

# Comparative Constitutional Law: An African Perspective

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Presentation to the UCT Department of Public Law  
Curriculum Day, 14 March 2008

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## CCL in African Courts

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- A brief survey of two jurisdictions (Malawi and Uganda) reveals that comparative constitutional law (CCL) is alive and well in Anglophone African courts
  - See:
    - In the Matter of the Question of the Crossing the Floor by Members of the National Assembly [2007] MWSC 1 (15 June 2007) (constitutionality of constitutional ban on floor-crossing)
    - Law Advocacy for Women in Uganda v Attorney General [2007] UGCC 1 (5 April 2007) (constitutionality of penal code provision relating to adultery against equality clause)
    - Tumukunde v Attorney General [2005] UGCC 1 (1 January 2005) (challenge to decision by President as Commander-in-Chief to dismiss Army Representative in Parliament)
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## CCL in African Courts cont.

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- ❑ Anecdotal evidence suggests that Anglophone African courts tend to refer more often to decisions of the CCSA than the CCSA does to decisions of other Anglophone African courts
  - ❑ The CCSA in this sense plays a role similar to that played by the US Supreme Court during the immediate post-WWII period
  - ❑ Anglophone African courts also frequently refer to non-African constitutional jurisprudence, and particularly to decisions of courts in other Commonwealth countries
  - ❑ CCL is used both in Bill of Rights disputes and in federalism or separation of powers cases
  - ❑ There is very little cross-referral between Francophone and Anglophone Africa
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## Implications for teaching

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- ❑ Question regarding relevance of CCL to teaching is therefore easily answered: not just a 'nice to have' but a 'must have'
  - ❑ Knowledge of comparative law method is a vital tool for Africa's future constitutional litigators and judges
  - ❑ CCL should therefore be taught in law schools, and African universities need to become au fait with debates in this area
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# The US debate

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- The Anglo-American debate over CCL has been rekindled by the decade-old dispute among justices of the US Supreme Court about the use of foreign law (see decisions cited in Saunders fn 3)
  - Justice Scalia, supported by Justice Thomas, leads the CCL-skeptics, and Justices Stevens and Kennedy the faction favourably disposed to CCL
  - Covers both Bill of Rights and federalism cases (Printz)
  - CCL-Skeptics essentially argue that the practice of CCL is democratically illegitimate and prone to outcome-oriented manipulation
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## The US debate cont.

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- ❑ Pro-CCL faction was in majority in *Lawrence v Texas* 539 US 558 (2003) (striking down criminal prohibition on sodomy with reliance on ECHR decisions as evidence that such prohibition not universal in West) and *Roper v Simmons* 543 US 551 (2005) (striking down juvenile death penalty)
  - ❑ US debate has particular inflection, given prominence of original intent theories of constitutional interpretation, the long-standing ideological conflict on the Court, and the status of the US constitutional model as the Ur-model from which all others are derived
  - ❑ Debate in other jurisdictions tends to be less sharp, but nevertheless raises very serious questions about the legitimacy and methodology of CCL
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## CCL and constitutional design

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- It is taken for granted in the Anglo-American debate that, of the two uses of CCL (constitutional design and adjudication), its use in constitutional design is least problematic
  - Once a duly elected constitutional assembly ratifies a constitution, whatever foreign influence there may have been on the constitution-making process is assumed to have been democratically legitimated
  - In Africa, this assumption may be naive:
    - Both immediately after independence and In the 1990s, foreign-authored constitutions were adopted by parliaments with little real sovereignty
    - Even in South Africa, where the constitution-making process is depicted as having been a productive dialogue between western liberalism and indigenous political traditions (Klug), the Constitution is vulnerable to the charge of disproportionate influence by foreign ideas
    - In certain quarters, liberal constitutional rights are regarded as the modern-day equivalent of the reviled colonial 'repugnancy clauses'
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## The link between constitutional design and interpretation

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- ❑ Disproportionate foreign influence on constitutional design may be a Trojan horse for inappropriate reliance on foreign law in constitutional interpretation
  - ❑ Reason? Foreign interpretations of foreign transplants seem self-justifying
  - ❑ Now accepted, however, that even where the verbatim text is borrowed, a country's political tradition and legal culture may make reliance on foreign-law interpretations of those phrases inappropriate
  - ❑ This is the so-called contextualist view, which will be touched on later
  - ❑ For now, 'transplantation' is out, 'migration' is in
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## The legitimacy problem

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- ❑ In the Anglo-American debate, the legitimacy problem with CCL is more commonly expressed in relation to the judicial use of foreign law in the justification of a decision
  - ❑ At his 2005 US Supreme Court confirmation hearing, Chief Justice Roberts famously attacked the use of foreign law by US courts as an anti-democratic practice, alleging that it allowed foreign judges, over whom the American people exercised no democratic control, to influence important US policy decisions
  - ❑ That particular critique may be unique to the US, with its peculiar combination of supreme-law judicial review, politicized judicial appointments process, and polarized theorizations of the legitimacy of judicial review (i.e. originalism vs. Dworkinianism)
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## The methodological problem

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- ❑ Outside the US, the legitimacy concern raised by Chief Justice Roberts is typically reframed as a methodological concern
  - ❑ The assumption is that there is a right way and a wrong way to do CCL and that, provided judges do CCL the right way, the practice is legitimate
  - ❑ Recent research has accordingly focused on the methodology of CCL, not just in Bill of Rights cases, but also in federalism and separation of powers cases
  - ❑ It is this particular part of the debate that needs to be understood by African legal academics and reflected in law school curricula
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## The methods

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- Tushnet identifies four CCL methods (or schools), to which may be added a fifth:
    1. Textualism: the view that permissible borrowing depends on similarities in constitutional text or rule – not supported in academy, but sometimes used by courts, either to dismiss relevance of foreign law or to justify reference to foreign law
    2. Functionalism: the recognition that rules that seem different on the surface may in fact serve a similar function in a constitutional system, and the concomitant belief that comparison should be conducted at this deep-structural level
    3. Universalism: the view that superficial differences between different legal rules in the major liberal democracies are simply different ways of reconciling/giving effect to the same liberal values or principles
    4. Contextualism: the view that, in fact, meaningful comparison can only take place when the judge or legal academic truly understands the doctrinal, institutional and legal-cultural context in which the rule is embedded
    5. Expressivism: the view that, in addition to these contextual issues, constitutional rules express something about a country's history and political traditions that is unique to it
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## Compatibility and usefulness of the various methods

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- ❑ Some of the methods of CCL depart from contradictory premises, and thus cannot be reconciled
  - ❑ Others can be reconciled in theory, but are better suited to different types of task
  - ❑ For example: textualism and contextualism cannot be reconciled since the latter denies the possibility of context-free meaning
  - ❑ Although it can be used to understand the work that a legal rule does in a particular system, and therefore its context, functionalism is probably better suited to constitutional design than it is to adjudication
  - ❑ Universalism is useful for identifying the outer parameters of a legal principle, but cannot be used without more to decide concrete disputes
  - ❑ Expressivism seems highly skeptical about the possibility of CCL, both as an aid to constitutional design and as an interpretative strategy
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## The cardinal rule: foreign law is not binding authority

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- Despite their differences, all methods agree that foreign law, as distinct from duly incorporated international law, may not be cited as binding authority
  - Rather, the purpose of referring to foreign law is to assist in arriving at the 'right answer' to the case according to conventions of legal reasoning applicable in the country concerned
  - Paradoxically, this starting point opens out the set of foreign decisions to which reference may legitimately be made in two ways:
    - the acceptability of citing minority opinions; and
    - the acceptability of citing opinions that may have been overturned on appeal, expressly or impliedly overruled by subsequent decisions, or counteracted by legislation
  - All that matters is whether the foreign rule or doctrine assists in understanding and answering the legal question before the court
  - This is helpful because it undercuts some of the 'lack of expertise' challenges to the legitimacy of CCL
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## The downside of non-bindingness

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- The fact that it is accepted that foreign law may be referred to only as persuasive authority has, however, a downside, viz:
    - Rules of precedent and legal validity no longer capable of limiting judicial discretion
    - Danger that judges may 'cherry-pick' decisions that suit them, either ignorant that the decision is no longer valid law or wilfully not disclosing that this is the case
  - In short, the objection is that CCL promotes unwanted judicial activism or simply sloppy decision-making
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## The combined challenge

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- When coupled with the charge that CCL is anti-democratic, it is clear that CCL faces an uphill justificatory struggle
  - Even in countries such as South Africa, where the Constitution expressly authorises reference to foreign law, and seems to require it for purposes of rights-limitation analysis, proponents of CCL must convince skeptics that the benefits of CCL outweigh its costs
  - The more mature a constitutional democracy, the harder it becomes to justify reliance on foreign law
  - In response to these challenges, certain informal rules have emerged for assessing 'good CCL practice'
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## Rule 1: The requirements for legitimate use of CCL vary

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- CCL may be used by judges (and legal academics) in a number of different ways, not all of which require the same methodological rigour (cf. Saunders pp. 99-100)
  - Some possible ways in which CCL may be used (in ascending order of the rigour required):
    - to understand the legal question being asked
    - to build a list of possible legal answers, without using CCL to justify a particular answer
    - to support a minor step in the argument that may in any case be supported by domestic authority
    - directly to support a particular interpretation as being better/more plausible than another interpretation suggested by the domestic legal materials and contended for by one of the parties
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## Rule 2: Direct reliance on CCL should not be undertaken lightly

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- ❑ When direct reliance is placed on foreign law to support a particular interpretation, the judge or legal academic must situate the decision or rule relied on within its doctrinal and institutional context
  - ❑ If the decision is a minority decision, or has been overruled or counteracted by legislation, this does not preclude reference to the rule, but should be mentioned, and an explanation given as to why the rule is nevertheless being relied on
  - ❑ Reference must also be made, where appropriate, to systemic features of the legal system that impact on the proper understanding of the rule
  - ❑ For example, if the jurisdiction concerned has a specialist Equality Court that limits the number and type of cases that come before the Constitutional Court, or results in the issues being framed in a particular way, this must be mentioned and factored into the analysis
  - ❑ In general, an optimal balance must be sought between putting the foreign rule in its doctrinal and procedural context and the need to avoid overburdening the decision with extraneous material
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## Rule 3: The foreign rule on which reliance is placed must be relevant

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- ❑ The overarching standard for reference to foreign law is that it must be relevant to the decision
  - ❑ Clearly, where one of the parties has strongly relied on foreign law, it is incumbent on the judge to deal with these arguments
  - ❑ This makes foreign law relevant to the case in a weak sense
  - ❑ A foreign rule referred to in argument may nevertheless be dismissed as irrelevant in the strong sense
  - ❑ Relevance in the strong sense is a function of:
    - (a) the similarity between the legal systems being compared; and
    - (b) the facts and law implicated in the case at hand
  - ❑ Dimension (a) makes reference to the law of other Commonwealth African countries with similar constitutional histories presumptively more relevant in Commonwealth African courts
  - ❑ Dimension (b) means that some of the techniques judges ordinarily use to deal with the applicability of binding domestic precedent may be applied *mutatis mutandis* to the use of foreign law
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## Illustration from Malawi Floor-crossing case ([2007] MWSC 1)

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- ❑ Part of case concerned alleged inconsistency between s. 65 (floor-crossing ban) of Malawi Constitution and ss. 32, 33, 35 and 40 (rights to freedom of association, conscience, expression and other political rights)
  - ❑ Earlier MSCA case (Nseula) had held that 'the entire Constitution must be read as a whole without one provision destroying the other'
  - ❑ Nseula in turn relied on Indian case of *Gopalan v State of Madras* (1950) SCR 88
  - ❑ In floor-crossing case, counsel argued that *Gopalan* did not stand for that proposition
  - ❑ MSCA affirms Nseula without commenting on its alleged misreading of *Gopalan*, situating decision instead in text of Malawi Constitution (s. 5 – meaning of 'law')
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## Malawi Floor-crossing case cont.

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- Next, and somewhat redundantly, MSCA refers to First Certification Judgment of the CCSA as authority for proposition that s. 65 amounts to reasonable limitation on s. 40 political rights
  - Greater reliance placed on similarity in wording between Malawi and South African anti-defection provisions than on similarity between electoral systems of Malawi and Britain (both first-past-the-post)
  - Relevance of quote from Edmund Burke dismissed on grounds that British Constitution unwritten with no express anti-defection provisions
  - Problems with decision:
    - Doesn't comment on its earlier alleged misreading of Nseula
    - Textualist rather than functionalist approach to use of foreign law
    - Fails to cite more recent decision of CCSA in UDM case, in which constitutional amendment permitting limited floor-crossing held not to violate political rights (although CCSA itself distinguished its own First Certification Judgment in UDM)
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