

LEARNED STAATSRECHT FROM THE HEARTLAND OF THE RECHTSSTAAT

Observations on the Significance of South African-German Interaction in
Constitutional Scholarship*

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I

During (especially the latter half of) the previous century it was impressed on several generations of law students (mainly but not exclusively) at Afrikaans speaking law faculties in South Africa, to pride themselves on their “principled” legal education.¹ Akin to (and indeed associated with) the paranormal knack of “thinking/reasoning like a jurist”, principled legal thinking was not really taught (or learnt), but sustained (like injuries) as a result of exposure to principled law teachers, enhanced by the ambiance of a principle-prone law faculty. In the impressionable, young minds thus shaped *Begriffsjurisprudenz* was principled legal thinking incarnate, and Germany the Valhalla² for those forever true to it.

* Background paper presented at a conference *Public Law Themes in South Africa and Germany* organised by South African scholars in Public Law under the auspices of the Alexander von Humboldt Foundation’s regional “Humboldt-Kolleg” programme and held at the Stellenbosch Institute for Advanced Study, Stellenbosch from 8-10 September 2005.

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1 Especially in (substantive) criminal law and the various disciplines of (substantive) private law.

2 Lindemans 2002 <http://www.pantheon.org/articles/v/valhalla.html> 21 Nov:
“Valhalla, Hall of the Slain, in Norse mythology is the hall presided over by Odin. This vast hall has five hundred and forty doors. The rafters are spears, the hall is roofed with shields and breast-plates litter the benches. A wolf guards the western door and an eagle hovers over it. It is here that the Valkyries, Odin's messengers and spirits of war, bring half of the heroes that died on the battle fields (the rest go to Freya's hall Folkvang). These heroes, the Einherjar, are prepared in Valhalla for the oncoming battle of Ragnarok. When the battle commences, eight hundred warriors will march shoulder to shoulder out of each door.”

The so-called *purist movement* in South Africa,³ whose heyday more or less overlapped with that of the latter-day apartheid regime (1948-1994), bore the torch of principled legal scholarship and jurisprudence. Its adherents preached and promoted – in class but in time also in courtrooms – loyalty to pure Roman-Dutch law, untainted by English legal influence and unperverted by English minded judges' (mis-)understanding of it. Like the legal systems of the Romano-Germanic or civil-law legal family, Roman-Dutch law – the purists' source of and guide to principled legal thinking – is of learned Roman-law extraction. This accounts for the purists' heartfelt empathy with the (German) historical school and, eventually, with the nineteenth century Pandectists who strongly influenced key-facets of the private-law theory taught at Afrikaans speaking law faculties in South Africa.⁴

Traditional South African-German fellow-feelings in law remained restricted to private law (excluding formal private law), criminal law (excluding criminal procedure), legal history, Roman Law as an academic discipline and perhaps legal philosophy and legal theory too (with international law eventually also creeping into the picture).⁵ Conspicuously underrepresented on the affinity list, for a long time, was the public law relevant for us at this conference, namely constitutional and administrative law which, in the “old” South Africa, was much more English than Roman-Dutch – as was criminal and civil law of procedure and various branches of commercial law. Constitutional and political reform was at any rate not a foremost concern of prominent purist legal scholars in South Africa. The handful of pioneers concerned with such reform felt quite comfortable to seek comparative guidance in the constitutional law of the United States of America – the oldest example of a system of modern-day constitutional democracy.⁶

3 Cf in this regard Du Plessis *Introduction to Law* 57-63; Fagan "Roman-Dutch Law" 60-64.

4 For nuanced and insightful discussions of this influence cf Van der Walt 1996 *TSAR* (3) 521; Van der Walt 1996 *TSAR* (4) 626; Van der Walt 1992 *THRHR* 170.

5 For a helpful overview, relating to the Humboldt contribution in particular, cf Rabie, Van der Merwe and Labuschagne 1993 *THRHR* 608.

6 One of these scholars, John Dugard, thought that consistent reliance on the Roman-Dutch (common) law could have boosted the safeguarding of basic human rights in apartheid South Africa and that many of the ills of apartheid were attributable to a lack of rigorous reliance on this “rights-friendly” source of South African law: Dugard 1971 *SALJ* 181 and

In the lively debates foreshadowing, accompanying and assessing the first tottering steps of constitutional democracy in South Africa during the 1990s, legal and constitutional comparison were dominant, and among the jurisdictions sourced for comparative examples Germany (and Canada) suddenly moved to the forefront. A number of South African scholars writing about various aspects of our transition to democracy, professed indebtedness to German sources, but not necessarily because these sources breathe the spirit of principledness.⁷ For the past ten years or so constitutional scholars have not (re-)turned to “the German example” as source of comparative information with an intensity and enthusiasm paralleling that of the mid-nineties. Most comparative studies referring to Germany⁸ actually saw the light when South Africa’s transitional or interim Constitution⁹ was still in force.¹⁰

The major object of this conference is to explore with (and for the benefit of) South African scholars, eligible for Von Humboldt stipends, possibilities for postdoctoral research in constitutional and administrative law in Germany. In this background paper I intend pursuing this object in mainly three ways (and not necessarily strictly in the sequence below):

- First, to explore the relevance of the German tradition of scholarship for South African legal scholars doing research on matters constitutional.
- Secondly, to reflect on possible reasons for strong South African-German affinities in matters constitutional.

Dugard *Human Rights and the South African Legal Order* 393-397. Dugard was educated at one of the (erstwhile?) bastions of “principled legal thinking” in South Africa, namely the Faculty of Law at the University of Stellenbosch.

7 Francois Venter’s attempt to adapt nineteenth century pandectism’s “principled” theoretical framework for (private-law) subjective rights to use in public law, was the exception and not the rule (cf Venter *Publiekregtelike Verhouding*) which attracted criticism; cf Van der Vyver “Doctrine of Private-law Rights” 208-209; Wiechers “Publieke Subjektiewe Reg” 270-291.

8 Among which an article by De Waal 1995 *SAJHR* 1 is foremost.

9 *Constitution of the Republic of South Africa* 200 of 1993.

10 There are, however, examples of more recently dated monographs broadly dealing with comparative issues and in which “the German example” receives its rightful attention; cf eg De Wet *Constitutional Enforceability of Economic and Social Rights*; Van der Walt *Constitutional Property Clauses* 121-163; Venter *Constitutional Comparison*.

- Thirdly, to reflect on the consequences of the affinities above-said as they have manifested themselves in South Africa's two constitutional texts since 1994 and in our constitutional scholarship and jurisprudence. Here I shall mainly devote attention to some developments since the commencement of South Africa's "final Constitution"¹¹ in 1997. However, at pains to preface rather than pre-empt deliberations on particular issues and themes, this third aspect of the paper will be restricted to bare essentials.

As far as the first two aspects of the paper are concerned, I intend sharing a moderate measure of personal experience too, and this will inevitably put an anecdotal spin on my presentation. I mention this principally to forewarn myself that a successful anecdote is one not centred on the person of the anecdotist, but on the illustrative value of the narrative involved. In case I am a failure as an anecdotist let me offer all those who are age-wise still eligible for a Humboldt stipend sound (anecdotal) advice right at the outset: Do not let the opportunity to apply for a Von Humboldt stipend go by default! Not following this advice was a rather regrettable mistake in my own academic career.

I have never counted myself among those South African legal scholars revering the conventional version of principled German (or, for that matter, South African) legal thinking. I have always found the legal positivism inherent in such thinking uninteresting, uninspiring and unimaginative. At the same time I have been attracted by – and, indeed, biased towards – the German intellectual tradition in general, especially in legal philosophy and legal theory, my default interests. German writings on philosophical and legal philosophical issues of interest to me, have mostly left me with a decidedly favourable impression of the quality of German scholarship, and I thank my understanding of topics as diverse as the evolution of early Greek natural law and the legal and political thinking of the church reformer, Jean Calvin, mostly to German sources.¹² In

11 *The Constitution of the Republic of South Africa* 108 of 1996 (hereinafter referred to as the 1996 Constitution).

12 Like Wolf *Griechisches Rechtsdenken* and Wolf *Das Problem der Naturrechtslehre* in

time (and in a growingly activist vein) some of the work of the *Frankfurter Schule* (the “Neo-Marxists” – as we used to call them) also shaped aspects of my philosophical thinking beyond repair.¹³

During the early 1990s the expectation of a new constitutional era in South Africa whetted my appetite for German constitutional law (and constitutional interpretation in particular) largely because of my previously positive encounters with “German learning”. At that time some of the locally published work contemplating a constitutionally reborn South Africa, devoted considerable attention to post-World War II German expertise and experience.¹⁴ In the process of actual constitution-making – both during the multi-party negotiations preceding the adoption of the transitional Constitution in 1993 and, later, in the Constitutional Assembly where the final (1996) Constitution took shape – a “German presence” (eventually manifesting itself in both end products) was tangible.

There is no single explanation for the consequential German influence on constitution-making and the inception of constitutional democracy in South Africa. As suggested before conventional academic affinities in law do not quite explain this phenomenon (but are also not wholly unrelated to it). Mentally many white Afrikaans speaking South Africans in apartheid South Africa identified with the “Germanic” traits in the German *Volksgeist*. For a long time German was the third language of preference in many an Afrikaans medium, secondary school. Germanist fellow-feelings among some Afrikaners even engendered concurrence in the Nazi notion of “an Arian *Herrvolk*”, remarkably pulling itself up by its bootstraps after a devastating war – against demonic forces that many Afrikaners, at any rate, regarded as hostile to their cause too. I can recall witnessing, even in the mid-1970s, earnest holocaust denial by well-educated, intelligent, Afrikaans speaking colleagues in law. It was, however, not

respect of the first topic and Baur *Gott, Recht und Weltliches Regiment im Werke Calvins* in respect of the second.

13 Cf eg Du Plessis 1984 *THRHR* 127.

14 Cf eg Davis, Chaskalson and De Waal “Democracy and Constitutionalism” 1-130.

these ill-placed, pro-German sentiments that brought the markedly German element to the constitutional negotiating table in South Africa.

As apartheid South Africa faced increasing academic isolation, most German institutions involved in academic exchange (universities as well as funding organisations) continued “to provide and keep open channels for comparative research to South African jurists”¹⁵ irrespective of race, colour, gender or creed as well as, controversially so, political and institutional affiliation. In the case of Humboldt stipends in law, almost only white, male academics, some approaching and others negotiating midlife, were advantaged by this approach, the only exception being a white female academic in 1986.¹⁶ The statistics for other German organisations, supporting academic exchange in law financially, probably did not differ significantly. According to the authors of an article appreciative of the Humboldt Foundation’s contribution to the development of the South African legal system and legal literature (hereinafter “the Humboldt article”) free access to the German academic world, amid increasing academic isolation elsewhere, resulted in “many South African jurists” relying “less heavily on Anglo-American law for comparative analysis” as well as a markedly “positive influence by German law on South African law reform”.¹⁷ This last claim will be tested shortly. However, it can safely be assumed that the jurists above-said could not, by themselves, have paved the way for a marked German impact on constitutional developments in South Africa, simply because they lacked the political clout to determine the outcome of decisions during multi-part negotiations (in 1993) and in the Constitutional Assembly (between 1994 and 1996).

The “mighty” ANC relied heavily on the input of their German *Berater*, Hans-Peter Schneider, Director of the *Deutsches Institut für Föderalismusforschung e.V.* in Hannover, and Professor of Law at the University of Hannover until

15 Rabie, Van der Merwe and Labuschagne 1993 *THRHR* 622.

16 The position just sketched, is as it was until 1995 (more or less also the time when the academic isolation ended); cf Rabie, Van der Merwe and Labuschagne 1993 *THRHR* 610-613.

17 Rabie, Van der Merwe and Labuschagne 1993 *THRHR* 622.

2002.¹⁸ Schneider had also been (and I presume still is) a principal adviser to the SPD, the social-democratic ANC's kindred soul in Germany. The Democratic Party (as it then was¹⁹) found a congenial spirited adviser in Ingo von Münch, formerly Professor of law at the University of Hamburg, and active politician in the German FDP. Quite significantly the predominantly black ANC and the more English oriented DP relied more intensely on the input of German advisers than the Afrikaans oriented NP or Freedom Front.

Among the South African technical advisers closely involved in constitution-making during the 1990s, there were at least five Humboldt stipendiaries. Working in concert with German law advisers these South Africans were indeed favourably placed to bring on the "positive influence" of German constitutional law in the law reform in South Africa attendant on constitution-making. It is difficult to determine empirically to what extent this indeed happened, but circumstantial evidence points to the likelihood that German (constitutional) law indeed influenced law reform in South Africa in the manner envisaged by the authors of the Humboldt article.

II

Predominantly logistic reasons for South African-German interaction in the field of constitutional law and practice have been considered so far. However, what destiny had in store for both countries and both nations, especially during the latter half of the twentieth century, also served to forge an affectionate sense of understanding between them (vast dissimilarities notwithstanding). Germany is an example of a relatively young (post-World War II) democracy from whose experience we in a new South Africa in the making stood to learn a lot.²⁰ The

18 Cf eg the contributions of Du Plessis "South Africa's peaceful Revolution" 209-224 and Steyler "Constitutional Promise of Decentralization in Practice" 225-240 in which they reminisce about issues in respect of which Schneider rendered valuable advice.

19 Presently the Democratic Alliance (DA).

20 On 11 September 1995 the former president of South Africa, Nelson Mandela, in his address at a state banquet in honour of former German chancellor, Helmut Kohl, then officially visiting South Africa, for instance said the following:

constitutions of the vast majority of African states as well as, for instance, the *Canadian Charter of Rights and Freedoms* of course also date from the post-World War II era. However, the German and South African experiences (put next to each other) stand out because of the matchless sense of urgency that, in both cases, permeated constitution-making and the establishment of constitutional democracy. The “*Nicht wieder!*” from post-Holocaust Germany reverberated (and indeed inspired action) in post-apartheid South Africa. In both countries far-reaching reconciliation and extensive nation-(re-)building simply had (and still has) to succeed to turn calamities of a shady past into accomplishments of a sunny future. The last step of constitutional significance in the German transition to full democracy, the *Wiedervereinigung*, preceded the first step in the South African transition, the commencement of the transitional Constitution and the first democratic elections, by a mere three and a half years, and both moves were bolstered – or *occasioned*, some might say – by the same historical event(s): the decline of Communist hegemony in the East Block. South Africans and Germans can furthermore, without compromising the modesty becoming citizens of countries that could (still) have been in tatters, celebrate appreciable achievements along the road of constitutionalism so far – achievements that add to the worthwhileness of Germany and South Africa as examples for constitutional comparison.

III

From experience I can say that in the realm of public law scholarship in Germany the phenomenon going by the name “typical German” is rather

“We know that the challenges facing South Africa today are in many ways comparable to those that faced Germany after the Second World War. In as much as we benefited immensely from the support of the German people in the struggle against apartheid, we can learn much by drawing on your valuable experiences in reconstruction and development.

The German constitution has, for example, become a popular reference point for South African experts. We believe we can learn much from Germany in the field of combating crime. Above all, history has placed economic reconstruction and national reconciliation at the centre of the challenges faced by both countries.” (see ANC 1995 <http://www.anc.org.za/ancdocs/history/mandela/1995/sp950911.html> 21 Nov).

elusive – especially the “typical German intellectual/professor”. Typicalness in German legal scholarship is (typically) associated with the “principled legal thinking” of *Begriffsjurisprudenz*,²¹ perceiving the law as a self-contained, rational system of general norms. Legal problems are solved when, through deductive reasoning, a concrete situation is subsumed under a norm appropriate to the exigencies of that type of situation. The state is the source of law and law, in its turn, allegedly rests on an independent foundation of reason and logic. Courts are autonomous institutions that apply the law in a systematic (even mechanistic) way as if it were a system of fixed (and predictable) rules. The “is” and the “ought” of law are markedly distinct, as are “law” and “morality” as well as “law” and “politics”.

German public lawyers working with the Basic Law can hardly afford to buy into the conventional paradigm just described. The Basic Law perceives fundamental rights as anterior to the state and “the state’s law” as subject to the objective order of values enshrined in the Basic Law. Law and morality (and law and politics) can therefore not “neatly” be separated. However, to quote Donald Kommers,²² “the approach to judicial reasoning in *Begriffsjurisprudenz* has outlasted positivism and has had a lasting influence throughout Europe, including Germany . . . German constitutional scholars no less than the justices of the Federal Constitutional Court have made significant attempts to build a theory of judicial decision based on reason and logic.” I think this explains the resoluteness with which even the freest thinkers among the German colleagues in public law I have encountered, can proffer answers to certain questions of law as if the law as it stands is (and can be) uncontentious. The more tentative manner in which South African scholars typically respond when interrogated about the law as it stands, evidences that we are partially made of common law stuff – always ready to defer to any last word that a judicial authority might (for the time-being) have.

21 For a succinct depiction of this style of thinking, cf Kommers *Constitutional Jurisprudence* 40-41.

22 Kommers *Constitutional Jurisprudence* 41.

The observations of Kommers also go some way to explain a phenomenon that took me by some surprise when I first came across and reflected on it, and that has ever since intrigued me – (also) because German constitutional scholars take it so much for granted that it is hard to find anyone who cares to explain (let alone justify) it. I refer here to the unquestioned use of FC Von Savigny's²³ four “methods of interpretation” for purposes of constitutional interpretation. Also known as the “Von Savigny quartet”²⁴ these so-called methods were initially designed for the interpretation of pandectarian Roman law, but in time they have gained acceptance all over the European Continent,²⁵ for the interpretation of codifications of the law, statutes²⁶ and constitutions.²⁷ In the South African context Hahlo and Kahn²⁸ first referred to them and since 1994 they have also met with (extra-judicial) approval.²⁹ These methods or modes of interpretation or, more appropriately, *reading strategies* – Labuschagne³⁰ speaks of *angles of incidence* (“invalshoeke”) – modelled on a slightly adapted version of the Savignian model,³¹ are:

- *grammatical interpretation* concentrating on ways in which the conventions of natural language can assist legal interpretation and can help to limit the many possible meanings of a provision;

23 Von Savigny *System des heutigen Römischen Rechts* 206-262.

24 Labuschagne 1983 *THRHR* 422 and Labuschagne 2004 *THRHR* 43 46.

25 But also in the civil law tradition in Canada; cf eg Côté *The Interpretation of Legislation in Canada* 193-350.

26 Cliteur *Inleiding in het Recht* 196-202; Labuschagne 2004 *THRHR* 43 46.

27 Forsthoft *Zur Problematik der Verfassungsauslegung* 39-40; Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 21; Kommers *Constitutional Jurisprudence* 42-43; Müller and Christensen *Grundlagen Öffentliches Recht* 269-297; and Müller 1999 *Stell LR* 275-276. Brugger 1994 *Archiv des Öffentlichen Rechts* 1-34 redefines the four methods or techniques of interpretation in a creative manner so as to adapt them to his understanding of the modern-day exigencies of (constitutional) interpretation.

28 Hahlo and Kahn *South African Legal System* 180.

29 Currie and De Waal *Bill of Rights Handbook* 145-156 rely, for purposes of bill-of-rights interpretation, on an interpretive scheme akin to that of Von Savigny *System des heutigen Römischen Rechts* 206-262. See also Du Plessis 1998 *Acta Juridica* 13-16.

30 Labuschagne 2004 *THRHR* 43 46.

31 For a summary see Du Plessis 1998 *Acta Juridica* 8.

- *systematic interpretation*, as a manifestation of contextualism,³² calling for an understanding of a specific provision in the light of the text or instrument as a whole and of extra-textual indicia;
- *purposive interpretation*³³ that sheds light on the possible meanings of a provision with reference to its purpose or ratio, and
- *historical interpretation* situating a provision in the tradition from which it emerged and allowing qualified recourse to information concerning the genesis of the text in which the provision occurs (and concerning the provision itself).³⁴

In short, I think Savigny's four "methods of interpretation" have found acceptance in German constitutional interpretation because (and simply because) their "reason and logic" (and "pedigree", one might perhaps add) appeal to constitutional scholars and judges (as *jurists*).

IV

Constitutional-law scholarship in Germany is vast, has a long history and accommodates – as is to be expected – diverse and divergent shades and styles of thinking. Endeavouring to discern a mainstream is contentious.

By way of example, fairly representative I trust, I wish to give a brief account of my impressions and experiences when I first spent time in Germany some ten years ago, doing comparative research as part of a project entitled *Statutory Interpretation in South Africa in the Light of the Adoption of a Bill of Rights*.³⁵ My aim was to complete a literature study, reading and collecting materials, making them accessible for later use and compiling a list of available literature

32 Du Plessis (*Re-Interpretation of Statutes* 111-115.

33 As manifestation of interpretive purposivism, see Du Plessis (*Re-Interpretation of Statutes* 115-119.

34 In the course of time a fifth "method" was added to the Von Savigny quartet, namely comparative interpretation, which facilitates the understanding of a provision, first, in the light of standards of international law and, secondly, in comparison with its counterparts in other national legal systems.

35 My unpublished report on the project was written in Afrikaans: *Wetsuitleg in Suid-Afrika in die Lig van die Aanvaarding van 'n Menseregtehandves*.

on my topic. Buzzwords for my study were “constitutional interpretation” (*Verfassungsinterpretation/-auslegung*) and “statutory interpretation” (*Gesetzesinterpretation/-auslegung*). Normally one would start reading about one’s topic(s) in inclusive works in the field (*Staats-/Verfassungsrecht*) which, in the German context, means beginning with constitutional law textbooks (*Lehrbücher*)³⁶ and then, for more detail, moving to Basic Law commentaries.³⁷ For my particular topic(s) it was important also to consult some standard works on legal methodology (*Rechtmethodenlehre*).³⁸ As one reads through these general sources, unignorable publications pertinent to more specific aspects of one’s research topic start surfacing – often in the form of collective works in which “the best on the topic” has been included,³⁹ but it can also be in the form of journal articles of restricted scope but lasting effect. For instance, the function, status and limits of theories and methods of (constitutional) interpretation (and of theories and methods of interpretation vis-à-vis one another) can, for instance, be problematic.⁴⁰ In the German context Ernst-Wolfgang Böckenförde has, in the form of two relatively short but widely cited articles, made valuable (pioneering) contributions by duly distinguishing the respective interpretive roles of methods (and principles) of constitutional interpretation, on the one hand, and fundamental rights theories, on the other.⁴¹

36 Examples are Benda, Maihofer and Vogel (eds) *Handbuch des Verfassungsrechts*; Von Münch *Staatsrecht*; Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*; Arnim *Staatslehre der Bundesrepublik Deutschland*; Maunz and Zippelius *Deutsches Staatsrecht*; Stein *Staatsrecht*.

37 Eg Sachs (ed) *Grundgesetz Kommentar*; Stern *Das Staatsrecht der Bundesrepublik Deutschland*; Isensee and Kirchhof (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland*; Wassermann (ed) *Kommentar zum Grundgesetz*. There is even the odd constitutional law casebook: Richter and Schuppert *Casebook Verfassungsrecht*.

38 Here the work of Müller and Christensen *Grundlagen Öffentliches Recht* dealing particularly with the methodology of public law, is indispensable. They have recently also published a second volume in which they apply their methodology in the context of European law: Müller and Christensen *Europarecht*. Classics on legal methodology include Coing *Juristische Methodenlehre*; Engisch *Einführung in das juristische Denken*; Larenz *Methodenlehre der Rechtswissenschaft*; Schmalz *Methodenlehre für das Juristische Studium*; Zippelius *Juristische Methodenlehre*.

39 In respect of my research theme Dreier and Schwegmann (eds) *Probleme der Verfassungsinterpretation*, for instance, stood out.

40 As Michelman 1995 *SAJHR* 482-485 shows.

41 Böckenförde 1974 *NJW* 1529 and Böckenförde 1976 *NJW* 2089.

In my field I have also come across work of German colleagues, creative in itself, and with catalytic qualities to unleash creative potential in others too. Examples are:

- the work of Peter Häberle exploring the idea of “the constitution as an open process”;⁴²
- Friedrich Müller’s *strukturierende Rechtslehre* which is post-structuralism incarnate – with German consistency and precision,⁴³ and
- Gerhard Robbers’ knack of bringing (in his teaching and writing) constitutional ideas to life through appreciation of music, architecture and the plastic arts.⁴⁴

I mention these examples so as to confront the stereotyped perception that the work of German constitutional law scholars, though thorough and meticulously systematic, is mostly tedious and uncreative.

V

Let me, in conclusion and as but a curtain raiser to the deliberations that are to follow, briefly take stock of what has happened to provisions of German origin in the South African Constitution – using the 1996 text as point of reference.

There is a sense in which the 1996 South African Constitution bears a stronger German resemblance than the 1993 (transitional) Constitution. Section 1 of the former arguably fulfils a role similar to article 20 of the German Basic Law (albeit not in similar terms), namely to characterise the kind of state for which the Constitution provides:

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

42 Häberle *Verfassung als Öffentlicher Prozeß*.

43 Müller and Christensen *Grundlagen Öffentliches Recht*; for a compact version of the *strukturierende Rechtslehre* cf Müller 1999 *Stell LR* 269-283.

44 Robbers "Musik und Verfassung" 197-218.

- (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.

Article 20 of the basic law states that:

- (1) The Federal Republic of Germany is a democratic and social Federal state.
- (2) All state authority emanates from the people. It is exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs.
- (3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law.
- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, should no other remedy be possible.⁴⁵

Of the pentarchy *Parteienstaat*, *Rechtsstaat*, *Streitbare Demokratie*, *Sozialstaat* and *Bundesstaat* envisaged in article 20 of the Basic Law, at least the first three are also “appointed” (and I guess one could add “anointed”) by section 1 of the South African Constitution to shape the nature of the polity. What section 1(d) prescribes is certainly a party state and a competitive democracy, while “rule of law” in section 1(c) is the English common law way of saying “Rechtsstaat”, though the two are not exactly synonyms.⁴⁶ That South Africa is a social state is not really stated in section 1, but it follows by necessary implication from several other constitutional provisions, for example, from section 7(2) that enjoins the state to “promote and fulfil” the rights in the Bill of Rights, from the

45 "(1) Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.
 (2) Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.
 (3) Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.
 (4) Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist."

46 Cf eg the discussion of the Constitutional Court's jurisprudence on the rule of law in Currie and De Waal *The new Constitutional and Administrative Law* 75-81.

authorisation of affirmative action in section 9(2), from the entrenchment of socio-economic entitlements (albeit restrained) in (amongst others) sections 26 and 27 and last but not the least from the jurisprudence of the Constitutional Court, construing these and other similar provisions.⁴⁷ It is no secret that for historical reasons prominent South Africans at the helm of constitution-making and, subsequently, government in this country, do not cherish federalist sentiments akin to those of their German counterparts. It is therefore not surprising that section 1 of the South African Constitution does not describe South Africa as a federal state. At the same time South Africa is not anti-federal and can best be described as a *co-operative* as opposed to a *competitive* federation.⁴⁸ A principle that in Germany is meant to counteract the fragmentation of the federation, is invoked in South Africa to impel co-operation among the various spheres of government. This principle, of course, is the German notion of *Bundestreue* which, in Chapter 3 of the South African Constitution, goes by the name of “co-operative government”. On an official visit to South Africa in September 1995⁴⁹ former German chancellor, Helmut Kohl, invited South Africa’s constitution-makers to send a delegation to Germany to study aspects of German constitutionalism. A multi-party delegation, consisting mainly of members of the National Assembly and advisers, visited Germany from 8 to 15 January 1996.⁵⁰ One of the outcomes of this visit was that German *ideas* on federalism were included in South Africa’s 1996 constitutional text without, however, fully embracing the German *system* of federalism whose centrifugal impetus is arguably more powerful than that of the South African system.

47 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1235 (CC) and *Treatment Action Campaign v Minister of Health (1)* 2002 (10) BCLR 1033 (CC)

48 Cf eg the discussion of the Constitutional Court’s jurisprudence on the rule of law in Currie and De Waal *The new Constitutional and Administrative Law* 119-124.

49 See n 20 above.

50 For a reference to this visit, cf ANC 1998 <http://www.anc.org.za/people/delange.html> 21 Nov (parliamentarian and deputy-minister Johnny de Lange’s curriculum vitae). I am also indebted to Prof Francois Venter of the North-West University, Potchefstroom, who provided me with an oral account of this visit and its consequences.

VI

Anyone conversant with the German Basic Law and the foundational prominence it affords human dignity, will be struck by the statement in section 1(a) of the South African Constitution that human dignity, together with the achievement of equality and the advancement of human rights and freedoms is one of the founding values of the Republic of South Africa as “one, sovereign, democratic state”. References to human dignity also occur in certain pivotal provisions in the Bill of Rights (chapter 2 of the Constitution):

- Section 7(1) states that the Bill of Rights “affirms the democratic values of human dignity, equality and freedom”.
- The general limitation clause, section 36, requires limitations of rights entrenched in the Bill of Rights to comply with the threshold of (amongst others) the extent to which the proposed limitation “is reasonable in an open and democratic society based on human dignity, equality and freedom”.⁵¹
- In section 39(1)(a) judicial authorities interpreting the Bill of Rights are enjoined “to promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.

The occurrence of the triumvirate of human dignity, equality and freedom in several places in the 1996 Bill of Rights tells where we in South Africa were coming from when we first tried to establish our fledgling constitutional democracy – exactly what article 1 of the Basic Law does with reference to Germany’s unique (and sad) holocaust history. Comparable provisions in South Africa’s transitional Bill of Rights mentioned freedom and equality, but not dignity. In human rights discourse and practice there is a perennial tension between freedom and equality, especially in a society like South Africa where astounding disparities between the haves and have nots still prevail. To the haves, on the one hand, their freedom is a vital item in the arsenal of whatever

51 S 36(1).

empowers them to have ever more. They are particularly mistrustful of government interfering in their affairs. The have nots, on the other hand, demand government intervention to empower them to gain a rightful share in the country's wealth – and this threatens the position of the haves in whom most of the wealth resides. It was therefore eminently sensible of the authors of the 1996 Constitution to come up with a textual strategy that can help negotiate the seemingly insoluble tension between freedom and equality: the inclusion in the constitutional sections referred to above of the value of human dignity with its particular history (also and especially in Germany) curbs the tendency to over-concentrate attention – in an “either . . . or” manner – on the fear of the haves and the plight of the have nots, and it demands deference to the worth and eminence of both the have nots and the haves as dignified human beings.

VII

Section 39(2) of the South African Constitution enjoins the judiciary, “[w]hen interpreting any legislation and when developing the common law or customary law” to “promote the spirit, purport and objects of the Bill of Rights”. Looked at superficially, this may seem to be a rather trite (and therefore superfluous) injunction. However, not only does this provision have a fascinating history, but it has also become a kingpin in the evolution of South African law. At the 1993 multi-party negotiations there was a strong sentiment against direct horizontal application of the Bill of Rights. It came from (amongst others and strangely enough) the representatives of the South African Communist Party. After an intense and lively debate in which the German notions of *mittelbare* and *unmittelbare Drittwirkung* featured freely and prominently, a compromise was reached and subsequently written into sections 7(1) and (2) of the transitional Constitution. The said section left room for a restrictive understanding of the operation of the Bill of Rights, excluding its direct horizontal effect. This was also how the section was eventually construed in the then landmark (and now almost forgotten) Constitutional Court judgement of *Du Plessis and Others v De*

Klerk and Another.⁵² Part of the package of the section 7 deal was the inclusion in the transitional Constitution of section 35(3), the predecessor to section 39(2) of the 1996 Constitution, in an attempt to ensure that the provisions of the Bill of Rights will at least have some “radiating effect” on the interpretation and application of non-constitutional law. The wording of the two consecutive provisions is very similar. That is, however, not the case with sections 7(1) and (2) of the transitional Constitution, and their successors in the 1996 Constitution, sections 8(1)-(3). The latter provisions authorise the direct horizontal application of “[a] provision of the Bill of Rights . . . to the extent that it is applicable taking into account the nature of the right and the nature of any duty imposed by the right”. There has not been a *Du Plessis v De Klerk* on section 8 (yet),⁵³ but there has in the meantime been a *Carmichele v Minister of Safety and Security and Another*,⁵⁴ a hurricane that could well be named Alix Jean after a very brave litigant, that has swept through our existing (common and especially private) law, with a force that initially seemed to have washed away all interest in the vexing (yet neglected) question posed by sections 8(1)-(3) of the Constitution, namely: “Precisely how directly do horizontal provisions of the Bill of Rights apply?” In the meantime, however, in the case of *Khumalo and Others v Holomisa*⁵⁵ O’Regan J intimated that direct horizontal application of the Bill of Rights (to natural and juristic persons) is always a possibility, depending on the circumstances of each particular case, but section 8(3) of the Constitution requires any such application of a particular right in the Bill of Rights to be mediated by the common law. “Common law” can be the common law as it stands or the common law as developed by the court if the law as it stands does not adequately cater for the exigencies of the situation under consideration.

The Constitutional Court’s judgement in *Carmichele* was not an interpretation and application of sections 8(1)-(3), but of section 39(2), and it has opened

52 *Du Plessis v De Klerk* 1996 (5) BCLR 659 (1996 (3) SA 850) (CC).

53 The way in which s 8 of the 1996 Constitution has been structured, arguably precludes the necessity of an effort as monumental as *Du Plessis v De Klerk* to unravel the mystery of horizontal application.

54 *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (2001 (4) SA 938) (CC).

55 *Khumalo v Holomisa* 2002 (8) BCLR 771 (2002 5 SA 401) (CC) par 31-34.

floodgates of legal reform through judicial intervention to such an extent that it has probably become necessary to consider strategies to channel the flood. A possible strategy, which our Constitutional Court has invoked without naming it, is what has become famous in Germany (and all of Europe) by the name of *subsidiarity*. In *S v Mhlungu and Others*⁵⁶ *subsidiarity* “made in South Africa” was verbalised as follows:

I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

In some of my own writings I have proposed an adaptation of *subsidiarity* for use in the South African context.⁵⁷ I leave the detail for another occasion. It is important for the present to note that this is an area for very fruitful co-operation with our German counterparts in public law and probably also European law – given the history of section 39(2) as product of a *Drittwirkung* debate.

VIII

The transitional Constitution contained three provisions that were eventually excluded from the 1996 Constitution. Two of them, sections 35(2) and 232(3) prescribed a widely acknowledged interpretive procedure, known as *verfassungskonforme Auslegung* in the German context, for the interpretation of, respectively, the Bill of Rights and the Constitution as a whole. The omission of these two provisions from the 1996 Constitution did not preclude judicial reliance on the interpretive procedure they (previously) prescribed⁵⁸ and *verfassungskonforme Auslegung* is still very much part of our constitutional law as it stands.

56 *S v Mhlungu* 1995 (7) BCLR 793 (1995 (3) SA 867) (CC) par 59.

57 Cf Du Plessis (*Re-Interpretation of Statutes* 29-32).

58 Cf eg *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA).

More directly and exclusively German was the *Wesensgehaltgarantie* included in the general limitation clause⁵⁹ in the transitional Bill of Rights. Like their German counterparts South African constitutional scholars and lawyers struggled to get to the heart of the essential content of rights and what added to our misery, on this side of the equator, was the fact that we took over a provision with a singular history and then ignored that history when we wrote in into our transitional Bill of Rights. I have not witnessed a single tear being shed over the demise of the *Wesensgehaltgarantie* in the 1996 Constitution.

IX

There is much for which we as scholars of and citizens under the South African Constitution can thank our German counterparts. Fortunately they are not in the bad habit of constantly reminding us of it. In the formerly referred to Humboldt article, the authors conclude:⁶⁰

Over almost three decades, the Alexander von Humboldt Foundation has contributed substantially to the personal development and growth of a number of jurists who have, in turn, exercised a significant influence on both the theory and the practice of South African law. This the Foundation has achieved without endeavouring to transplant German legal doctrine on its South African counterpart. Rather, scholars have been enabled to develop their own legal thought and theory, and so to be part of the evolution of their legal system as they consider appropriate.

In my experience a similar spirit permeates interaction between South African and German scholars in matters constitutional. And I do not think that especially during the last ten to fifteen years it has been just a one way traffic: there is indeed much to be learnt from South Africa and especially from our constitutional enterprise of accommodating (and desiring to celebrate) our diversity as an asset. South Africa's "small miracle", à la Nelson Mandela,⁶¹ can

59 S 33(1)(b).

60 Rabie, Van der Merwe and Labuschagne 1993 *THRHR* 622.

61 Cf eg Lawrence "From Soweto to Codesa" 1.

only be sustained if we do not take it for granted – and if we share its fruits with kindred spirits the world over. Humboldt exchanges contribute to a considerable extent to the creation of a supra-national context within which this can be done.

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