses: a Comparative Analysis*, cit., nota 11, p. XIX.

57 Häberle, *op. cit.*, nota 10, 916ff; *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (1992).

58 See eg *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 34 (Kentridge AJ), 109 (Ackermann J) (referring to academic critique of *Shelley v Kraemer* 334 US 1 (1948)).

Sometimes, judges justify a decision not to intervene, or to give a particular right (usually liberty rights) a restrictive interpretation, with reference to foreign examples of the usurpation by judges of legislative power, and the dire consequences it had for constitutionalism and the legitimacy of the judiciary in those countries. By far the best known of these narratives of judicial transgression is that of the *Lochner* era in the United States. Sujit Choudry⁵⁹ shows that the history of the *Lochner* era has had a profound influence on the development of Canadian constitutional law. In South Africa, too, the spectre of *Lochner* has been invoked to delegitimize interpretations which, it is argued, would disguise judges' own political and ideological preferences as constitutionally mandated, or which would seriously impede the state in the discharge of its regulatory and redistributive functions.⁶⁰

7. *Securing the courts' institutional role*

Klug argues in his study of South Africa's constitutional transition that the judiciary in a newly established constitutional democracy is in a precarious situation: on the one hand, it is vested with vast constitutional powers; on the other, it is institutionally weak and often distrusted by certain sections of the population. According to Klug, South Africa's Constitutional Court has shown great skill in the way it has established its authority as final arbiter of the Constitution while, at the same time, refraining from action that was likely to put it on a collision course with the legislature or executive.

The Court has made clever use of comparative analysis in attempting to negotiate the conflicting institutional demands made upon it. Comparative law sometimes assists the Court in distinguishing areas in which intervention is appropriate, from areas in which deference should be paid to the other branches of government. I have already referred to the use of cautionary tales of judicial transgression to justify deference in certain areas.⁶¹ Courts are also more inclined to defer to the policy choices of the legislature and executive in areas in which foreign courts allow the political branches a considerable discretion. In a case involving the constitu-

59 "The *Lochner* era and comparative constitutionalism", *Journal of International Constitutionalism* (forthcoming), 2003.

60 See eg *Ferreira v Levin NO 1996 1 BCLR 1 (CC)* para 182.

61 See 3.6 above.

tionality of a ban on prostitution,⁶² the Court noted that the responses of open and democratic societies to the problems associated with prostitution “vary enormously”, and that “[t]he issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts”⁶³. A finding of unconstitutionality would be inappropriate in a case in which the limitation in question is not severe and is designed to achieve important purposes, and where —as is evidenced by the wide variety of responses of open and democratic societies— “people may reasonably disagree as to the most effective means for the achievement of those purposes”.⁶⁴

IV. CONCLUDING REMARKS

In this paper, I have explored the possibilities of comparative constitutional law. I have argued that the growing convergence between national constitutional systems provides lawyers and judges with the opportunity to enrich constitutional argument through comparative analysis. However, I have also made a few cautionary remarks. It is my belief that our sense of exhilaration at the possibilities of comparative law should be tempered by a critical sensibility. What is required is a suspicion of “grand narratives” which make current constitutional understandings appear natural and necessary, and an awareness of the social and historical contingency of “global constitutionalism” and the power relations within which it is enmeshed.

What is further required is a detailed analysis of the ways in which courts engage with comparative materials. Even on a superficial overview of South African case law, it is clear that the critical possibilities of comparative analysis are not always realised. Although the Constitutional Court generally uses comparative materials not as authority for a particular standpoint, but to develop lines of argument and to engage with the South African context, there are decisions in which foreign law is invoked to preclude, rather than to facilitate, reasonable debate,⁶⁵ or in

62 *Jordan v S* 2002 (11) BCLR 1117 (CC).

63 Para 90.

64 Para 94.

65 *Cf.* Woolman and Davis, “The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim

which the position in foreign countries is clearly oversimplified,⁶⁶ or in which the Court merely asserts that the position in South Africa is different from those in foreign countries, without attempting to explain the relevant differences.⁶⁷ Decisions such as these remind us of the difficulties attending comparative analysis. They should also alert us to the dangers inherent in the development of a new comparativist orthodoxy.

and Final Constitutions”, 12 *SAJHR*, 1996, 361 at 368-371 for a critique of the use of foreign law in *Du Plessis v De Klerk*.

⁶⁶ See *ibidem*.

⁶⁷ Cf the Court’s rejection in *S v Makwanyane*, of the limitation test which was laid down by the Canadian Supreme Court in *R v Oakes*.