

## Why Should the South African Constitutional Court Consider German Sources? Comment on Du Plessis and Rautenbach

By Francois Venter\*

### A. The Unlikely Southern *Rechtsstaat*

Christa Rautenbach's painstaking charting of the citation of foreign precedent by the South African Constitutional Court is a meritorious contribution to the burgeoning field of constitutional comparison. Employing the statistical outcome of her survey to assess the impact of—in this case—German sources on a young constitutional system is enlightening. In some instances it produces surprising information, such as the fact that the South African Constitutional Court continues to utilize comparative materials sometimes available only in German.

Du Plessis and Rautenbach provide a sketch of the historical and conceptual background of the, somewhat eclectic, declining but ongoing comparative judicial reference to German law by the Court. It may be said that the constitutional emergence of the South African constitutional state provided noteworthy impetus to the global upsurge of comparative constitutionalism. This is, of course, primarily visible from a South African perspective, but the spate of comparative literature in which the South African instance figures prominently comes from various jurisdictions and involves perspectives from a range of constitutional contexts.<sup>1</sup>

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<sup>1</sup> For further demonstration of this point, see Lourens W.H. Ackermann, *Equality Under the 1996 South African Constitution*, in *GLEICHHEIT UND NICHTDISKRIMINIERUNG IM NATIONALEN UND INTERNATIONALEN MENSCHENRECHTSSCHUTZ* 105 (Rüdiger Wolfrum ed., 2003); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004); *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (Norman Dorsen et al. eds., 2003); HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000); BJÖRN GERD SCHUBERT, *AFFIRMATIVE ACTION UND REVERSE DISCRIMINATION: ZUR PROBLEMATIK VON FRAUENQUOTEN IM ÖFFENTLICHEN DIENST AM BEISPIEL DER BUNDESREPUBLIK DEUTSCHLAND UNTER EINBEZIEHUNG DES RECHTS DER EUROPÄISCHEN GEMEINSCHAFT, DER VEREINIGTEN STAATEN VON AMERIKA UND DER REPUBLIK SÜDAFRIKA* (2003); *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006); HILKE THIEDEMANN, *JUDICIAL INDEPENDENCE: EINE RECHTSVERGLEICHENDE UNTERSUCHUNG DER SICHERUNG UNABHÄNGIGER RECHTSPRECHUNG IN SÜDAFRIKA UND DEUTSCHLAND* (2007); FRANCOIS VENTER, *CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES* (2000) [hereinafter *CONSTITUTIONAL COMPARISON*]; FRANCOIS VENTER, *GLOBAL FEATURES OF CONSTITUTIONAL LAW* (2010) [hereinafter *GLOBAL FEATURES*]; Francois Venter, *Human Dignity As a Constitutional Value: A South African Perspective*, in *RECHT, STAAT, GEMEINWOHL: FESTSCHRIFT FÜR DIETRICH RAUSCHNING* 335 (Jörn Ipsen et al. eds., 2001); Susanne Baer, *Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz*, 64 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [ZAÖRV] 735 (2004);

South African constitutional law and constitutional interpretation are not naturally orientated toward German scholarship or jurisprudence. As Du Plessis and Rautenbach indicate, the German language is inaccessible to most South African lawyers. Germany is a First-World Western European power whose culture is foreign to many South Africans. Scholars whose interests are kindled by the immense wealth of published German legal learning and who wish to penetrate the complexities and subtleties of this reservoir of scholarship are furthermore confronted with the need to learn to deal with an academic language quite distinct from even colloquial German—or else chance reliance on secondary sources.

It is indeed true that, in the second half of the twentieth century, a small and formerly influential group of South African constitutional scholars did successfully enter the domain of German *Staats- und Verfassungsrecht* (constitutional law), literature, and jurisprudence, and that they took some of it home in time to share their knowledge in the period of constitution-writing, early constitutional interpretation, and adjudication.<sup>2</sup> Given the difficulties presented by the poor fit of the German legal ethos in a post-British colonial African environment, there must, however, be more, and perhaps better reasons for the fact that there is a distinct *Grundgesetz* (Basic Law)—and sometimes even a *Bundesverfassungsgericht* (Federal Constitutional Court)—flavor to current constitutional thinking in South Africa, sometimes even unintentionally or incidentally.

In the last decade of the previous century, South Africa was in the privileged position of being able to make foundational constitutional arrangements *de novo* and autochthonously, i.e. without any external prescriptions.<sup>3</sup> The general understanding was that the influence

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Sarah Davis, *United States, Germany, and South Africa: Constitutional Legislation and Judicial Decisions on Abortion—Testing Judicial Globalization*, 16 TEMP. INT'L & COMP. L.J. 175 (2002); Dennis Davis & Hugh Corder, *Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries*, in ACTA JURIDICA 68 (Jan Glazewski ed., 2009); Andrew Foster, *The Role of Dignity, in Canadian and South African Gender Equality Jurisprudence*, 17 DALHOUSIE J. LEGAL STUDS. 73 (2008); Thomas M. Franck & Arun K. Thiruvengadam, *International Law and Constitution-Making*, 2 CHINESE J. INT'L L. 467 (2003); Andrea Lollini, *Legal Argumentation Based on Foreign Law. An Example from Case Law of the South African Constitutional Court*, 3 UTRECHT L. REV. 60 (2007); Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737 (2004); Felix Oelkers, *Die Gleichheitsrechtsprechung des südafrikanischen Verfassungsgerichts*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 899 (1997); Francois Venter, *The Politics of Constitutional Adjudication*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 129 (2005); ANNE-CAROLIN SEIDLER, *GRUNDRECHT AUF UMWELTSCHUTZ - AM BEISPIEL DER REPUBLIK SÜDAFRIKA : VERFASSUNGSRECHTLICHER UMWELTSCHUTZ IN DER REPUBLIK SÜDAFRIKA ALS BEISPIEL ZUR WEITERENTWICKLUNG DES DEUTSCHEN UMWELTVERFASSUNGSRECHTS* (2007).

<sup>2</sup> See e.g., L. du Plessis, *Learned Staatsrecht from the Heartland of the Rechtsstaat*, 8 POTCHEFSTROOM ELEC. L.J. 106 (2005), available at <http://www.nwu.ac.za/p-per/2005volume8.html>.

<sup>3</sup> The author personally witnessed the process closely: First as technical advisor to the government, then as convener of a technical committee responsible for the formulation of the largest part of the 1993 Constitution, and finally as a member of one of the official technical teams supporting the writing of the 1996 Constitution.

of the foregoing system was relevant only for the purpose of ensuring continuity when profound innovation was introduced, so that these profound innovations could be cultivated incrementally. Because the English notion of parliamentary sovereignty was much abused in South Africa during the preceding eight decades,<sup>4</sup> it was particularly off-putting to constitutional architects with the freedom to innovate. Under these circumstances the obvious and instinctive route was to take guidance from existing examples of well-recognized and successful constitutional designs elsewhere in the world. Despite their linguistic familiarity, the British and Commonwealth examples—except the one from Canada—offered very few inspirational qualities. Given the availability of quantitatively more academic knowledge of constitutional thinking expressed in English at the time, notions of United States constitutional law remarkably did not find much purchase in the constitution-writing processes, nor in the early jurisprudence of the Constitutional Court. Examples from the rest of Africa, South America, and Asia were also not perceived to fall in the category of being universally acclaimed or particularly influential in global constitutional thinking.

Aside from the pre-constitutional history of South Africa and the influence of some of the role-players in the constitution-writing process, the reasons for the surprising measure of influence exerted by the German example, I think, are to be found primarily in the nature of exemplary constitutionalism as understood by the world community at the end of the twentieth, and beginning of the twenty-first centuries. In this general understanding of constitutional excellence, German constitutionalism did and still does figure prominently.<sup>5</sup> One does not need to be irrationally enthusiastic about things German to gain this insight. After all, post-War Germany, like post-apartheid South Africa, greatly benefited from the fruits of Western constitutional thinking, which had been suspended for a considerable period prior to its constitutional rebirth in 1949. Germany, however, did have the benefit of having been a major contributor in the nineteenth and early twentieth centuries to beneficial constitutionalist doctrine.

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Some of what is reflected in this comment is based upon observations made during those and subsequent experiences.

<sup>4</sup> See, e.g., John Dugard, *The Judicial Process, Positivism and Civil Liberty*, 88 S. Afr. L.J. 181 (1971).

<sup>5</sup> See, e.g., KLAUS STERN, 40 JAHRE GRUNDGESETZ 235 (1990). See also Hans-Peter Schneider, *Das Grundgesetz als Vorbild? Sein Einfluß auf ausländische Verfassungen*, in *DAS GRUNDGESETZ IN INTERDISZIPLINÄRE BETRACHTUNG* 159 (Hans-Peter Schneider ed., 2001).

## B. The Global Impact of German Constitutionalism<sup>6</sup>

Having been formulated and adopted when it was, the *Grundgesetz* set the tone for constitution-making in the second half of the twentieth century. Additionally, there was a lot of constitution making going on across the globe at the time. As was the case with South Africa some forty-five years later, Germany—initially only the western *Länder*—in the late 1940s arrived at what some refer to as a “constitutional moment.” Bruce Ackermann coined this expression, meaning that a fundamentally fresh constitutional arrangement could be devised under circumstances where evolutionary constitutional progression had become impossible and unnecessary.<sup>7</sup> The historical run-up to the adoption of the *Grundgesetz* is well known, but bears to be briefly reviewed here.<sup>8</sup>

In different parts of what is now the Federal Republic of Germany, various constitutions were drafted in the nineteenth century following the French Revolution. These included the famous “Paulskirche” Constitution of 1849, which never came into effect. Some were adopted and applied, including the constitutions of Sachsen-Weimar (1816), Bavaria (1818), Baden (1818), Württemberg (1819), Hessen/Darmstadt (1820), Sachsen (1831), Kurhessen (1831), Hannover (1831), Braunschweig (1831), Prussia (1848 and 1850) and then the *Reichsverfassung* of 1871. The latter established a German nation-state for the first time. The 1871 Constitution was not to blame for it, but Germany fought World War I while it applied, leading to constitutional chaos and dissolution at the end of 1918. A constituent assembly then formulated the 1919 Constitution of the Weimar Republic establishing Germany as a social-democratic federal constitutional state, which still resonates in the current constitutional system. The Constitution however harbored weaknesses that allowed Adolf Hitler to introduce the Nazi dictatorship by ostensibly democratic means. These weaknesses were studiously avoided in 1949 by the *Parlamentarischer Rat* (“Parliamentary Council” responsible for the drafting of the Constitution). The instruction of the Allied forces to the latter was to draft a constitution that would satisfy the requirements of democracy, federalism and the protection of individual rights and freedoms. This really amounted to prescribing the design of a constitution, which would reflect the essence of constitutionalism as it had developed in

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<sup>6</sup> For brief indications of this impact, and its background in Germany's own constitution-writing history, see Wolfgang Benz, *Die Neugestaltung Deutschlands zwischen Weststaat und Provisorium*, in *DAS GRUNDGESETZ IN INTERDISZIPLINÄRE BETRACHTUNG* 9 (Hans-Peter Schneider ed., 2001); Friedhelm Hufen, *Entstehung und Entwicklung der Grundrechte*, in *DAS GRUNDGESETZ IN INTERDISZIPLINÄRE BETRACHTUNG* 41 (Hans-Peter Schneider ed., 2001); Jörg-Detlef Kühne, *Verfassungsvorbilder für das Grundgesetz. Von der Paulskirchenverfassung zum Grundgesetz*, in *DAS GRUNDGESETZ IN INTERDISZIPLINÄRE BETRACHTUNG* 57 (Hans-Peter Schneider ed., 2001).

<sup>7</sup> Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

<sup>8</sup> For this narration of the history, see 1 KLAUS STERN, *DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND* 49–50 (1977).

Europe—including pre-Nazi Germany—and North America since the eighteenth century. Characteristic of the richness of German legal doctrine, the reference in Article 20(3) of the *Grundgesetz* to the *verfassungsmäßige Ordnung* (constitutional order) signifies, without express regulation, that the law of the constitution (*Verfassungsrecht*) is law of the highest order to which all other rules of law are subject. The *Verfassung* (constitutional form or state of affairs) therefore normatively delineates the supreme order of fundamental principles underlying the dispensation of authority and values prevailing in the state.

The wholeness of post-War German constitutionalism made it particularly attractive to subsequent constitution-writers, such as the South Africans from 1993 to 1995. Part of the completeness of the German Constitution was that the *Bundesverfassungsgericht* was placed in a position where creative jurisprudence based upon the clear values and principles of the *Grundgesetz* could be produced from the outset as an essential element in the construction of a modern *Rechtsstaat* (constitutional state).<sup>9</sup>

These developments in Germany did not naturally lead to a perfect constitutional system, nor was, or is, the jurisprudence of the *Bundesverfassungsgericht* beyond reproach. However, since its inception, much profound scholarship, judicial analysis, and interpretation, as well as admirable executive and legislative implementation based upon the guidelines of the *Grundgesetz* have emerged, making the Federal Republic into a paragon of constitutionalism that is impossible to ignore and that is desirable to be emulated by lawyers and governments of this era.

Because German constitutional jurisprudence and doctrine has grown to be so prominent—although it naturally is not alone in this regard—in the minds of constitutional lawyers across the globe, its influence has been multiplied as comparison has become an indispensable tool of the contemporary constitutional lawyer.

### C. The Indigenization of German Constitutional Notions in South Africa<sup>10</sup>

#### I. *Bundestreue*

In the South African constitution-writing process, opposing negotiators had conflicting ideals for the future form of state. The socialist preference of the African National Congress (ANC) was for a state governed from the center, whereas the De Klerk

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<sup>9</sup> See, e.g., Peter Derleder, *Rechtsstaat—Sozialstaat—Kulturstaat. Überlegungen zur Fortentwicklung alter Theorien*, 40 KRITISCHE JUSTIZ [KJ] 110 (2007).

<sup>10</sup> For further information dealing with the constitution-writing process in South Africa in the early 1990's, see LOURENS M. DU PLESSIS & HUGH CORDER, *UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS* (1994); HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998); HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000).

government strove for maximal decentralization. In the process of drawing from the German constitutional example, some notions were transfigured to a level where the original can hardly be recognized. The extra-constitutional German notion of *Bundestreue*, rooted in federalism, emerged in Chapter 3 of the 1996 Constitution in the form of *cooperative government*—which also resonates with the Canadian conception of *cooperative federalism*. The emphasis in the relevant provisions of the South African Constitution is primarily on discouraging litigation and strife between the national, provincial, and local spheres of government. The establishment of a federation was not in the cards. Nevertheless, when the Constitutional Court was called upon to apply Chapter 3, its interpretation might be said to have sounded very similar to that of the *Bundesverfassungsgericht*<sup>11</sup> when it stated:

In terms of this section the government consists of three spheres: [T]he national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and “not assume any power or function except those conferred on [it] in terms of the Constitution.”<sup>12</sup>

Thus, neither the spirit of federalism nor the doctrinal German or Canadian roots of Chapter 3, but the letter of the wording of the constitutional text provided the foundation for the judgment. This is not necessarily a negative result. In fact, it demonstrates how constitutional conceptions are adapted to local circumstances when they are recycled elsewhere.<sup>13</sup>

## *II. Constitutional Values*

Du Plessis and Rautenbach justifiably point out the similarity of understanding and the application of human dignity as a constitutive constitutional value, both in German and South African constitutional law. When it comes to equality as foundational value,

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<sup>11</sup> Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvG 1/60, 12 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 205, 254 (Feb. 12, 1961) (Ger.).

<sup>12</sup> *Johannesburg Metro. Mun. v. Gauteng Dev. Tribunal* 2010 (6) SA 182 (CC) at para. 43 (S. Afr.).

<sup>13</sup> In the vernacular of legal comparison the choice of metaphors to describe this process is wide, including *migration, borrowing, transplantation*, etc.

however, the emphases of the two systems differ significantly. According to Seibert-Fohr, the German courts are primarily concerned with the general principle of equality provided for in Article 3(1) *Grundgesetz* as a limitation on the exercise of governmental discretion. Discrimination on the grounds specified in Article 3(3) draws more scrupulous judicial attention where fundamental rights are involved, whereas other forms of distinction are weighed for their arbitrariness.<sup>14</sup> The South African notion of constitutional equality—which entails a distinction between discrimination as such and “unfair” discrimination—has been given a programmatic nature by the Constitutional Court. It is understood as a mechanism for social engineering and is qualified with terms such as “remedial,” “restitutionary,” and “compensatory.”<sup>15</sup> In the Hugo case the Constitutional Court explained its approach as follows:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.<sup>16</sup>

### III. *Rechtsstaatlichkeit*

A remarkably successful, although not necessarily conscious or express process of incorporation of German constitutional dogma in the South African vocabulary, concerns *Rechtsstaatlichkeit*. This was facilitated by the appearance of the term *regstaat* in the preamble of the Afrikaans text of the 1993 Constitution. The term did not resurface in the 1996 Constitution, but the rule of law—historically and conceptually distinct from the German notion often incorrectly referred to as such—is listed in Section 1 as one of the founding values. The Constitutional Court succeeded in the course of a series of judgments to subsume both the ideas of *Rechtsstaat* and the rule of law under the generic expression

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<sup>14</sup> Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 *BROOK. J. INT'L L.* 1, 21–22 (2010).

<sup>15</sup> Ackermann, *supra* note 1 at 107–08.

<sup>16</sup> *President of S. Afr. v. Hugo* 1997 (4) SA 1 (CC) at para. 41 (S. Afr.).

“constitutional state,” which might be translated directly into German as *Verfassungsstaat*.<sup>17</sup>

#### D. Choices Available to South African Judges

Du Plessis and Rautenbach point out the Constitutional Court's rather cavalier interpretation of section 39(1)(b) and (c) of the 1996 Constitution. It would appear that the Court, despite its tendency to approach constitutional interpretation in the global setting—which Du Plessis and Rautenbach label “transnational contextualization”—by not holding back on exploring any foreign materials that catch the judges' fancy, but they have not as yet really engaged with questions of comparative methodology. Not that comparative methodology must be considered to be included in the remit of a court to engage in the creation of methods or theories on constitutional comparison, but it seems that the Court simply goes out on occasion to sample foreign law—and to a lesser extent, international law—for the purpose of determining how other jurisdictions deal with issues similar to those with which the Court is confronted. Consulting foreign materials and international law obviously does not compel the Court to bind itself to the norms and their interpretation that it finds elsewhere, except naturally when customary international law or a binding international agreement is in conformity with the Constitution.

One might then ask why—and how—do the justices look at foreign law while section 39(1)(c) does not oblige them, but merely allows them to do so?<sup>18</sup> After all, the most profound question that a comparatist, whether a scholar, a practitioner or a judge, should respond to when embarking on a comparative exercise, is why the comparison is, or should be, undertaken. One often suspects that writers and courts have the worst possible motive for their comparative endeavors, viz. to embellish the product with impressive-looking exotic data. Such suspicions usually surface when information gleaned from one or more foreign systems is found to be compiled and reflected in the judgment, book or article, and nothing more is done with it.

There are various possible answers to the question of why the Constitutional Court justices have incorporated comparative reflections in their judgments. One is that, when it started out in 1995, the Court was venturing into uncharted waters and needed some navigational aids that were already available and had already been tested in other jurisdictions. One

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<sup>17</sup> See Francois Venter, *South Africa: A Diceyan Rechtsstaat?*, 57 MCGILL L.J. 721 (2012).

<sup>18</sup> S. AFR. CONST., 1996, § 39(1)(c) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”).



should, however, also take into account that the Court started its work in an era during which constitutional comparison and judicial discourse was blooming around the globe.<sup>19</sup>

It will not be attempted here to find or substantiate all of the other possible reasons that the Court might have had. Suffice it to suggest at least one probable motive. The Court has sometimes found foreign judicial information with which it could legitimate its findings and conclusions, either by contrasting its own findings or to by taking courage from the fact that others had followed the same argument and had come to similar results. This may not be the most noble, or scientifically justified motive, but it would not necessarily be illegitimate, especially for a freshly established court.

No analysis of the judgments of the Court have been undertaken in which comparison was purported to have been done for the purposes of determining the nature of the Court's methodology. In the absence of such an analysis one cannot say whether the Court inclines towards functionalism of some sort, whether it would consider itself to support dialogical interpretation in the form of trans-judicial cross-fertilization, whether the transplantation or migration of constitutional concepts is part of its thinking, or whether it considers itself called upon to promote constitutional universalism. There is, however, ready evidence that the Court has produced some creative comparative results, apparently without a methodological roadmap in the hands of the justices. Witness, for example, the following dictum from a judgment written by Justice Ngcobo in 2008:

What must be stressed here is that our Constitution embodies an objective, normative value system; it embodies 'fundamental constitutional value[s] for all areas of the law [which should act] as a guiding principle and stimulus for the Legislature, Executive and Judiciary'. These fundamental constitutional principles are explicitly set out in the founding provisions of our Constitution and are explicitly given effect to in the Bill of Rights. Such values are human dignity and the achievement of equality.<sup>20</sup>

Whether Justice Ncobo was aware that his words were a reflection from, inter alia, the *Lüth* judgment of the *Bundesverfassungsgericht* of 1958<sup>21</sup> is not clear, since he was citing

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<sup>19</sup> See, e.g., Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT'L J. CONST. L. 1, 1 (2013) ("There is no doubt that comparative constitutional law has enjoyed a certain renaissance since the mid-1980s.").

<sup>20</sup> *Thint (Pty) Ltd. v. Nat'l Dir. of Pub. Prosecutions, Zuma v. Nat'l Dir. of Pub Prosecutions* 2008 (1) SA 1 (CC) at para. 375 (S. Afr.).

<sup>21</sup> Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 400/51, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198, 204 (Jan. 15, 1958) (Ger.) (establishing "*eine objektive Wertordnung*").

previous judgments of his own court where the connection was made directly.<sup>22</sup> For present purposes, the judge's historic and comparative awareness is, however, not material: what it does demonstrate is that, regardless of the methodological predilections and the motives of the Court for sometimes looking beyond the text of the Constitution, profound comparative notions can find their way from abroad into the local constitutional consciousness. For quality jurisprudence, this confirms the value, if not the inevitability, of comparison—potentially to the reciprocal benefit of the systems involved in the comparison.

The justices of the Constitutional Court are free to choose the nature and range of their comparative undertakings, but indications are that they may run the risk of making less convincing judgments if they ignore compelling evidence from abroad regarding global constitutional trends in the systems of operational constitutional states.<sup>23</sup>

South African judges are naturally not limited in their comparative undertakings to German law, and have indeed ranged much wider. This has benefited the Court in many ways, but it does raise the question that some comparatists consider to be of crucial importance: comparability.<sup>24</sup>

### E. Comparison's Challenges

Comparability has—at least in private law—been iconized by Zweigert and Kötz, who famously stated, “[i]ncomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfill the same function.”<sup>25</sup>

This is naturally a core position of the functionalist comparative method, which is by no means the only defensible approach.<sup>26</sup> Even if one preferred a different method, however, comparability remains relevant, although not necessarily absolute.<sup>27</sup> A circumstance where constitutional comparability might be a central consideration, is one where the comparatist attempts to draw insights from a foreign system which is eminently

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<sup>22</sup> *Carmichele v. Minister of Safety & Sec'y* 2001 (4) SA 938 (CC) at para. 54 (S. Afr.); see also *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) at para. 94 (S. Afr.).

<sup>23</sup> See, e.g., Sir Sydney Kentridge, *Comparative Law in Constitutional Adjudication: The South African Experience*, 80 TUL. L. REV. 245 (2005).

<sup>24</sup> See, e.g., Catherine Valcke, *Comparative Law As Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004).

<sup>25</sup> KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34 (Tony Weir trans., 3d ed. 1998).

<sup>26</sup> VENTER, *GLOBAL FEATURES*, *supra* note 1, at 47–51.

<sup>27</sup> VENTER, *CONSTITUTIONAL COMPARISON*, *supra* note 1, at 44–45.

undemocratic for application in the law of a constitutional state. Another example would be an attempted comparison of aspects of systems that are founded upon different points of departure. A German/South African instance in this context would be where a comparatist attempted to make the provisions of Article 23 of the *Grundgesetz*—on Germany's participation in the development of the European Union—relevant for South Africa's role in the African Union, other than for the purposes of contrast.<sup>28</sup>

As is clear from a reading of Du Plessis and Rautenbach's contribution, South African constitutional jurisprudence has benefited much from the comparative work by some of the Constitutional Court justices who championed the beneficence of the Court's work by means of the incorporation of insights and concepts from German constitutional law. It is uncertain whether the bench of the Court will be similarly adorned by capable comparatists in the future. An important factor in this regard concerns the accessibility of relevant German sources. Nevertheless, given the fact that very few of the judges on the South African Constitutional Court are, or have been, capable of comprehensive reading of original German texts, the reported influence that German jurisprudence has had on the Court's work is quite remarkable. In addition to the eminent utility of the comparative insights mentioned above on South African jurisprudence, it may be surmised that interns, judges' assistants, the presentation of arguments to the Court, the representatives of litigants, and academic materials have all assisted the judges in making useful comparative linkages. One hopes that the challenge to continue to do so will be met in similar ways in the future.

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<sup>28</sup> The South African Constitution does not have a provision similar to Article 23 of the Basic Law.