UTILIZING CONSTITUTIONAL VALUES IN CONSTITUTIONAL COMPARISON

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Summary

We are living in an era in which constitutional law has become a comparative science. A cogent, generally accepted methodology for constitutional comparison, however does not exist. There can, it is therefore submitted, be no such thing as a universal, monolithic science or discipline of comparative law, be it in the field of private or of public law. On the other hand, juridical comparison done unscientifically will not yield the fruits of useful knowledge.

The law in general is replete with unspecific notions such as justice, reasonableness, public interest, boni mores, and many others. It should therefore not be disturbing to find that values are often foundational to the operation and application of constitutional law. The values underpinning different constitutional systems may be useful as a tertium comparationis in a comparative exercise. This however requires a penetrating consideration of the foundations of the systems being compared.

In this contribution "a small comparative exercise" is undertaken by way of demonstration of the method. The South African constitutional provisions relating to equality and affirmative action are set against the background of the relevant norms and practices in the United States of America and Canada. This produces some useful insights:

- in the USA equality increasingly underpins a strict proscription of discrimination, thus shrinking the scope for justifiable affirmative action programmes;
- the South African law relating to discrimination and upliftment of the disadvantaged was clearly influenced by, and is therefore better understood against the background of, the equivalent arrangements in
Canada, which was in its turn possibly conceived against the backdrop of early developments in this regard in the USA;

- the Canadian doctrine and law of the constitution deals with affirmative action as an exception to the prohibition of discrimination and does not favour private affirmative action programmes;
- the South African approach seeks on the one hand to promote equality as a near-absolute prohibition of discrimination, while on the other hand affirmative action is projected not as an exception to non-discrimination, but as a means of achieving equality;
- whereas the identification of disadvantage in the USA and Canada tends to focus on discrete and insular minorities, the South African Constitution deals with an obvious reality of past disadvantage of a substantial majority, thus probably giving preferential programmes in South Africa a different character.

It is concluded that "comparing with values" has, at the very least, the potential of revealing which foreign sources can justifiably be used locally as authoritative or pursuasive references, and which not.