

Filling *Lacunae* by Judicial Engagement with Constitutional Values and Comparative Methods

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One's understanding of what a legal lacuna is will be determined by one's understanding of how the law works. Before coming to gap-filling by means of constitutional interpretation, attention will be drawn to the questions what a lacuna is, when they are filled and if interpretation amounts to gap-filling. Adjudication in legal orders operating under supreme constitutions (recently exponentially growing in numbers) is often associated with creative problem solving. Two important instruments used by constitutional courts for the resolution of the issues requiring adjudication are constitutionalized values and comparative consideration of foreign and international law. The use of these instruments in the process of the filling of lacunae by courts with the authority to determine the meaning and implications of supreme constitutions is the theme of this Article.

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I. THE PHENOMENON “*LACUNA*”

The law deals with the social and individual life of human beings, a very complex affair, not least because it is in constant flux, evolving for many reasons, some of which relate to the ever-changing circumstances surrounding the human condition. The law simply cannot provide for every eventuality and, thankfully one might say, is not intended to do so. By definition the law therefore occasionally exhibits a *casus omissus*, deficiencies, inadequacies, incompleteness, open territory, voids, *lacunae*—that has been the case for centuries and should remain so. The closure of these gaps is not always identified or articulated as the creation

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of something new, and is often presented merely as reasonable interpretation.

Society is (more so in times past than today) unknowingly a law-maker by means of the development of custom and usage. More importantly, the state, itself a creation of the law and the context within which law is made, administered and enforced, is equipped to make and adapt legal rules by means of legislation, and to a less pronounced extent, through adjudication. In a sense, it is what legislators do: they fill gaps in the law in accordance with the way they see the need for legal regulation. Following prescribed procedures, those persons and bodies lawfully endowed with the authority to do so, lay down new legal rules or amend old ones, thus establishing a regime of binding rules. Society functions within the four corners of this legislated legal regime, enhanced by unlegislated rules in forms such as common law,¹ equity, customary law and time-honoured usage.

In most jurisdictions courts have the function of applying the law in its various forms in matters brought before it, very often requiring the court to find the applicable rules and then interpret their meaning and effect on the particular case that is being adjudicated. In this process a court may be confronted with a situation where fair resolution of the case is called for, but the situation is not covered by a pre-existing legal rule.

It is possible to argue that every adjudication amounts to the filling of a gap: the dispute or issue being determined is open until resolved by the court. Although such an argument may be made, this is not the approach here. For present purposes we will assume that a legal *lacuna* exists where an appropriate legal rule to be applied by a court to the situation before it is not evident, is uncertain, unclear or does not (yet) exist. Such a problem is usually solvable (as opposed to being an insoluble dilemma) provided that the court concerned is endowed with the jurisdiction to fill the crack. If a particular court does not have such jurisdiction, it should identify the gap to be filled by other means, such as legislation or superior adjudication in order to provide justice.

Gaps in the law can take various forms, e.g.:

- where a matter is regulated by a legal rule which does not cover an aspect of the situation that should also be regulated, e.g. a statutory crime for which no particular punishment is prescribed;

1. The term “common law” is here used to mean all the law in a system not contained in legislation. Reference to the Common Law as it emerged in the history of English law and spread across the English speaking world, is written in capital letters.

- a new situation arises which has not before been in need of legal regulation, e.g. pension rights of persons involved in newly recognized unconventional life partnerships;
- a new paradigm within which the law must operate is established, leaving pre-existing norms adrift, e.g. the introduction of democracy in a system previously characterized by authoritarian rule;
- rules of law are found to be inconsistent with external standards, e.g. the injunctions of a supreme Constitution, or binding norms of supra-national or international law.

In the ordinary course of things, courts are presently not eager (or at least not overtly eager) gap-fillers. Essentially this is so because of the truism that judges are adjudicators, not legislators. This is a tenet of the doctrine of the separation of powers which is primarily but not exclusively applicable to constitutional law.

Being an important theme in the field of legal hermeneutics, more particularly statutory interpretation, the history of the considerations relating to the filling of gaps is a fascinating subject. A valuable exposition of the history of gap-filling by means of statutory analogy, ranging through centuries' worth of developments in Roman law, canon law and Common Law, was published in 1994 by Hans Baade.² He deals with the question how a *casus omissus*, i.e., a situation that was not within the contemplation of the legislature, was approached. This he finds not to be a situation where the construction of the actual legislative intent is apposite.³

Baade's thorough historical investigation revealed that, because of the powerful foundations of the Common Law, parliamentary sovereignty in English law was not so much of a constraining consideration as one might think,⁴ that statutory hermeneutics in the Common Law developed in close association with that of the Civil Law⁵ and that there has throughout history been a need for judges to find just solutions under unregulated conditions. During some periods in the different systems judge-made law was the norm and at other times it was a strictly limited exception. Baade emphasizes⁶ "the basic fact that the Roman and English constitutions evolved in opposite directions", meaning

2. Hans W. Baade, "The Casus Omissus: A Pre-History of Statutory Analogy," (20) SYRACUSE J. INT'L L. & COM. 45-94 (1994).

3. *Id.* at 46, 80.

4. *Id.* at 88-91.

5. *Id.* at 65-75.

6. *Id.* at 68.

essentially that where both the classical Roman jurists and early English judges did not have much regard for legislation, interpretation became increasingly statute-bound with the inception of absolutism in Civil and Canon Law, whereas the importance of the text of English parliamentary legislation grew as representative government became established.⁷ As will be shown below, recent constitutional developments in Britain have however brought about new qualifications on parliamentary sovereignty. In the history of the Civil Law, the *ius commune*, and in the English context the Common Law as developed by the courts, served as background references for filling gaps in statutes. An ironic (Baade calls it “banal”) result has been that the Common Law “now solves the unprovided-for case by analogizing from judicially-developed principles and rules, while the Civil Law solves them through extrapolation from Codes.”⁸

In English Common Law as it was introduced across the British Empire,⁹ parliamentary sovereignty was the keystone of the system: courts were required in their interpretation and application of legislation to determine the “intention of Parliament.” According to Goldsworthy,¹⁰ this is not to be understood in a formalistic way. He maintains that judging in terms of legislative intent does not render courts servile because the Common Law presumptions of interpretation require them to apply Common Law rights and principles in instances of uncertainty about Parliament’s intentions. Nevertheless, in British and Commonwealth courts, “it is almost universally asserted that the most fundamental principle of interpretation is that statutes should be interpreted according to the intention they convey, either expressly or by implication given the context in which they were enacted.”¹¹

History therefore teaches us that judges have been making law to fill gaps through the centuries, sometimes with more and at other times with smaller limitations to their ability to do so. The framework within which the courts assumed and justified this role also varied, usually in

7. *Id.* at 65-66.

8. *Id.* at 94.

9. It is interesting to note that parliamentary sovereignty became entrenched after the Glorious Revolution towards the end of the seventeenth century (*id.* at 88), coinciding with the beginnings of the global expansion of the British Empire.

10. JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY — CONTEMPORARY DEBATES 278 (Cambridge UP 2010) (referring also to a previous publication by him).

11. The absence of judicial subservience may have been the appropriate Common Law approach, but in some instances such as in pre-constitutional South Africa, a rigid understanding of the principle led to a positivistic avoidance of judicial responsibility to call the parliamentary (political) authorities to order: *cf.* John Dugard *The Judicial Process, Positivism and Civil Liberty*, 1971 S. AFRICAN L.J. 181.

accordance with the prevailing constitutional system within which they functioned.

Litigating parties approach a court to decide which one of their views on what the applicable law should be, is the correct one. For the court, it is usually not merely a matter of choosing between the alternatives that are presented to it, but of determining the relevant facts, authoritatively establishing which legal rules are indeed to be applied, and then deciding the case based upon its findings. In the process of making a motivated choice of the applicable legal rules, interpretation of the law is more often than not called for. Such interpretation may have to be original and creative, contributing to the development of the law. But, one might then ask, where is the boundary between the interpretation and application of the provisions of a Constitution, statute or of a common law norm on the one hand, and filling a gap in the fabric of the law on the other? The answer to this question may be different for the constitutional and non-constitutional contexts.

In cases where the domination of the provisions of the Constitution is not a crucial factor for deciding a case, the interpretation will not require consideration of the foundations, structure, principles and values of the Constitution concerned. This naturally does not mean that gap-filling in non-constitutional law is not value-bound or contextual, but the context in such cases may not call for the interpreter to base the interpretation on the Constitution. Here we will not attend to such cases.

When it comes to the interpretation of a supreme Constitution, either for the purposes of deciding a point of constitutional law as such or of non-constitutional law that must be interpreted by taking the provisions of the Constitution into consideration, the full impact of the foundations, principles, values and specific wording of the Constitution must be considered. Limiting this analysis to Constitutions with a status elevated above “ordinary” legislation (written with a capital “C”), i.e., Constitutions enjoying priority before all other law, brings one to a different world of interpretation and gap-filling. Due to the spread of constitutionalism, this is the world that an increasing number of people are living in.

Let us now consider more fully whether constitutional interpretation amounts to gap-filling.

II. CONSTITUTIONAL INTERPRETATION AS GAP-FILLING

The era of the supreme Constitution has brought about some important changes in the judicial responsibilities of courts. Constitutions differ from other laws in that, at least in part, they usually create a

framework within which the law is to be understood rather than laying down clear “black-letter” rules. Constitutions need to be interpreted and the courts are in most cases, sometimes to the frustration of the other branches,¹² the designated authoritative interpreters. In newly established constitutional states or where the constitutional environment changes fundamentally, the courts are often, especially during the early years of constitutionalism, called upon to be creative in their constitutional adjudication.¹³ Although not all constitutional adjudication can properly be classified as such, it would appear that authoritative constitutional interpretation requiring evolutionary propounding of legal norms determined by superior constitutional standards may be understood to be a particular form of gap-filling.

This is perhaps best illustrated by the changes occurring in the English legal system in recent decades. Bogdanor describes recent developments in the UK in the following terms:¹⁴

The British constitution is now characterised not by the sovereignty of Parliament and a concentration of power at the centre, but by a separation of powers at the centre, and a quasi-federal territorial separation of powers between Parliament and the European Union, on the one hand, and the devolved bodies, on the other. Britain is in the process of becoming a constitutional state, one marked by checks and balances between the different organs of government, and a state in which the judiciary now has a crucial role to play in the determination of individual rights and in determining the scope of government action.

Roger Masterman confirms the role of the British judiciary’s “ability to amend or modify primary legislation in the name of achieving compatibility with the Convention rights.”¹⁵ Although the British courts

12. A rather disturbing example is the amendments to the Fundamental Law of Hungary in March 2013 in terms of which the jurisdiction of the Constitutional Court was severely curbed, according to Human Rights Watch, <http://www.hrw.org/news/2013/03/12/hungary-constitution-changes-warrant-eu-action> (last visited May 10, 2013), as a response to decisions of the Court in 2012 declaring some parliamentary laws unconstitutional.

13. E.g., the Constitutional Court of Kosovo established in 2009 has been quite active in the structuring of the new constitutional dispensation. This is immediately clear when one surveys its judgments to be found at <http://www.gjk-ks.org/?cid=2,1> (last visited May 10, 2013).

14. VERNON BOGDANOR, *THE NEW BRITISH CONSTITUTION* 289 (Hart 2009). He introduces the section of the book from which this citation is taken with the following dramatic statement: “The constitutions of Bagehot and of Dicey, then, are dead or dying.” *Id.* at 285.

15. ROGER MASTERMAN, *THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION—JUDICIAL COMPETENCE AND INDEPENDENCE IN THE UNITED KINGDOM* 156 (Cambridge UP, 2011). Section 3(1) of the *Human Rights Act* of 1998, adopted against the background of the British accession in 1951 to the *European Convention on Human Rights* provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

are not formally “constitutional” courts, they have obtained the capacity through the *Human Rights Act* of 1998 “to make law” through statutory interpretation and the development of the Common Law.¹⁶ Despite the continued existence in legal rhetoric of the sovereignty of Parliament, its mere assertion is “an inadequate ground on which to entirely deny the coercive power which the judiciary do wield over both of the elected branches of government.”¹⁷ The introduction of constitutional considerations in adjudication has had the effect of actually determining the meaning of parliamentary legislation: “[R]egardless of the clarity with which parliamentary intent is expressed . . . the courts act as the conduit between the theory of Parliament’s unfettered legal power and its translation into practice.”¹⁸ These are circumstances where, when the courts find gaps in the law, be it statutory or otherwise, they respond by filling the gaps by means of constitutional interpretation. Such a role for courts is common in constitutional states and is sometimes formalized in express constitutional provisions.¹⁹

Although this is not offered as an argued taxonomy of gaps that occur in constitutional law, at least three instances can be identified: a gap in the Constitution (or the constitutional order) as such, gaps in the law caused by the introduction of a new Constitution and gaps caused by constitutional adjudication. Gaps in these three categories may be illustrated with reference to some South African examples.

A rather dramatic instance of constitutional gap-filling occurred when the newly negotiated South African Constitution came into force in 1994. The Constitution was silent on the admissibility of the death penalty, a burning political issue that could not be resolved in the negotiation process during which the Constitution was formulated. This was a constitutional *lacuna* that was left intentionally, though not expressly, to be filled by means of creative constitutional interpretation. It required the newly established Constitutional Court almost immediately to attend to it in what may be considered to be its inaugural judgment.²⁰ In a comprehensively argued and well-documented decision in which each of the eleven judges on the bench delivered an independent judgment, the Court found the imposition and execution of capital punishment to be inconsistent with the Constitution, essentially on the

16. MASTERMAN, *supra* note 15, at 247.

17. *Id.* at 251-52.

18. *Id.* at 252.

19. E.g., section 39(2) of the *Constitution of the Republic of South Africa, 1996*, cited in the text below.

20. *S v Makwanyane*, 1995 3 SA 391 (CC).

basis of the death penalty being incompatible with the constitutionally entrenched disallowance of cruel and inhuman punishment. Both constitutional comparison and the application of constitutional values played a role in the judgments of the members of the bench.

In another case decided by the South African Constitutional Court in 2005,²¹ eight justices each delivered a separate judgment, some quite voluminous, in addition to the joint judgment of the bench of eleven. One of the issues to be determined was whether subordinate legislation should be deemed to be administrative action for the purposes of deciding its consistency with the Constitution. The answer to this question was, according to one of the justices not to be found in the provisions of the Constitution, nor in the applicable legislation adopted by Parliament as required by the Constitution.²² As an introduction to a lengthy and thoroughly motivated explication of this finding, Justice Sachs made the following significant remark:²³ “While the Constitution, like nature, abhors a vacuum, it does have what may appear to be *lacunae*. One of the tasks of the judiciary is, when called upon, to fill in these apparent gaps. It does so not by a process of invention but by one of completion.”

In 2007, the South African Constitutional Court was called upon to determine whether a conviction of rape for conduct that was not covered by the common law definition of rape (because the penetration was anal and not vaginal), should be confirmed. The court did not confirm the conviction because it would have required retrospective redefinition, but did extend the definition of rape for future cases. The ground upon which this redefinition was undertaken was that the promotion of “the spirit, purport and objects of the Bill of Rights” required it.²⁴ Section 39(2) of the 1996 Constitution provides, “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.” Judicial development of the common law was, according to the Court, to be distinguished from testing legislation for constitutionality, which is part of the process of checks and balances between the constitutional branches.

The development of the common law on the other hand is a power that has always vested in our Courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed, but

21. *Minister of Health v New Clicks* 2006 (2) SA 311 (CC).

22. The legislation concerned was the *Promotion of Administrative Justice Act* 3 of 2000.

23. Para. [580] of the judgment in *New Clicks*, 2006 (2) SA 311 (CC).

24. *Masiya v Dir. of Pub. Prosecutions*, Pretoria 2007 (5) SA 30 (CC) para. [27].

the Constitution in s 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition . . . that it is the Legislature that has the major responsibility for law reform. . . . The greater power given to the Courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.²⁵

In this case, the gap in the common law definition was caused by the constitutional requirement that all law should be interpreted in order to align it with the spirit, purport and objects of the Bill of Rights.

The reverse side of the coin, as it were, is exposed by the difficulties that arise when a judgment which declares a legal rule of whatever nature to be unconstitutional, *creates* a gap in the law by the removal of the offending rule while it does not have the authority to replace it. This has been the concern of the South African Constitutional Court in various cases against the background of a provision of the 1996 Constitution²⁶ in terms of which a court may, where it declares a law to be inconsistent with the Constitution, order the suspension of the coming into effect of the invalidity in order to allow for the correction of the defect. Thus, e.g., in 2007 the Constitutional Court declared²⁷ the provision in the *State Liability Act 20 of 1957* (which did not allow for execution or attachment against the state or for a procedure for the satisfaction of judgment debts of the state) constitutionally invalid. The declaration was however suspended for twelve months in order to allow Parliament to remedy the situation since the Court considered the complexities of the state's accounting procedures to fall outside the ambit of adjudication, but within that of the administration. Merely nullifying the provision would have left an undesirable gap, but the Court required Parliament and the executive to fill the gap. Ironically, in what might be described as a process of (confrontational) dialogue²⁸ between the judiciary and the executive, the Court extended the period of suspension twice before it allowed a final extension attached to a suggested reformulation of the

25. *Id.* para. [31].

26. Section 172(1)(b).

27. *Nyathi v MEC for Dep't of Health, Gauteng* 2008 (5) SA 94 (CC).

28. An example of judicial/legislative dialogue of a more amicable nature is to be found in the judgment in *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) paras. [55]-[56], where the Court took note of a possible *lacuna* caused by its finding of the invalidity of a piece of legislation, but preferred merely to "draw the legislature's attention to this possible lacuna, if any."

offending provision.²⁹ Parliament then effected the amendment, much in the manner suggested by the Court, in 2011.³⁰

These examples (and it is possible to find many more in various jurisdictions) can hardly not be understood as occurrences of gap-filling by means of constitutional interpretation. A question that might be raised here (although it will have to be pursued elsewhere), is whether there is a real qualitative difference in the nature of the creative work of the classical Roman jurists, the English equity courts and contemporary constitutional courts. One may observe tentatively that the Roman jurists relied on their assumed rational wisdom and the equity judges on their instincts for justice, but that constitutional judges today have the four corners of a supreme Constitution within which to work, usually enriched by comparative examples and by foundational values incorporated in the text.

III. CONSTITUTIONAL VALUES AS INTERPRETATIVE TOOLS

The notion of “constitutional values” is frequently encountered in current constitutional discourse. Its meaning is however not crystal clear and it is often used in association with the notion “principle.” Consider, e.g., the language of the *Constitution of the Russian Federation* of 1993: in the Preamble mention is made of the assertion by the “multinational people of the Russian Federation” of “human rights and freedoms, civil peace and accord,” “the universally recognized principles of equality and self-determination of peoples,” “faith in goodness and justice,” the “democratic foundations” of the state and of being part of the world community. In Article 1, Russia is proclaimed to be “a democratic, federative, law-governed State with a republican form of government,” and Article 2 identifies “man, his rights and freedoms” to be “the supreme value.”

In the introductory chapter of a book on the future of international law, Antonio Cassese points out³¹ that “some traditional state prerogatives” such as sovereignty “are being steadily eroded by the emerging universal values consecrated in peremptory international norms.” This sounds more negative than it should. It in fact concerns what is being referred to as the “constitutionalization of international law,” an important element of which is the extrapolation of values engraved in national constitutions to the international sphere. Expression

29. Minister of Justice & Constitutional Dev. v Nyathi 2010 (4) SA 567 (CC).

30. *State Liability Amendment Act* 14 of 2011.

31. REALIZING UTOPIA—THE FUTURE OF INTERNATIONAL LAW, at xix (Antonio Cassese ed., Oxford UP, 2012).

was given to this notion in the judgment of the European Court of Justice in the *Kadi* case.³²

[F]undamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.

In his engaging contribution to a book on Russia's Constitution, Alexei Trochev³³ describes the considerable efforts of the Russian Constitutional Court (RCC) to extract the "spirit" and unwritten principles of the 1993 *Constitution of the Russian Federation*, inter alia by means of extensive comparative surveys into international and European law. Despite the lack of support that the highly activist constitutional bench³⁴ received from the government and other Russian courts, the efforts of the Court exemplify a specific form that legal gap-filling takes in newly reconstructed constitutional systems. Trochev states:³⁵

From the beginning of its operation, the RCC has been developing its own hierarchy of both written and unwritten legal principles. Initially, the Court was forced to draw on the unwritten principles to make up for the gaps in internal contradictions in the heavily amended Soviet-era 1978 Constitution.

Trochev ascribes an aspiration to the RCC "to develop constitutional principles as a way of protecting basic rights against their abuse by the ever-expanding administrative state" which led to the development of three hierarchical layers of constitutional principles, namely "generally accepted principles of law," followed by "constitutional principles" and legal principles specific to various branches of the law. Fairness, equality and proportionality are among the "principles" in the highest category, in the second we find federalism, separation of powers, etc. and in the third, freedom of private activity, free movement of goods and capital, etc.³⁶

32. *Kadi & Al Bakaraat Int'l Found. v Council & Comm'n* [2008] ECR I-6351 para. 283.

33. Alexei Trochev, *Russia's Constitutional Spirit: Judge-Made Principles in Theory and Practice*, in *RUSSIA AND ITS CONSTITUTION: PROMISE AND POLITICAL PRACTICE* 53-77 (Gordon B Smith and Robert Sharlet eds., 2008).

34. In terms of Article 125 of the 1993 Constitution, the Constitutional Court is composed of 19 judges and is endowed with the jurisdiction to interpret the Constitution, to test legislation and international agreements entered into by the Federation and to nullify them if found to be unconstitutional.

35. Trochev, *supra* note 33, at 55.

36. *Id.* at 55-56.

This work of the RCC is clearly intended to enhance and expand the meaning and impact of the 1993 Constitution. It is indeed an example of extensive interpretation of the constitutional text for the purposes of establishing binding legal norms for which express provision has not been made.³⁷ That appears to me to be constitutional gap-filling par excellence.

What the distinction is between constitutional “values” and constitutional “principles” is not clear at all and it does not help that, e.g., both fairness (probably a good candidate to be described as a value) and the separation of powers (which has the character of a principle rather than a value³⁸) are classified as “principles.”

The South African Constitution suffers from the same terminological confusion that is found in the Russian discourse. Section 1 of the 1996 Constitution³⁹ provides as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

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

Given such a broad palette of “values,” it is to be expected that some would carry more weight than others. There is good reason to consider human dignity to be the primary kernel value of the Constitution, as is the case in Germany.⁴⁰ Supporting kernel values are equality and liberty, democracy, the supremacy of the Constitution and the rule of law are

37. *Id.* at 56. Trochev refers to a judgment of 2000 that expanded the meaning of Article 55(3) of the Constitution to include the freedom to contract. The article is broadly worded:

Human and civil rights and liberties may be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, for ensuring the defense of the country and the security of the state.

38. In *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), e.g., at para. [21], itself a “gap-filling” judgment regarding the doctrine of the rule of law, the Constitutional Court specifically referred to rule of law as a “principle.”

39. In terms of section 74(1) of the 1996 Constitution this foundational provision is more heavily entrenched against amendment than the rest of the Constitution.

40. The very first provision of the 1949 *Grundgesetz*, Article 1(1) states: “Human dignity is inviolable. To respect and protect it is the duty of all state authority.”

values of a structural and procedural nature while non-racialism and non-sexism are values that eventuate from the kernel values.⁴¹

We will however not here attempt to solve the terminological confusion over what values and principles are. It is in fact a matter requiring deeper, philosophical, analysis. I have suggested elsewhere⁴² that it is possible to distinguish between constitutional values and principles. A constitutional value may be understood to be a standard or measure of good, to set requirements for the appropriate or desired interpretation, application and operationalization of the Constitution and everything dependent thereupon. A constitutional principle might then be understood to be founded upon and to give expression to a constitutional value: if for example justice is a foundational value of a Constitution, a principle that would be founded upon it would be that the law should be applied fairly. Let us however assume for the purposes of this discussion that both constitutional values and principles are manifestations of the same phenomenon, namely qualitative standards underlying substantive rules of law that determine the interpretation of the meaning and effect of those rules.

The jurisprudence of the South African Constitutional Court is required to be guided⁴³ by the values expressed in section 1 of the 1996 Constitution.⁴⁴ The *dicta* of Justice Albie Sachs in his supplementary minority judgment in the *New Clicks* case cited above, demonstrate the

41. This classification was elaborated upon in FRANCOIS VENTER, CONSTITUTIONAL COMPARISON—JAPAN, GERMANY, CANADA & SOUTH AFRICA AS CONSTITUTIONAL STATES 141-44 (Juta & Kluwer 2000). Whether all of these “values” are properly so called instead of being identified as constitutional principles is a question deserving of consideration.

42. FRANCOIS VENTER, GLOBAL FEATURES OF CONSTITUTIONAL LAW 56 (Wolf Legal Publishers 2010).

43. The Court (and possibly also the authors of section 1 of the Constitution) was clearly influenced strongly by the judgment of the Canadian Supreme Court in *R. v Oakes* [1986] 1 S.C.R. 103, para. 64, to take this route. This *dictum* by Chief Justice Dickson reads as follows:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

44. Chaskalson CJ states in *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) para. [21]: “The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.”

filling of a *lacuna* by means of values-jurisprudence well.⁴⁵ According to Sachs, when a *lacuna* is found to be in need of filling:

The courts use what is there as the foundation for discerning what is not manifest; they render explicit what is implicit. They plumb the overall structure and design of the Constitution, and let themselves be guided by the values that the Constitution articulates.⁴⁶

And,⁴⁷ referring to what he considered to be “a notable *lacuna* in the Constitution” and related legislation, had the following to say:⁴⁸

The legal imagination does not invent materials that do not exist. Rather, it reconfigures already acknowledged legal materials according to a new underlying or organising principle. Such a principle derives its force from the fact that it is recognisable, incontrovertible and possessed of great and immediate explanatory power. It produces a fresh way of looking at and appreciating the significance of the materials as a whole. The whole is made up of the parts, but is greater than the parts, and solidifies their interrelationship. Central to my analysis is the concept, drawn expressly and implicitly from the text of the Constitution, that South Africa is a constitutional democracy. This basic understanding is more than an aid to the interpretation of a particular text. It serves as an independent structural element in the analysis.

For this view, Sachs J found support in the lectures of Charles L Black, whose central thesis was that the appropriate method of constitutional interpretation was “inference from the structures and relationships created by the constitution in all its parts or in some principal part.”⁴⁹ Sachs eloquently explained his interpretative approach based on values (although identifying the standards both as principles and values in the same breath, as it were) in the following terms:⁵⁰

The problem, then, is not *whether* the values of accountability, responsiveness and openness should apply to the adoption of subordinate legislation, but *how*. In particular, what does the Constitution looked at as an organic and principled whole, and not as a patchwork of discrete injunctive texts, require in terms of procedures that will meet constitutional standards? How can one ensure that the processes are manageable and efficient? This is an area that cries out for express legislative guidance. Experience in this country and abroad, both positive and negative, needs to

45. *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) para. [581].

46. *Id.* para. [580].

47. *Id.* para. [581].

48. *Id.*n.2.

49. CHARLES L BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (La. State Univ. Press 1969).

50. *New Clicks* 2006 (2) SA 311 (CC) para. [628].

be weighed. A decade of constitutional democracy provides invaluable insight into the problems involved. . . . In the absence of such legislation it will therefore be incumbent on the courts, oriented by the foundational constitutional principles of accountability, responsiveness and openness, and cognisant of the fact that we are living in a constitutional democracy, to ensure that proper procedures are followed when subordinate legislation is being made.

Examples such as these from Russia and South Africa of the actual and potential role of constitutional values in constitutional adjudication as a means of expertly filling the blank spaces on the constitutional canvas also occur in other jurisdictions, and in international law.⁵¹ Thus, even with respect to the unwritten (or perhaps nowadays more properly described as unconsolidated) British constitution Masterman writes:⁵² “Proportionality and deference are . . . the tools with which the courts regulate their interventions in the political realm.” One might in passing wonder whether these “tools” are merely instruments, or have they (or one of them) grown into constitutional principles?

Whatever name or designation we choose to give to the standards of constitutional interpretation, be it values, principles or something else, there is no denying the crucial role they perform in the process of the constant judicial exposition or elucidation of constitutional law as the guiding norm for law in constitutional states—a process also capable of being described as constitutional gap-filling.

IV. CONSTITUTIONAL COMPARISON AS INTERPRETATIVE TOOL

The growing inclination of courts to resort to comparative enquiries in the process of developing solutions to constitutional questions that need to be adjudicated (especially in instances where a clear and unambiguous legal rule is absent) has increased the importance of comparative methodology. The tendency towards global comparison can perhaps also be understood as the cause of an increasing number of jurisdictions having become “mixed.” This “mixedness” however has less to do with the legal systems concerned having split historical roots

51. Useful further elaboration on the role of (constitutional) values in international law is provided by other contributors to Cassese: Andreas Paulus, *Whether Universal Values Can Prevail over Bilateralism and Reciprocity*, in (REALIZING UTOPIA—THE FUTURE OF INTERNATIONAL LAW, *supra* note 31, ch. 8; Antonio Cassese, *A Plea for a Global Community Grounded in a Core of Human Rights*, in (REALIZING UTOPIA—THE FUTURE OF INTERNATIONAL LAW, *supra* note 31, ch. 11; Massimo Iovane, *Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law*, in (REALIZING UTOPIA—THE FUTURE OF INTERNATIONAL LAW, *supra* note 31, at 615 *et seq.*

52. MASTERMAN, *supra* note 15, at 246.

than with the spread of a globalized conception of desirable constitutionalism recently enthusiastically embraced and superimposed, for better or for worse, upon many legal orders that did not previously contribute to the idea. Those legal orders do not always contain sufficient inherent resources required for the cultivation of responses to profound questions raised by the overarching demands put forward by pervasive constitutionalism. This naturally inspires the urge—if not the need—to venture comparatively into the constitutional world beyond the national frontiers.

Comparative lawyers, especially those interested in public law, will know that the global debate on constitutional comparison (often erroneously referred to as “comparative constitutional law” as though it were a discipline such as labour law or criminal law⁵³) has assumed huge dimensions. In some countries dogmatic opposition to the utilization or even reference to foreign materials in constitutional adjudication is tangible.⁵⁴ In other cases constitutions favour comparison.⁵⁵ In the supra-national context of Europe comparison has become entrenched in the system.⁵⁶ In newly constituted democracies constitutional courts often demonstrate a considerable appetite for the inclusion of comparative insights from abroad.⁵⁷ Indulging in such comparison is however not without its difficulties. Even elementary methodological questions such as the reasons for a court to consider foreign law and the choice of jurisdictions for comparison have no simple answers if judicial serendipity or quasi-learned posturing is to be avoided.⁵⁸ Having

53. According to Otto Pfersmann, *Ontological and Epistemological Complexity in Comparative Constitutional Law*, in ANTONINA BAKARDJIEVA ENGELBREKT & JOAKIM NERGELIUS *NEW DIRECTIONS IN COMPARATIVE LAW* ch. 6, at 85 (Edward Elgar 2009): “There is perhaps only one subject in which there is more confusion than within the eternal debate ‘what is law?’ and this is the use of the expression ‘comparative law.’”

54. Consider the continuing debate in the United States sparked by conflicting opinions expressed in 2005 by the Justices of the U.S. Supreme Court on the use of foreign materials in the interpretation of the Constitution in *Roper v Simmons*, 543 U.S. 551 (2005). Mark C. Rahdert commented very usefully on this debate in *Comparative Constitutional Advocacy*, 56 AM. UNIV. L. REV. 553-665 (2007).

55. Section 39(1) of the 1996 South African Constitution provides: “When interpreting the Bill of Rights, a court, tribunal or forum—... (b) must consider international law; and (c) may consider foreign law.”

56. *Cf.* *Kadi & Al Bakaraat Int’l Found. v Council & Comm’n* [2008] ECR I-6351.

57. *Cf.* Trochev, *supra* note 33.

58. In his recent provocative editorial, Ran Hirschl rightly rebukes the idea of the comparative study of constitutionalism as “a predominantly legalistic enterprise that is heavily influenced by the prevalent case-law method of instruction” (characteristic of North-American law schools). Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 INT’L J. CONST. L. 1-12 (2013).

surveyed the current trends in constitutional comparison elsewhere,⁵⁹ the statement of the following assumptions regarding constitutional comparison must suffice here:

- Globalization has profoundly influenced the nature of constitutional law and the need for comparison.
- law, regardless of its geographic application, can no longer be understood or practiced properly without comparative engagement.
- Constitutional comparison can be undertaken to variable depths, and under some circumstances benefit from insights gleaned from international law.

When we compare constitutional systems, and even constitutional norms across jurisdictions, we are not dealing with a distinct and delimitable component of a system of juridical norms ordering a national or the international legal community: we are merely drawing information from the different systems for the purposes of improving our understanding of constitutional law, be it foreign or local. Constitutional comparison is an undertaking which has become essential for the acquisition of adequate knowledge of constitutional law.

Some examples of the use of comparison as an interpretative tool in constitutional cases are useful to support these assumptions.

In the landmark South African death penalty case already cited, a great deal of comparative information was collected. The Court did however not consider itself bound by foreign examples since the Constitution required no more than “having regard to” foreign materials. The President of the Court wrote:⁶⁰

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.

Extensive citation of materials from various and diverse foreign jurisdictions, European and international law is to be found in the judgments, unfortunately with hardly any pointers towards an appropriate methodological approach. These materials nevertheless clearly bolstered the justices’ unanimous conviction that modern constitutionalism could not countenance capital punishment.

59. VENTER, *supra* note 41; VENTER, *supra* note 42.

60. *S v Makwanyane*, 1995 3 SA 391 (CC) para. [34].

Reverting again to the Russian example discussed above, the manner in which the Russian Constitutional Court interpreted the 1993 Constitution extensively also demonstrates the use of comparison to produce the materials with which constitutional gaps may be bridged. According to Trochev,⁶¹ the RCC built its hierarchy of principles on the broader text of the provisions of the Constitution, interpreted against the background of international human rights law reflected in, e.g., the *Universal Declaration of Human Rights*, the *European Convention on Human Rights* (even before the latter was ratified by Russia) and judgments of the European Court of Human Rights.⁶² Furthermore the judges “routinely” study and cite the judgments of a broad spectrum of foreign courts. This relatively rapid process of concretization of constitutional principles by the RCC, Trochev indicates, is comparable to the manner in which the Constitutional Courts of Italy, Korea and Spain proceeded, albeit with less speed.

Using foreign and international materials, whether required or merely allowed as an interpretative instrument to fill in empty spaces in the law, is an art in need of development. It is frequently done, often badly and either for poor reasons or with undisclosed (and therefore suspect) motivations. The history of constitutional comparison goes back to Aristotle and Montesquieu,⁶³ and comparison was strongly in evidence in every period of constitution-writing, recurring in surges through the centuries of constitutionalism.

Perhaps one of the main reasons for the absence of terminological and epistemological coherence in the field of comparative law, is the fact that promoters of the notion have over time been too ambitious in their goals. Typical e.g., was Ernst Rabel who, working for international legal unification between the two World Wars of the twentieth century, hoped to promote solutions to various national and international problems of his time.⁶⁴ Despite the fact that Rabel’s heritage is considerable, as can be

61. Trochev, *supra* note 33, at 57 *et seq.*

62. A recent example of the Court’s reference to judgments of the EctHR is to be found in the RCC’s *Judgment of 24 December 2012 No. 32-II* (English translation available at <http://www.ksrf.ru/en/Decision/Judgments/Documents/2012%20December%2024%2032-P.pdf>, p. 7 (last visited Apr. 26, 2013).

63. *Cf., e.g.,* Charles Donahue, *Comparative Law Before the Code Napoléon*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW 4* (Mathias Reimann & Reinhard Zimmermann eds., Oxford UP 2006); Lorenzo Zucca, *Montesquieu, Methodological Pluralism and Comparative Constitutional Law*, 5 *EUR. CONST. L. REV.* 481-500 (2009).

64. David J Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* ch. 7, at 196 (Annelise Riles ed., Hart Publ’g 2001).

traced in the contemporary international law on the sale of goods,⁶⁵ his contribution to comparative methodology is rather obscure.⁶⁶

Not quite as ambitious, Otfried Höffe has more recently written⁶⁷ of the emergence of a World Republic. He did not intend thereby to indicate the emergence of a single world state, but rather the development of a global form of governance founded upon the moral responsibility of mankind to recognize within itself the need for a universal legal imperative: the rule of law, justice and democracy should, according to Höffe, be acknowledged as a global standard applicable to the future world order, which may be characterized by the notion of a subsidiary (in the sense of subsidiarity) and federal World Republic. Despite the unfortunate choice of terminology (the Orwellian-sounding “World Republic”), Höffe’s identification of common concepts of constitutional governance is sound and is consonant with a growing literature dealing with global constitutionalism.⁶⁸

Contemporary comparative activity and the concomitant theorization has given rise to a flourishing cottage industry of metaphor-making. Writing shortly after the first heart transplant done by Christiaan Barnard in Cape Town, Alan Watson coined the term “legal transplant.”⁶⁹ Some other well-known metaphors include “reception,” “borrowing,” “circulation of legal models,” “legal transfers” and “cross-fertilization.” In the constitutional context a fresh concept namely the “migration of constitutional ideas” was introduced a few years ago,⁷⁰ and Pierre Legrand has captivantly likened comparison to “caress” (with enticing sexual undertones!).⁷¹

65. Cf., e.g., Stefan Grundmann, *The Fault Principle as the Chameleon of Contract Law: A Market Function Approach*, 107 MICH. L. REV. 1583, 1583-85 (2009).

66. Gerber, *supra* note 64, at 199.

67. OTFRIED HÖFFE, *DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG* (CH Beck Verlag 1999), translated as *DEMOCRACY IN AN AGE OF GLOBALISATION* (Springer 2007).

68. Cf., e.g., the materials referred to in the editorial by Antje Wiener, Anthony F Lang, James Tully, Miguel Poiars Maduro, & Mattias Kumm, *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, 1 GLOBAL CONSTITUTIONALISM 1-15 (2012).

69. ALAN WATSON, *LEGAL TRANSPLANTS—AN APPROACH TO COMPARATIVE LAW* 27 (Univ. Press of Virginia 1974). More recently, Von Gebhard M Rehm, *Rechtstransplantate als Instrument der Rechtsreform und -transformation*, 72 RABELS ZEITSCHRIFT 1-42 (2008).

70. *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., Cambridge UP, 2006).

71. *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 311 (Pierre Legrand & Roderick Munday eds., Cambridge UP, 2003).

Huge dogmatic battles may be (and sometimes are) fought over comparative methodology.⁷² Probably the most popular, but also increasingly contested comparative approach is described as “functionalism.” The essence of functionalism is the idea that the function of a legal norm should be the starting point for comparison, whereby one is enabled to compare foreign legal norms performing the same function to provide solutions to similar legal problems in the different systems. Michaels⁷³ identifies seven different concepts of functionalism and concludes that it is an “undertheorized approach” but that much can be gleaned from a “more methodologically aware functionalism”⁷⁴ If this is true of functionalism, which has among the different schools and approaches to comparative law probably received most theoretical attention, it is clear that much remains to be done across the spectrum.

Often heatedly opposing functionalist are the universalists who, building upon the writings of Immanuel Kant, promote the possibilities of cosmopolitan peace and harmony founded upon democratic justice as the goal for humanity.⁷⁵ In our era of globalization this is a tempting approach enhanced by the spreading of the precepts of constitutionalism as it developed in Europe and North America. A universalist methodology will however tend to idealistically emphasize similarities between systems, easily blinding the comparatist to the realities of sometimes profound and irreconcilable differences.

Between the functionalist and universalist poles, a great many variations of methods and approaches are possible. To name some: the approach of the school of Critical Legal Studies would favour a focus on politics, history and social and economic realities; the “dialogical approach” would in constitutional comparison primarily be interested in constitutional interpretation in different systems, and postmodernist analysis is preoccupied with a confrontation with “the other.”

One does however not need to join a methodological camp in order to do constitutional comparison. I have concluded elsewhere⁷⁶ that

72. Paging through the contributions in Part II of Reimann & Zimmermann, e.g., quickly produces a picture of doctrinal pluralism. THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 63.

73. Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 63, ch. 10, at 339, 342.

74. *Id.* at 344-63, 381.

75. *Cf., e.g.*, THE GLOBAL JUSTICE READER pt. VI (Thom Brooks ed., Blackwell Publ'g, 2008) (including chapters from the works of Kant, Habermas and Pogge).

76. VENTER, *supra* note 42, at 48.

there is room for a multiplicity of comparative methods. Methodological claims that a particular approach will exclusively produce true, useful or even the most useful results have historically been successful in the founding of schools of comparative law, but their exclusion of the validity and utility of alternative approaches (typical of scholarly egoism and imagined intellectual self-sufficiency), tend to undermine their own validity, occasionally bordering on narrow-mindedness.

For the filling of gaps by means of constitutional interpretation, comparison has progressed beyond mere usefulness—it has become essential, if for no other reason than because of the undeniable conceptual linkage that exists between a growing number of contemporary constitutional orders while each continues to provide for the specific needs of the polity which produced its constitutional texts and norms.

V. CONCLUSION: THE VALUE OF CONSTITUTIONAL VALUES AND COMPARISON IN THE PROCESS OF FILLING *LACUNAE*

Qualitative constitutional standards underlying substantive rules of law essential for determining the desired meaning and effect of those rules—let us here call them “constitutional values”—are characteristic of our era of constitutionalism. Simultaneously, and partly also because of a significant degree of convergence of constitutional language around the globe regarding desirable constitutional values, constitutional comparison is often undertaken by courts in need of finding wisdom or indicators towards justice when they address *lacunae* in the course of interpreting and applying dominant constitutional norms. In most of such cases the judges display satisfaction with the results of their efforts although it cannot be said that a satisfactory set of dogmatic guidelines for cogent comparison has emerged as yet, nor is there satisfactory evidence that comparative and value-guided jurisprudence have promoted legal certainty or consistency. To find such evidence will require extensive empirical investigation, but until that is done, the hypothesis that constitutional comparison and value-driven interpretation are useful mechanisms for constitutional gap-filling does not appear to be unreasonable.

This is so, because using a framework of constitutional values (and/or principles) for the development of the law does make sense, given the reality that the law is not composed of a simple set of blind rules providing a wall-to-wall cover of all contingencies of human life. At the same time values are also not fixed quantities: a similarly named constitutional value, e.g., equality, may mean different things to different

interpreters, especially if they operate in differently composed, or plural societies. Nevertheless the core motive of a judge filling a *lacuna* must be to ensure a just outcome. Unfortunately “justice” also notoriously does not have a fixed meaning, nor can it be quantified in neutral terms.

It also makes sense to do constitutional comparison for the purposes of enhancing one’s understanding of essential constitutional conceptions in this globalized world, not as a luxury or elitist pastime, but as an essential component of dealing with constitutional law. In the long run, the development of trustworthy comparative methods may promote the predictability of outcome and therefore legal certainty, but legal scholarship has much work ahead if that is to be achieved.