Comparative method: Comparing legal systems and/or legal cultures?

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A comparative lawyer studying laws outside the context of his own culture is like a colour-blind painter: what he paints is foggy shapes and lines only.¹

1 INTRODUCTION

Comparative law, the comparison of different legal systems of the world,² is an enterprise that has developed explicit conceptual frameworks for comparison between state legal systems. Placing legal systems into different “legal families” has for long been used as a conceptual framework to be utilised by comparative lawyers.³ According to this approach it has become customary in South Africa to distinguish between inquisitorial and adversarial or accusatorial families of law,⁴ not only for purposes of law reform but also in the interpretation of the Constitution.⁵ Reception⁶ of foreign law can take place at different levels: (a) reception in legislative and constitutional drafting; (b) reception by the judiciary;⁷ and (c) what Mostert calls reception through scholarly work.⁸ In the first part of the article, when examining the more traditional approaches to the

4 Note that the adversarial (accusatorial) and inquisitorial distinction has been criticised by Damaska The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (1986) 3-6, as not capable of adequately describing modern systems of law. See also Nijboer “Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective” 1993 Am J of Comp L 308.
6 A working definition of reception for the purposes of this article is the following: A process whereby legal concepts from a foreign jurisdiction are adopted or assimilated in another legal jurisdiction.
7 See s 39 (1) of the Constitution of the Republic of South Africa, 1996:
   “(1) when interpreting the Bill of Rights, a court, tribunal or forum –
   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   (b) must consider international law; and
   (c) may consider foreign law
   (2) when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”
comparative method, I shall use the somewhat “overworked” terms of certain jurisdictions being either inquisitorial or adversarial and others as “mixed”.

In this article I should like to show that in using the comparative method for law reform purposes or in judicial interpretation, it is no longer merely enough to look towards both the adversarial and inquisitorial models for solutions. It is suggested that the *modus operandi* should rather be not only to compare rules, but also to evaluate legal cultures. Friedman explains the notion *legal culture* as follows:

“[b]y legal culture we mean the ideas, values, attitudes and opinions people in some society hold, with regard to law and the legal system . . . Legal culture is the source of law – its norms create the legal norms; and it is what determines the impact of legal norms on society.”

When reforming any area of any legal system, it is not sufficient to look at optimal structural and rule-based solutions without also taking into account the local legal culture into which such proposed solutions are to be transplanted as well as the cultural context of the “donor” jurisdiction. In finding solutions for legal problems in the South African justice system, the existing South African legal culture must inform such an undertaking.

In the first section I review some traits that customarily have become associated with the so-called adversarial and inquisitorial methods. The second section investigates the meaning of and the extent to which legal culture should be factored into comparative methodology.

2 THE ADVERSARIAL AND INQUISITORIAL SYSTEMS

2.1 Introduction

Traditionally, the adversarial system is described as a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury pronouncing one version of the facts to be the truth. Both the prosecutor and judge are actively involved in truth finding.

Although traditionally the English and American systems are quoted as examples of the accusatorial model, and the Dutch, French and Spanish systems as examples of the inquisitorial system, it should be noted that almost no country today has a system which is purely adversarial or purely inquisitorial. This is explained by Goldstein as follows:

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10 See Snyman “The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison between South African and Continental Systems” 1975 *CILSA* 100-111, who explains how the South African criminal procedure although accusatorial in character also displays definite inquisitorial traits.
12 Friedman “Is there a Modern Legal Culture?” 1994 *Ratio Iuris* 118.
14 Nijboer 1993 *Am J of Comp L* 303. He also alerts comparative researchers to the fact that the “character” of a system is not necessarily found in formal legal rules, but that it should also be sought in the actual day-to-day practice of the law.
15 The adversarial procedures have been subjected to a wide range of criticism on the grounds that the process does not take truth-finding seriously enough. See Jackson “Evidence: Legal Perspective” in Bull and Carson (eds) *Handbook of Psychology in Legal Contexts* (1995) 166. Jackson suggests with reference to Damaska that “instead of comparing the

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“These portraits of accusatorial and inquisitorial systems are, of course, idealized. European criminal procedures are no more purely inquisitorial than ours are purely accusatorial. Europeans too have accusatorial elements and mixed systems; they may tolerate more discretion than their literature concedes and may, in many instances, be moving towards greater role for counsel and more explicit protection for the accused. Nevertheless, these are central tendencies.”

Bearing these remarks in mind, I now turn to examine the structural characteristics of the English and Dutch systems which, as pointed out above, may be regarded as typical examples of adversarial and inquisitorial systems respectively. Although the two systems may be more alike in reality than the classical models imply, there are certain distinguishing characteristics that need to be borne in mind in dealing with these systems from a comparative point of view.

2.2 Presentation of evidence

The English Royal Commission on Criminal Justice captures the significant distinction between the common law and civil law traditions in the following terms:

“In this context, the term ‘adversarial’ is usually taken to mean the system which has the judge as an umpire who leaves the presentation of the case to the parties (prosecution and defence) on each side. These separately prepare their case and call, examine and cross-examine their witnesses. The term ‘inquisitorial’ describes the systems where judges may supervise the pre-trial preparation of the evidence by the police and, more important, play a major part in the presentation of the evidence at trial. The judge in ‘inquisitorial’ systems typically calls and examines the defendant and the witnesses while the lawyers for the prosecution and the defence ask supplementary questions.”

The general rule in favour of oral evidence in the adversarial system has its origin in the English common law and trial procedure. Cross and Tapper state:

“Perhaps the most important feature of an English trial, civil or criminal, is its ‘orality’. Much greater weight is attached to the answers given by witnesses in court on oath or affirmation than to the written statements previously made by them.”

The preference for oral evidence as opposed to written statements can be ascribed to the fact that in the adversarial system the verbal confrontation between the witness and the cross-examiner is seen as the most effective way to test the version of the witness.

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18 South African law of evidence has the English law of evidence as its common law.
20 Best and Phipson Best on Evidence: The Principles of the Law of Evidence with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses (1992) para 100: “But of checks on the mendacity and misrepresentations of witnesses, the most effective is the . . . (one) . . . requiring their evidence to be given viva voce, in the presence of the party against whom they are produced, who is allowed to ‘cross-examine’ them; ie to ask them such questions as he thinks may serve his cause.”
It is therefore not surprising that it has been said that the “centrepiece of the adversary system is the oral trial . . .”,\(^{21}\) and that “the ordinary process of examination, cross-examination and re-examination . . . is the basic principle of the adversary system”.\(^{22}\) In fact, Wigmore\(^{23}\) referred to cross-examination as “the greatest legal engine ever invented for the discovery of the truth”.\(^{24}\)

In the inquisitorial systems in general little emphasis is placed on oral presentation of evidence\(^{25}\) or on cross-examination.\(^{26}\) According to the classical inquisitorial model cross-examination in the adversarial system is regarded as “an attempt to ‘corner’ a witness into an attitude which the cross-examining party has himself decided upon beforehand, and as a method whereby the most honest witness can be driven or twisted into contradicting himself”.\(^{27}\) Since in the inquisitorial system most of the questioning of witnesses is conducted by the judge, the distinction between examination-in-chief and cross-examination is unknown.\(^{28}\)

Inherent to the concept of orality, is the fact that public hearing is the crucial stage of the criminal justice process in adversarial proceedings. The public hearing is designed for the oral screening of evidence and the oral performance of witnesses. Usually the evidence collected during the pre-trial investigations is of no value unless tested at a public hearing. In the Netherlands, although the principle of orality was laid down in the Dutch Code of Criminal Procedure of 1926, this adversarial element was immediately undermined in the same year by the Hoge Raad’s acceptance of the admissibility of hearsay evidence.\(^{29}\) The “inquisitorial” character of the criminal process is therefore more apparent in practice than found in the rules of the code of criminal procedure.\(^{30}\)

The inquisitorial presiding officer\(^{31}\) plays a more active role, both during and sometimes even before the trial. He introduces and elicits the evidence by questioning the witnesses and the accused, and only then allows the prosecutor and defence to put questions to the witnesses. He is not bound by the evidence introduced at the trial. This has often given rise to the view that the inquisitorial judge searches for the material truth, whereas the accusatorial judge searches only for the formal truth since he relies upon the information that has been placed before him.\(^{32}\)

\(^{21}\) Devlin The Judge 54.
\(^{24}\) The protagonists of the adversarial system believe that cross-examination is the only tool to reveal the true facts. What the “truth” in legal fact-finding is, they do not say.
\(^{25}\) Germany is an exception to this generalised notion. See Foster German Law & Legal System (1993).
\(^{26}\) Goldstein 1974 Stanford LR 1009.
\(^{27}\) Snyman 1975 CILSA 109.
\(^{28}\) Herman “Various Models of Criminal Proceedings” 1978 SACC 5.
\(^{29}\) HR 20 December (1926) NJ 1927 85.
\(^{30}\) This is an example of where “legal culture” had an effect and was stronger than the actual legislative reform. See section 3 below.
\(^{31}\) There are three categories of presiding officers in inquisitorial systems viz. (i) judges; (ii) assessor-judges; (iii) lay-assessors. The “episodic” style (see Damaska Evidence Law Adrift (1997)) of inquisitorial proceedings also has different judges performing different functions. In this way an examining or investigating judge (juge d’instruction) can be distinguished from the decision-making judge.
\(^{32}\) Snyman 1975 CILSA 103.
Herman argues that an advantage of the active judge in the inquisitorial model is that, since he has to decide the case, he knows best what information he requires and what questions he needs to put to the witnesses and the accused. By being able to conduct the interrogations himself, he obtains the necessary evidence rather than having to wait for the evidence to be presented to him by the parties.

One of the main criticisms levelled against the inquisitorial system relates to the double role which the judge has to fulfil. He has to act as both the investigator who has to find the evidence and the arbiter who has to make an objective decision. Snyman argues that these two functions contradict one another, as it would be difficult for a judge to be completely unprejudiced against the accused if he has to act as prosecutor and judge at the same time. Although the judge also has to investigate circumstances which favour the accused, he is, nevertheless, perceived by the accused to be associated with the state-prosecuting authorities.

The accusatorial system, on the other hand, is criticised as not being a search for the material truth, since the judge is limited to the evidence placed before him by the parties in making his decision and he has very little discretion to move beyond this.

2.3 Dominant players

Damaska has argued that the essential feature which distinguishes adversarial systems of justice from inquisitorial systems is the parties’ control of the range of the dispute, and the collection, preparation and presentation of evidence. In adversarial systems each party is responsible for developing evidence to support its arguments, while in inquisitorial systems an official performs most of the evidence eliciting activities. Goldstein explains that in the former systems both parties “play an aggressive role in presenting and examining witnesses and in shaping legal issues”. This has given rise to the “contest” or “battle” theory of justice where parties are left to prove their own case and the judge acts as an impartial umpire to see that the rules of the game are observed. In respect of inquisitorial systems it can be argued that there is no party contest at all.

In adversarial systems the investigation is motivated by self-interest rather than public interest. Unlike the inquisitorial systems, there is no investigative judge to seek out the “truth” and as Jörg et al observe: “despite official rhetoric about impartiality in prosecution, the concrete legal duties of police and prosecution lawyers do not extend to seeking out exculpatory evidence.”

The traditional approach of adversarial systems to allow the examination of the witnesses and experts to be placed in the hands of the parties’ counsel has been perceived to be incompatible with the traditional inquisitorial view that the chief function of a court of law is to find out the truth and not merely to decide which party has adduced better evidence.
2.4 Rules of evidence

The adversarial system is characterised by an elaborate law of evidence. The detailed law of evidence can be seen as a natural consequence of the jury system, since it is argued that lay persons may not be in a position to place the appropriate weight on certain prejudicial evidence. Over time strict rules with regard to the admissibility and exclusion of evidence have developed.

In the inquisitorial system the rules of evidence are less technical and less restrictive. The emphasis in the inquisitorial model is not on the admissibility of evidence, but rather on the value that is to be attached to the evidence. In the case of hearsay evidence the focus is on how much weight will be attributed to that type of evidence and not on whether it is admissible or not. In general the Continental law of procedure is characterised by free appreciation of proof. Kralik explains that:

“The principle of free appreciation or evaluation of evidence means that the court is not fettered by any formal rules of evidence, but can evaluate the evidence produced by the parties or taken sua sponte, in its own free and reasonable evidence, including happenings in the courtroom, which are not evidence in the strict sense, as it deserves in reason. Behind this principle is familiar history of dissatisfaction with a system of weighing evidence by artificial scales and tables, against which draftsmen of codes of procedure were in full reaction. So the principle of free appreciation of the evidence is now the most characteristic aspect of modern continental procedure. As compared with English and American law, continental law is less strict in regard to the admissibility of evidence and the procedure of proof taking, any evidence – even hearsay – is admissible. It is left to the court to decide how much value is to be attached to the evidence.”

In common law systems the rules of evidence are a means by which courts can exercise retrospective control over the way in which investigations have been conducted. In inquisitorial systems there is contemporaneous judicial control of the investigation according to statute.

2.5 Status of court decisions

According to the common law tradition court decisions are seen as important sources of law, whereas in the civil law tradition legislation remains the most important source of law. Whereas the decisions of higher courts form precedent and should be followed according to the stare decisis doctrine in common law systems, court decisions as a general rule form no binding precedent in civil law courts. In inquisitorial systems, court decisions may however, reflect the

42 Ibid.
43 Nokes An Introduction to Evidence (1967) 18; Heydon Evidence: Cases and Materials (1997) 3; Cross and Tapper Cross on Evidence 248 explain that: “Although some of the modern rules of evidence can be traced to the middle ages, the story of the development really begins with the decisions of the common law judges in the seventeenth and eighteenth centuries.”
44 Richings “German Criminal Trials: Some Notes and Impressions” 1978 SACC 225.
current trend or legal culture at a specific time which may deviate from the “black letter” law and may be followed in practice.\(^\text{48}\)

2.6 In sum

Despite the fact that the adversarial/inquisitorial distinction is not hard and fast,\(^\text{49}\) there are some indicators by reference to which the adversarial (common law) and inquisitorial (civil law) systems can be distinguished. The following table\(^\text{50}\) reflects the most salient characteristics that have been traditionally associated with these systems as discussed above, although no one system will manifest all these attributes in an unqualified manner.

<table>
<thead>
<tr>
<th>Indicia of adversarial (common law) systems</th>
<th>Indicia of inquisitorial (civil law) systems</th>
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</thead>
<tbody>
<tr>
<td>• Court decisions are the important source of law</td>
<td>• Legislation is usually the important source of law</td>
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<tr>
<td>• Stare decisis for continuity</td>
<td>• No stare decisis, reference to Code articles</td>
</tr>
<tr>
<td>• Elaborate decisions, to be followed</td>
<td>• Brief decisions, not creating precedent, although superior court decisions are often followed in practice</td>
</tr>
<tr>
<td>• Such control as is exercised by courts over investigations is retrospective via rules of evidence</td>
<td>• Contemporaneous judicial control of investigation in accordance with code of criminal procedure</td>
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<tr>
<td>• Judicial passivity</td>
<td>• Judicial activity</td>
</tr>
<tr>
<td>• Parties are responsible for obtaining and introducing evidence</td>
<td>• Court has power to obtain evidence</td>
</tr>
<tr>
<td>• Accused pleads guilty/not guilty</td>
<td>• Accused not required to plead</td>
</tr>
<tr>
<td>• Decision based entirely upon material introduced by parties</td>
<td>• Decision can be based upon any material lawfully available to the court</td>
</tr>
<tr>
<td>• Oral evidence, with cross-examination the primary test of testimonial reliability</td>
<td>• Generally written evidence is given priority over oral evidence</td>
</tr>
<tr>
<td>• No inference of guilt from accused’s silence</td>
<td>• Inference of guilt from accused’s silence may legitimately be made</td>
</tr>
<tr>
<td>• Little disclosure of defence case before trial</td>
<td>• Full disclosure of prosecution and defence cases prior to trial</td>
</tr>
<tr>
<td>• Trial as the site of contest</td>
<td>• Trial as verification of dossier</td>
</tr>
<tr>
<td>• Institutional trust reposed in dialectic of parties and finder of fact.</td>
<td>• Institutional trust reposed in state officials</td>
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3 LEGAL CULTURE

3.1 Introduction

There is a growing belief among socio-legal scholars in the recognition and identification of legal cultures for purposes of the comparative methodology. It is hypothesised that what people think about the law and the values embedded therein will influence their attitude to law, their willingness to comply with law, “and that lawyers studying the law of other jurisdictions cannot understand the law without understanding the legal culture of that particular jurisdiction”.51 Gibson and Caldeira52 also maintain that one cannot understand the role of law in a society without understanding something of its legal culture.

Legal systems, one should remember is the result of a layered complexity as pointed out by Gambaro and Sacco as quoted by Mattei:

“...We should also consider an even larger difficulty that depends on the dynamic nature of legal systems; on the coexistence within them of different layers and sub-layers; from that of different borrowings and receptions that divide the legal systems into different areas of law (e.g. public law based on the common law and private law based on the civil law as in many Latin American countries) and by different legal formants (e.g. case law and legal scholarship of a given system borrowing from sources of different legal systems such as in many modern European countries and such as in the United States during the age of legal formalism.”53

3.2 The concept ‘legal culture’

There has long been debate between lawyers and sociologists about the meaning and value of the concept “legal culture”.54

Lawrence Friedman has over the years developed a variety of definitions of legal culture.55 In his 1985 The Legal System he postulates that legal culture “refers to public knowledge of and attitudes and behaviour patterns toward the legal systems” and that legal cultures may also be “bodies of custom organically related to the culture as a whole”.56 Friedman has also defined legal culture as ideas, attitudes, expectations and opinions about law, held by some people in a given society.57

Karl Klare58 defines legal culture as follows:

“By legal culture I mean professional sensibilities, habits of mind, and intellectual reflexes: What are the characteristic rhetorical strategies developed by participants in any given legal setting? What is their repertoire of recurring argumentative moves? What counts as a persuasive legal argument? What types of arguments, possibly valid in other contexts (e.g. in political philosophy), are deemed outside the professional discourse of lawyers? What enduring political and ethical commitments influence professional discourse? What are understandings of and assumptions about politics, social life and justice? What ‘inarticulate premises [are]

51 Gibson and Caldeira “The Legal Cultures of Europe” 1996 Law and Society Review 55.
52 Ibid.
54 See, for example, the debate between Roger Cotterrell and Lawrence Friedman in Nelken (ed) Comparing Legal Cultures (1995) 193.
56 Friedman The Legal System 194.
58 Klare “Legal Culture and Transformative Constitutionalism” 1998 SAJHR 146.
Comparative Method: Comparing Legal Systems and/or Legal Cultures

Comparing legal cultures gives the researcher/judge a more realistic look at the legal system that is investigated. To cling to the notion that the law of a particular jurisdiction can be found in “black letter law”, ignores the fact that “legal culture is a socially derived product encompassing such interrelated concepts such as legitimacy and acceptance of authorities, preference for and beliefs about dispute arrangements, and ‘authorities’ use of discretionary power”.

A compelling example of this is the 1926 Criminal Procedure Act in the Netherlands, which makes provision to incorporate the English “fair process” by direct oral presentation of evidence during trial, although this is not followed in practice.

Researchers’ interest in the interconnection between the different levels of law, such as the relationship between “law in books” and “living law” reflects, according to Nelken, a specific kind of legal culture.

Scholars like Blankenburg and Bruinsma have tried to integrate various aspects of legal culture and they argue that legal culture should be treated as a “multi layered” concept which includes legal norms, salient features of legal institutions and the infrastructure, social behaviour in creating, using and not using law, as well as the legal consciousness in the legal professions among the public.

The way in which new legislation is received within a given legal culture will ultimately influence the impact of such legislation in practice. In response to the passage of the Human Rights Act 1998 in the United Kingdom, Murray Hunt gives expression to how legal culture can influence or even hamper the acceptance of the Act:

“At risk of over-simplification, there is some justification for saying that there are two particular features of this country’s current prevailing legal culture that are most likely to hinder the development of the human rights culture envisaged by the Human Rights Act. One is the unquestioning loyalty demanded to the absolute, continuing, and indivisible sovereignty of Parliament and the other is the acceptance of the primacy of private ordering.”

61 Although the Code embodies the principle of immediacy (ommiddelijksbeginsel) or of direct testimony, the Hoge Raad (Supreme Court) soon after the introduction of the Code accepted hearsay testimony as evidence. HR 20 December (1926) NJ 1927 85.
63 Blankenburg and Bruinsma Dutch Legal Culture 2 ed (1994).
65 Hunt “The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession” 1999 Journal of Law and Society 86 92. Klare 1998 14 SAJHR 187 argues that lawyers “can address problems concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretative practices are a medium for articulating social visions”.

By contrast, the birth and development of the South African Bill of Rights and its influence on the South African substantive law is quite different. 66 What should comparative lawyers be aware of when using South African law for comparative purposes?

4 A SOUTH AFRICAN LEGAL CULTURE?

4.1 The South African Constitution

In briefly using South Africa as an example of how legal culture can influence comparability of the South African jurisdiction with other systems, certain critical aspects need to be highlighted. The historical context of the birth of the South African Constitution as “[h]ammered out at the very brink of civil war, [it] strikes a balance between a variety of fiercely contending interests” 67 must not be forgotten. In AZAPO v President of the Republic of South Africa 68 Mahomed DP (as he then was) referring to the Promotion of National Unity and Reconciliation Act 34 of 1995 stated:

“If the Constitution . . . kept alive the continuous retaliation and revenge . . . the [historic] bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.” 69

Fundamental human rights are enshrined in the South African Constitution adopted by an elected Constitutional Assembly to be the supreme law of the land.

Cameron, 70 however, reminds us of the fragility of the new South African legal systems and states that the Constitution represents “an uneasy pact” made about the past and indicating how to deal with the future; “a pledge” about how governmental power should be used at present and “a promise” about how to deal with the future. 71

Justice Langa stated in S v Makwanyane:

“It may be that for millions in this country the effect of the change has yet to be felt in a material sense. For all of us though a framework has been created in which a new culture must take root and develop.” 72

66 Justice Mahomed (as he then was) expressed it as follows in S v Makwanyane 1995 3 SA 391 (CC) para 262:

“In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.

The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.” 67

68 1996 4 SA 671 (CC).
69 Paragraph 19.
71 Cameron 2000 SALJ 373.
72 1995 3 SA 391 (CC) para 221.
It is within this ideal framework that South African law must be understood and interpreted.73

4 2 The preamble

The preamble serves to remind South Africans of their past and sets out the ideals for the new legal dispensation:

“We the people of South Africa, Recognize the injustices of our past: Honour those who have suffered for justice and freedom in our land, Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel’ iAfrika. Morena boloka setjhaba sa heso.

God seeën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afirika. Hosi katekisa Afrika.”

As early as in 199574 Justice Albie Sachs highlighted the significant importance of the Preamble of the Interim Constitution:

“The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It comes up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose. This is not a case of making the Constitution mean what we like, but making it mean what the framers wanted it to mean; we gather their intention not from out subjective wishes but from looking at the document as a whole.”75

4 3 Founding values

The South African Constitution explicitly declares that the founding values of the new society are:

“(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the Constitution and the rule of law.

73 The fact that the Constitution erects the infrastructure for a new legal culture, does not, however, guarantee that the legal culture will germinate in the head and minds of its citizens. Cox, in his seminal book The Role of the Supreme Court in American Government (1976) 117 as quoted by Corbett “Aspects of the Role of Policy in the Evolution of our Common Law” 1987 SALJ 52 expresses this as follows: “Constitutional adjudication depends, I think, upon a delicate symbiotic relationship. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves ... But while the opinions of the court can help to shape our understanding of ourselves, the roots of its decisions must be already in the nation.”

74 S v Mhlungu 1995 3 867 (CC).

75 Paragraph 112.
(d) Universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.  

These are the values that must now inform all aspects of the South African legal order. The South African legal system is shaped by the Constitution and all law, including the common law and customary law, derives its force from the Constitution.  

4.4 When interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, courts tribunals and forums must consider international law and may consider foreign law.  

The guidelines found in s 39 have been encapsulated as follows: “values it seeks to nurture for a future South Africa”; “... values that fuel our progress towards being a more humane and caring society” of a more mature society. Comparable democracies, for purposes of ascertaining the values contained in open and democratic societies have been the United States of America and Canada.  

4.5 When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.  

This demand of s 39(2) seems to have been the most difficult for the ordinary courts to come to grips with, especially where these courts had to deal with matters previously regulated according to customary law and religion and/or culture. The “common law enclave approach” seems finally to have been given the kiss of death in The Pharmaceutical Manufacturers Association of SA: in re: ex parte Application of President of the RSA.  

4.6 Public opinion  

One layer of legal culture is seen by some to be the population’s attitude and belief in the values and legitimacy of the law. Max du Plessis, in his insightful article “Between Apology and Utopia – The Constitutional Court and Public
Opinion”. Others, like Du Plessis, believe that public opinion should not be rejected by the Constitutional Court in its reasoning and decision-making process with regard to constitutional law issues.

4 Ubuntu

In the Makwanyane case, the Constitutional Court judges sought to forge the concept of ubuntu as a reflection of a value system that could be considered indigenous and South African. The late Mohamed J (as he then was) referred to “the reciprocity [ubuntu] generates in interaction with the collective community”. According to Madala J the concept carries in it the ideas of “humaneness, social justice and fairness”. Sachs J suggested that the invocation of ubuntu by the court would “restore dignity to ideas and values that have long been suppressed or marginalized”.

Some writers have seen ubuntu as an answer to the quest for an indigenous jurisprudence and ask whether it was stillborn. Ubuntu is mentioned in the post-amble of the Constitution, and is therefore one of the values on which the new South African legal order is based:

“The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimisation.”

The Nguni word ubuntu may be translated as “humaneness” or the “link that binds men [sic] together”. The essence of ubuntu is the connection between individual and community.

Dr Desmond Tutu (previously Archbishop of Cape Town) outlined his version of the concept as follows:

“Our people must show the world God has given us a great gift, ubuntu . . . However, the world should also know that forgiveness and reconciliation are not cheap . . . Ubuntu says I am human only because you are human. If I undermine

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87 2002 SAJHR 1-40.
88 2002 SAJHR 8.
89 Davis Democracy and Deliberation (1997) 47.
90 S v Makwanyane para 263.
91 Paragraph 237.
92 Paragraph 365.
93 Paragraph 367.
95 English 1996 SAJHR 641.
96 Per Madala J in S v Makwanyane para 237.
your humanity, I dehumanise myself... That’s why African jurisprudence is restorative rather than retributive.”

In my opinion there is no insurmountable conflict between ubuntu and the “values that underlie an open and democratic society”.

4 8 The epilogue

The historical context of the Constitution, the reason for its introduction and the legal culture of the transplantee jurisdiction can co-determine comparability. Nowhere is it more explicitly stated in the epilogue to the Constitution:

“This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”

5 CONCLUSION

All legal systems are mixing in one way or another in our world of globalisation and ever-increasing contacts and mutual influences. In the words of Oruçü:

“Legislators and courts are looking at other jurisdictions at least for inspiration if not for direct borrowing, in an effort to improve responses to shared human problems. Legal ideas and institutions are crossing borders rapidly.”

This article endeavours to indicate that comparative legal method is not only a question of borrowing from other legal systems, or knowing whether other legal systems share common characteristics with one’s own. The example of South Africa attempted to illustrate very briefly the problems and pitfalls that a comparative lawyer may encounter when reception from one jurisdiction to another takes place, without taking into account the legal culture of the “lending” jurisdiction or without sufficient insight into the legal culture of the “borrowing jurisdiction”.

99 Profile Mail & Guardian March 1996.
100 See, however, Kroeze “Doing Things with Values: The Role of Constitutional Values in Constitutional Interpretation” 2001 Stell LR 265 268-269.
101 The late Etienne Murénik argued that South Africa’s new Constitution must be a bridge from a culture of authority to a culture of justification in which “every exercise of power is expected to be justified: in which the leadership given by government rests on the potency of the case offered in defence of its decisions; not the fear inspired by the force at its command. “A Bridge to Where? Introducing the Interim Bill of Rights” 1994 SJHR 31 32.
103 Studies in Legal Systems: Mixed and Mixing 351.