

Copyright © ECMI 2019

This article is located at:

http://www.ecmi.de/fileadmin/downloads/publications/JEMIE/2019/DeVilliers_2019.pdf

The Utility of Comparative Constitutional Law – the Practical Contribution by South Africa to a World Searching for Consistency in Democratic Practices

Bertus de Villiers*

Law School University of Johannesburg

Abstract

The Constitution of South Africa, which was enacted in two phases with an interim constitution in 1993 and a final constitution in 1996, has served as a stimulus and encouragement to other emerging democracies involved in constitutional reforms. Several aspects of the South African constitution have attracted international interest. In this article the question is asked, with reference to South Africa, whether comparative constitutional studies contribute to new standards in international law and practice. The two areas that are the focus of this article are firstly the abolition of the death penalty in South Africa and the way in which the Constitutional Court relied on international literature and jurisprudence to reach its conclusion. Secondly the South African experience with coalition government according to the consociational theory is considered and how the experiences of the transitional government of national unity has informed mandated coalition developments in Northern Ireland and Kosovo. The article concludes that the South African constitution has contributed to the development of international law and to international state constitutional law, particularly in the areas of protection of human rights and mandatory coalition government according to consociational principles. The constitutional court not only utilized international jurisprudence and literature in its reasoning to abolish capital punishment, it also contributed to developing international law by concluding that capital punishment is cruel and inhuman; not consistent with the right to life; and not an acceptable form of punishment in a democratic society. The government of national unity has highlighted how consociational principles can be applied to establish a mandatory power-sharing executive, even if just for a limited duration. The government of national unity was based on participation by political parties rather than specific communities and

* Correspondence details. Bertus de Villiers. Visiting Professor, Law School University of Johannesburg. Email: Bertus.DeVilliers@justice.wa.gov.au.

although it suffered a premature end, it highlighted how workable institutional arrangements could be devised for one of the world's most fragmented societies.

Keywords: comparative law; abolition of capital punishment; consociationalism; power-sharing; Good Friday Agreement; mandatory coalition

Comparative constitutional law has, particularly since the fall of the Berlin Wall and the resultant democratization wave that swept the world, gained traction amongst jurists and political scientists on a scale arguably not seen previously. Constitutional law theorists and practitioners have always been fascinated by comparative constitutional experiences, albeit that the circumstances of each nation are so unique that sceptics can raise questions about the practical utility of comparative constitutional studies for purposes of drafting new constitutions or construing the text of existing constitutions.

Prior to the fall of the Berlin Wall the thrust of theoretical development and focus of comparative constitutional research was often biased towards the experiences of what could be described as the traditional 'western democracies' and their contribution to the rest of the world. During the past three decades the number of democratic case studies available for comparative analysis has burgeoned with many countries in Africa, Asia, central and eastern Europe, the Middle East and South America emerging as democracies or at least attempting to democratize. This is particularly evident in the ongoing international interest, especially by emerging democracies, in South Africa's experiences when it negotiated its constitution as well as the content of the constitution.¹

The question that inevitably must be addressed by those attracted to constitutional comparisons is whether certain constitutional principles and mechanisms are becoming universal to the extent that they set a normative standard for institutional development by emerging democracies.

In this article an attempt is made to investigate how, within the sphere of the selected areas under consideration, comparative constitutional law is contributing to a growing universalization of certain constitutional norms. It is axiomatic that a constitution must, ideally speaking, be a product by a nation for a nation. At the same time, however, there is no need to re-invent the wheel each time a constitution is drawn up. General principles of representivity,

accountability, judicial review, separation of powers, decentralization and respect for individual rights already have elements of universality to them.

This article investigates how South Africa benefitted from and in turn contributed to the development of international constitutional law in the fields of human rights and coalition government. It is proposed that (a) in the application of the ‘right to life’ South Africa has utilized international law and literature and in the process also contributed to the development of an international human rights norms that the death penalty is inconsistent with modern democratic governance and the protection of human rights; and (b) in the application of the consociational principle of ‘grand coalition’ in the government of national unity, South Africa highlighted the utility for deeply divided societies to explore mandatory coalitions in either transitional or permanent constitutional arrangements.

The two main themes to be explored in this article are: Firstly, universalization of human rights: abolition of the capital punishment in South Africa. And, secondly, Lijphart, the government of national unity in South Africa and consociational power-sharing in Northern Ireland and Kosovo.

1. Universalization of human rights: abolition of capital punishment in South Africa

South Africa, with its *apartheid* background, was one of the first countries after the fall of the Berlin wall that relied on universal developments in human rights and human rights instruments to develop the bills of rights in the 1993 (interim) and 1996 (final) constitutions (Van Wyk, 1994). The South African bill of rights drew substantially on international human rights instruments and on constitutions such as the Basic Law of Germany, the bill of rights in the USA and the bill of rights of Canada (Dugard in Van Wyk, 1994).

The 1996 constitution sets down criteria to guide the judiciary when interpreting the constitution. These criteria enable the judiciary, in particular the constitutional court, to draw on international jurisprudence in order to give content and life to the South African bill of rights. s 39(1) determines that:

When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) *must* consider international law; and (c) *may* consider foreign law. (emphasis added by author)

s 39(1) must be read with s 233 which determines that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The South African judiciary may and must draw on international jurisprudential developments to inform itself on norms and standards adhered to in international law and in state constitutional law to determine the scope of application of the South African bill of rights. It was particularly in the formative years of the constitutional court that international jurisprudence assisted to give guidance (Klug, 1996). This was the first constitution that so explicitly empowered and obligated the judiciary to draw on international law and foreign constitutional law to give substance to a domestic bill of rights in manner consistent with an open and democratic society. There is no obligation on the judiciary to apply international law to South Africa, unless the international law has become incorporated into South African law. The court must, however, have regard to international law (Rautenbach, 2004: 42).

In arguably *the* ground-breaking ruling of the constitutional court in utilizing and reflecting on international jurisprudence, the question of the constitutionality of capital punishment in South Africa was considered as the first case in the newly established constitutional court (Maduna, 1996). In the *Makwanyane* case the court abolished the death penalty and declared that the ongoing application of capital punishment was inconsistent with the right to life (*S v. Makwanyane*). The court considered wide-ranging submissions, but of relevance to this article is the reference the court made to international jurisprudence and literature in its judgement. The court took note that although capital punishment has been the practice in societies for ages, in recent times many countries have been moving away from imposing the death penalty, and that even in those countries where the death penalty remains available, it is rarely applied (with the notable exception of China).² This ruling was one of the first by a court to abolish the death penalty (Bae, 2005).

In their reasoning, various Justices referred to jurisprudential developments in international law and the state constitutional law of other nations.³

The following are examples of how the court addressed, with reference to international law and literature, some of the most important considerations for and against capital punishment:

Firstly, the court accepted that even if capital punishment may appear to be neutral to all individuals in its statutory context, in practice it has been shown internationally and in South Africa that it is more likely that poor and uneducated persons may have the death penalty imposed than those who are highly educated and those who can afford independent counsel. A statute which appears at face to be non-discriminatory, may be arbitrary in effect and in the case of capital punishment such arbitrariness potentially has the worst of possible consequences (*Furman v. Georgia*).⁴

Secondly, the court refused to accept that there was adequate empirical evidence that the death penalty was an effective and important deterrent to high crime levels.⁵ Justice Didcott observed that: ‘The records of countries that executed convicts formerly, but have ceased doing so, are also examined. Comparisons are then drawn between the rates of those crimes found there before the punishment was abandoned and the ones encountered afterwards. Such statistics, when analysed, have always turned out to be inconclusive in the end.’ (*S v. Makwanyane*, para. 181).

Thirdly, the court did not accept propositions that the death penalty is more likely to deter violent crime than a long prison sentence (*S v. Makwanyane*, para. 59). The court said there was not only inadequate evidence to support such a proposition, but it was also unlikely that a person would make a calculated decision based on the expected penalty that may be received.

Fourthly, the court emphasized with reference to the Basic Law of Germany that the right to dignity precludes punishment that can be categorized as cruel and inhuman (*Life Imprisonment and Kindler*).⁶ The state cannot turn an offender into an ‘object of crime prevention’ for purposes of punishment and to the detriment of fundamental rights (*S v. Makwanyane*, para. 59). After referring to the approach adopted by the Human Rights Committee of the United Nations, Chaskelson concludes that ‘what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it [Human Rights Committee] as cruel and inhuman punishment within the ordinary meaning of those words...’ (*S v. Makwanyane*, para. 67).

Fifthly, the court highlighted that the right to life as enshrined in the South African bill of rights is unqualified. The right in South Africa differs for example from the constitutions of Hungary, Tanzania and India and the European Convention on Human Rights which anticipate that legislation may restrict the scope of the right to life (*S v. Makwanyane*, para. 86).

Sixthly, it was noted by the court that public opinion may be strongly supportive to retain the death penalty, but ultimately the court was not responsible to gauge public opinion but to declare the impact of fundamental rights as recognized by the constitution (Zlotnick, 1996).⁷ International law requires the court to sometimes be a buffer against public opinion, rather than a voice for public opinion.

Chaskelson concluded that the right to life and dignity are the ‘most important of all human rights’ and that South Africa is required to ‘value these two rights above all others’ (*S v. Makwanyane*, para. 144).⁸

The final observation by Justice Kentridge is relevant to the topic under consideration in this article:

Although one cannot say that the death penalty is as yet contrary to international law, Chaskelson P has demonstrated that that is the direction in which international law is developing. (*S v. Makwanyane*, para. 198)

Justice Sachs added to this:

Reference in the Constitution to the role of public international law underlines our common adherence to internationally accepted principles. (*S v. Makwanyane*, para. 162)

The New York Times usefully summarized how South Africa's constitutional court drew from international law in the judgement, but also how it contributed to the development of international law through their judgement: 'The opinion of the court's president, Arthur Chaskelson, and 10 concurring opinions owe much to the writings of American liberal justices, but they have also much to teach the United States' (Editorial, 1995).

The *Makwanyane* ruling set a high bar for the judiciary in emerging democracies. It referred extensively to international jurisprudence and literature and highlighted how the norms developed in international law can guide domestic courts; it adopted a stance that did not reflect the popular opinion in regard to the death penalty, thereby highlighting a potential stress fracture that all democracies face namely curtailing parliamentary sovereignty through judicial review (Institute of Race Relations, 2016); it positioned the court as a transformative force to change South African society shortly after the constitution had been adopted without the constitution explicitly prohibiting capital punishment; it transitioned jurisprudence from sovereignty of parliament under *apartheid* to the rule of law under the constitution; and it set the scene for the abolition of capital punishment in several other countries, thereby contributing to an international normative standard that excludes capital punishment as an option to sentencing in modern democratic societies.⁹

2. Lijphart, the government of national unity and consociational power-sharing in transitional arrangements

The concept of a consociational 'grand coalition' is closely associated with the contribution of Arend Lijphart who, for the latter part of the twentieth century, had been particularly active to develop and apply the concept of 'consociational' democracy to deeply divided societies, including South Africa (Lijphart, 1977; 1999; 2004; 2007).¹⁰ The concept 'consociational' or *consociatio* in Latin was first used as a political term in 1603 by Althusius (Malan, 2017). Although consociationalism is inextricably linked to Lijphart, he cautioned that at the time of

his writing other experts were also active in the field of theorizing along similar themes as he about institutional arrangements for government in complex societies (Lijphart, 2018).¹¹

Lijphart was of the view that a ‘grand coalition’ in cabinet is a ‘most obvious’ solution for a ‘fragmented system’ (Lijphart, 1969: 213).¹² He emphasized however that in a deeply divided society stability is not found only in institutional design, but also in the commitment of leaders to stabilize the system.¹³ A mandatory coalition is therefore unlikely to ensure effective coalition government, but it may at least provide an institutional framework wherein leaders can cooperate for the greater good. In his view the search for stability and the granting of vetos to the leaders of the respective communities, are entirely consistent with normative democratic theory since special majorities are often required in a second house for matters that are of special importance to a nation.¹⁴

To Lijphart a key requirement for a successful consociational arrangement is that the elites must ‘demonstrate the ability to accommodate divergent interests’ and that they must understand the ‘perils of political fragmentation’ (1969: 216). He acknowledged that consociational arrangements may have a limited time span,¹⁵ but in the process of working together the mandatory elite arrangements may lay the basis for new, integrative institutional arrangements which may rely less on mandatory requirements.¹⁶ He cautioned, however, that an elite agreement can be prone to ‘immobilism’ (e.g. Cyprus, Belgium and Lebanon), and therefore the leaders involved in a consociational arrangement must be capable of addressing the concerns of the nation without becoming deadlocked by using mutual vetos (1969: 219). He (1998: 101) explained that the lesson to be drawn from successful power-sharing arrangements is that ‘rational choice’ of leaders to cooperate and find common ground for the greater good, is achievable. It is through rational choice, rather than institutional design, that leaders in deeply divided societies work together to neutralize the fragmenting forces of their society. Although the presence of ethnic cleavages in a society do not automatically give rise to conflict, countries with a high level of ethno-political polarization are often more prone to instability, violence and pressure on institutional arrangements (Simonsen, 2005).

The propositions of Lijphart have in recent years been actively pursued in emerging democracies, particularly during the transition to democracy. The experience of South Africa during the short lifespan of its government of national unity contributed to the interest in mandatory power-sharing arrangements from un-democracy to democracy. This is because ‘power sharing has proven to be the only democratic model that appears to have much chance of being adopted in divided societies...’ (Lijphart, 2004: 97). The emphasis in consociationalism is for communities to generally exercise their political rights *within* the ‘silo’

of their community, whereas the elites who are elected by the respective communities should be constitutionally-obliged to work together in a mandated, power-sharing coalition (Andeweg, 2000).¹⁷

The contribution of Lijphart to institutional design of constitutions and to some degree of consistency in democratic practices are highlighted by the transitional power-sharing arrangements in the emerging democracies such as South Africa, Northern Ireland and Kosovo. The South African government of national unity was the first major mandatory coalition negotiated after the fall of the Berlin Wall. South Africa's experiences in terms of process of negotiation, substance of the constitution and transition to democracy remain relevant to other emerging democracies.

In South Africa the concept of a government of national unity in 1993 paved the way to move from *apartheid* into a democracy. In the lead-up to the 1993 constitution, political parties and movements with divergent backgrounds, identities, policies and ideologies had to be moulded together in some form of power-sharing government to serve as a transition to democracy. Agreement was reached that as far as cabinet was concerned a government of national unity that reflected consociational principles would be formed whereby all sizeable parties gained ministries and the two largest parties qualified for deputy presidents. Each political party that held 20 (out of 400) or more seats in the national assembly could participate in the government of national unity in proportion to its electoral support (Constitution 1993, s40(1); s88(1)).¹⁸ In addition, each political party with more than 80 seats in the national assembly, was entitled to designate a deputy president (Constitution 1993, s84(1)).¹⁹ The allocation of portfolios within the government of national unity was the responsibility of the president 'after consultation' with the deputy presidents and the leaders of the political parties who participated in the government of national unity (Constitution 1993, a88(4)). The president was obliged to consult with the deputy presidents about development and execution of policies by the national government (Constitution 1993, s82(2)).

The composition and decision-making by the government of national unity were guided by five core principles, namely: (i) all sizeable political parties should be represented in the executive; (ii) representation was not based on ethnic or racial community but on political party; (iii) a consensus-seeking spirit guided the government (Constitution 1993, s89); (iv) certain decisions by the president could only be made 'in' consultation with the cabinet; and (v) certain decisions of the president could only be made 'after' consultation with the cabinet.²⁰ Veto and qualified veto mechanisms were therefore imbedded into the operations of the government of national unity.

The government of national unity had a 5-year lifespan to expire automatically in 1999, but it ended on February 3, 1997 after the National Party's deputy president De Klerk withdrew from it (De Villiers, 2018).

The government of national unity's 'grand coalition' was, in light of South Africa's violent and *apartheid* past, an agreement of historical proportions. Venter observed that the government of national unity formalized the structure of the executive 'into a consociational grand coalition' and the decision-making mechanisms between the president and deputy presidents and cabinet were also consistent with consociationalism (Venter, 1995: 178). The government of national unity inspired several other emerging democracies, including Northern Ireland and Kosovo, to consider or to enter into arrangements whereby transitional power-sharing institutions were devised. The spirit of conciliatory leadership of Mandela and De Klerk, the importance which has also been stressed by Lijphart, served as inspiration to countries such as Northern Ireland and Kosovo.

In Northern Ireland consociational theory was nestled at the heart of the settlement of the multi-generation conflict (Kerr, 2006).²¹ Lijphart (1975) was the first proponent of the grand coalition proposal for Northern Ireland. One of the main concerns expressed against consociationalism in Northern Ireland was that it is said to have adopted a 'pessimistic' approach to identity by assuming that political rights and discourse must be structured around identity politics (Dixon, 2005: 360).²² The result, according to critics, is that consociationalism tends to harden rather than soften inter-ethnic rivalry (Rooney, 1998).

The consociational principles nevertheless laid the basis for a power-sharing arrangement entered into on April 10, 1998, the so-called Good Friday Agreement.²³ The grand coalition has been described as the 'critical consociationalism condition' of the Northern Ireland settlement (White, 2018). The parties in Northern Ireland faced a similar challenge to South Africa where co-government and decommissioning of a civil war had to take place simultaneously. The international community, particularly the USA, European Union institutions, and the governments of Ireland and the UK played an essential role to encourage the disparate parties to, amongst others, enter into the grand coalition.²⁴ The agreement was entered into between the governments of the UK and the Republic of Ireland and 8 political parties in Northern Ireland. Although some parties supported a sunset clause at which the mandatory power-sharing arrangements would expire similar to what was intended for the government of national unity in South Africa, the requirements for an ongoing grand coalition were left open-ended.²⁵ The Good Friday agreement and institutions created by it was described as 'extraordinary achievement' (Neuheiser, 2002: 12).

The first minister and deputy first minister are elected by the assembly of Northern Ireland on the basis of ‘cross-community support’ (Good Friday Agreement, a15).²⁶ Ministers are required to support decisions pursuant to cabinet collegiality. Generally, cabinet processes are guided by the Programme for Government which sets governing and spending priorities and is submitted to the assembly for approval (Good Friday Agreement, aa20 and 24).²⁷ Similarly to the South African government of national unity, the executive is chaired by a first minister, supported by a deputy first minister and up to 10 ministers (Good Friday Agreement, a 14; Kerr, 2006). The notion of ‘cross-community’ support is unique to Northern Ireland when compared to South Africa and Kosovo. In South Africa and Kosovo the parliaments had no role to endorse the members of cabinet, whereas in Northern Ireland there is pressure on parties to nominate candidates that are acceptable to the other community otherwise the cabinet would not be endorsed by parliament.²⁸

An additional unique aspect of the Irish settlement is that the allocation of ministerial portfolios is not left to the discretion of the first minister. The negotiators in Northern Ireland anticipated that it may become protracted for the first minister to negotiate ministerial allocations with the respective political parties, and hence it was agreed that the d’Hondt-system would be used to allocate portfolios (Good Friday Agreement, a16).²⁹ Each participating party therefore elects a ministry followed by the next party.³⁰ Ultimately the number of ministries reflects the popular support of the respective parties, but the allocation of portfolios is done according to the d’Hondt formula. This is an essential contribution to the consociational ‘tool box’ that may be relevant to other countries (McGarry and O’Leary, 2006: 63).

The mandatory coalition arrangements have now been in place for two decades. This in itself is remarkable in light of the many years of ‘troubles’ in Northern Ireland (Farry, 2018: 34).³¹ The success of the coalition arrangements does not necessarily imply that inter-communal integration has taken place or that the need for a consociational arrangement has expired. The political community of Northern Ireland remains deeply divided, but the institutional arrangements have given the respective communities an opportunity to - (a) be part of power-sharing and joint policy formulation; (b) take responsibility for managing government departments; (c) develop communality through shared governance institutions; and (d) pursue objectives without the use of violence.³²

The Northern Irish political community is similar to those of Kosovo in the sense that community divisions run deep along ethnic identity at societal and political levels, whereas in South Africa although race remains an important predictive factor in voting intention, at a societal level cross-cutting identities exist in areas such as sport, religion, residential area,

education, language and shared patriotism. Wolff (2018: 22) observes as follows about the ongoing relevance of community divisions in Northern Ireland:

Their [the two communities] interests have remained fundamentally the same; that is, the ethnonational nature of the conflict has not been transformed yet, even though the means with which each community pursues its goals have changed.

The constitution of Kosovo, including the provision of a mandatory coalition government, was designed and imposed by the United Nations pursuant to the powers granted to its special representative of the United Nations, Martti Ahtisaari. In contrast to South Africa and Northern Ireland, the Kosovar political parties and movements had not been able to negotiate a political settlement of the civil war. The new constitution took effect without a referendum to legitimize it. An important aspect of the Kosovo constitution for purposes of this article is the obligatory power-sharing in the executive according to what is widely regarded as a consociational approach to the democratization of the country (Chaney, 2001).

The Serb and other minorities are guaranteed positions in cabinet and also deputy ministerial positions (Constitution of Kosovo, a96(3)).³³ The original idea was for the mandatory coalition arrangements to expire after a limited period as was the case in South Africa, but the minorities have been unwilling to consent to abolish it (Constitution of Kosovo, a81).³⁴ Similarly to the case of Northern Ireland, it is unlikely that the minority communities would soon consent to the mandatory power-sharing in the cabinet being terminated. The ministries are filled after consultation with the respective political parties that represent the communities, but there is no requirement as in Northern Ireland for the cabinet to be endorsed by the national legislature (Constitution of Kosovo, a96(5)).

In Kosovo no party has a dominant political position comparable to the ANC in South Africa. Coalition government is therefore essential to Kosovo, whereas in South Africa the government of national unity was an outcome of political expediency for purposes of a transition, but the government of national unity was not seen by the dominant ANC as a necessity for ongoing democratic government. Although the political circumstances in Kosovo demand a form of coalition government, the un-voluntary nature of the current arrangement renders it unstable and at risk of dysfunction (Baliqi, 2013).³⁵ In similar vein to Northern Ireland, the mandatory coalition in Kosovo has successfully transitioned the parties from the civil war, but the underlying inter-community tensions remain deeply imbedded.

The decision-making protocol in the Kosovo executive is aimed at consensus, but there are no formal requirements similar to the 'in consultation' provisions of the government of national unity in South Africa or the agreed programme for government as in Northern Ireland. Since the constitution was not a negotiated outcome, it remains in a process of developing and

deepening legitimacy. Community divisions remain entrenched with critics saying that the cabinet solidified ethnic division, whereas proponents say the cabinet successfully brought together warring parties. It is not contested that there remains in Kosovo a high focus on ethnic identity as a primary motivator of voting intention. This is not dissimilar to South Africa and Northern Ireland where cross-party inter-ethnic and inter-racial support is low. However, whereas South Africa is arguably the most progressive of the three case studies in regard to societal integration in areas such as sport, recreation and culture, Kosovo and Northern Ireland remain deeply segregated at societal level (Baliqi, 2018: 60).³⁶ Since the political parties in Kosovo do not share a common policy platform or a voluntary coalition contract, there is a risk of little common ground existing between them in cabinet (Loncar, 2015). The unintended consequence of the voting and coalition system in Kosovo (and Northern Ireland) has been 'segregation rather than integration at the societal level' (Baliqi, 2018: 60).

Arising from the mandatory power-sharing arrangements of the government of national unity in South Africa and the ongoing arrangements in Northern Ireland and Kosovo, the following observations can be made about the South African contribution to the application of consociationalism in practice:

Firstly, a mandatory elite power-sharing arrangement in the executive may afford leaders in a post-conflict, transitional society a basis from which to cooperate without them having to face the uncertainty and unpredictability of negotiating and managing a voluntary coalition. Leaders in neither of the three case studies were likely to have entered into voluntary coalition agreements at the time of transition.

Secondly, a mandatory coalition is likely to be for a limited time span. The South African government of national unity was arguable of too short duration, whereas the open-ended arrangements in Kosovo and Northern Ireland may in future become problematic since it may constrain political choice and dynamics. Ideally a sunset clause should signal the end of a mandatory arrangement, but perhaps with an opportunity for it to be renewed should parties reach agreement. In South Africa a majoritarian approach followed the government of national unity, whereas in Northern Ireland and Kosovo the open-ended mandatory coalition may discourage political parties from exploring common ground in different communities.

Thirdly, the role of leadership within a consociational executive is essential for the success thereof. Leaders are required to fulfil two roles simultaneously: on the one hand to represent the interests of their community, whereas on the other hand to find common ground with the leaders of other communities. This is a particularly demanding challenge, especially

when one political party has a clear majority to govern in its own right. A consociational power-sharing arrangement without conciliatory leadership is unlikely to succeed.

Fourthly, finding a joint agenda for governance within the government of national unity is essential. In South Africa the RDP (Reconstructing and Development Programme) was a major positive outcome of the government of national unity, albeit that other policy issues had to be addressed on a case by case basis and ultimately eroded the trust and relationship between the Mandela and DE Klerk.

Conclusion

The contribution made by the South African constitution-drafting process and the content of the 1993 and 1996 constitutions to international law and democratization, is widely respected and often referred to. In this article two contributions were highlighted, namely the role of the constitutional court to abolish capital punishment and the contribution of the government of national unity as an example of transition from violence to democracy. In both examples the South African experience has been emulated, quoted, relied upon and also criticized.

The South African constitution has contributed to the development of international law and to international state constitutional law, particularly in the areas of the abolishment of the death penalty and mandatory coalition government according to consociational principles.

The constitutional court not only utilized international jurisprudence and literature in its reasoning to abolish capital punishment, it also contributed to develop international law by concluding that capital punishment is cruel and inhuman; not consistent with the right to life; and not an acceptable form of punishment in a democratic society.

The government of national unity has highlighted how consociational principles can be applied to establish a mandatory power-sharing executive, even if for a limited duration. The government of national unity was based on participation by political parties rather than specific communities and although it had a premature end, it highlighted how institutional arrangements could be devised for one of the world's most fragmented societies. A question which remains open, is what the duration of a government of national unity should be. The South African experience compared to those of Northern Ireland and Kosovo suggests a sunset clause subject to renewal may be advisable. Finally, the Mandela/De Klerk factor in the government of national unity showed that stable and mature leadership is essential to operate mandatory coalition arrangements.

Notes

¹ In the experience of the author the following are examples of South African constitutional experiences that have drawn international interest: the negotiation process; the structure and functioning of the government of national unity; the protection of social and economic rights; the concept of cooperative government in a multi-level arrangement; the role of traditional leaders; and the composition and functioning of the national council of provinces. See for example how experts from South Africa have given advices in countries such as Northern Ireland, Ethiopia, South Sudan, the Philippines, Myanmar, Madagascar, Nepal, Democratic Republic of Congo, and Kenya as the result of insights and experiences gained during the South African transitional and negotiation process.

² Chief Justice Chaskelson said about international trends about the application of the death penalty: ‘According to Amnesty International, 1,831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China, which means that only 412 executions were carried out in the rest of the world in that year.’ (*S v. Makwanyane*, para. 33).

³ Chaskelson said about the interpretation value of international instruments: ‘International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.’ (*S v. Makwanyane*, para. 35).

⁴ Chaskelson commented that although arbitrariness is in itself not an adequate rationale to declare capital punishment unconstitutional since through appeals the risk of arbitrariness can be reduced, in the case of a prison sentence a person can be released, but the death penalty is final and ‘irremediable’ (*S v. Makwanyane*, para. 54).

⁵ Justice Didcott expressed the view that the statistics before the court were open to the opposite conclusion, namely that the death penalty had little if any impact on the murder rate. (*S v. Makwanyane*, para. 182).

⁶ The court also referred to the view expressed by the Supreme Court in Canada when it observed that the death penalty is the ‘ultimate desecration of human dignity’ (*Kindler*).

⁷ Chaskelson agreed with the Justice Powell’s observation in *Furman v. Georgia* when he said: ‘But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery - not the core - of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, and not a judicial, function.’ As quoted by Chaskelson (*S v. Makwanyane*, para. 89).

⁸ Justice Ackerman also draws a distinction between the South African constitution and the USA by stressing that the right to life in South African constitution is not constrained. (*S v. Makwanyane*, para. 154).

⁹ Although it is too early to state that the death penalty contravenes international law, the *Makwanyane* ruling contributed to a trend in international and state constitutional law that views the death penalty as cruel and inhuman; inconsistent with the right to life; and inconsistent with modern democratic norms. See for example the subsequent abolition of the death penalty in Gambia, Namibia, Mozambique, Angola, Mauritius and Ivory Coast.

¹⁰ The propositions by Lijphart remain subject of critical discourse, but he has succeeded to elevate the pragmatism of coalition government to a theoretical level which has found its way into several emerging and post-conflict democracies.

¹¹ Lijphart (2018: 8) observes that where in the early years of theoretical development he used consociation as an analytical tool to evaluate constitutions, he is now of the view that the theoretical concept has so developed that it could be used as a ‘policy recommendation’.

¹² The other elements of consociational democracy in addition to a grand coalition are segmental autonomy by way of community and territorial decentralization; proportionality in the filling of positions; and veto powers when matters of key importance to communities are affected.

¹³ This article does not suggest that consociational theory is beyond reproach. It has been subject to vigorous comment, criticism and analysis. The relevance of the theory is, however, that the principles (perhaps logic) underlying mandatory coalitions in emerging democracies have a strong consociational base, and as such is relevant to this article to highlight the contribution comparative constitutional law (and political science) is making to develop normative guidelines in international law for the composition of executives in emerging democracies with deep societal divisions (Lustick, 1997).

¹⁴ Examples of special majorities in democracies are: amendment of the constitution; variation of regional boundaries; election of the president; creation of new regions in federal systems; and approval of treaties.

¹⁵ See for example the government of national unity under the 1993 constitution of South Africa which had a 5 year expiry date.

¹⁶ In a previous article the author explored the experience of South Africa in moving from a consociational government of national unity (1994-1997) to majoritarianism (1997-). The author holds the view (De Villiers, 2019) that the premature end to the government of national unity was detrimental to the political culture of South Africa and that the emphasis on majoritarianism is leading to ongoing one party dominance and an increase in extra-parliamentary protest and violence. Lijphart (1985: 11) acknowledged that if one community has a clear majority it reduces the likelihood of a consociational outcome since the majority is (ultimately) likely to rely on its numbers rather than cooperation to pursue objectives.

¹⁷ This is one of the main areas of concern to those who criticize Lijphart since institutions may solidify identity-based conflict rather than soften it. In response to the concerns of Andeweg note the difference between South Africa on the one hand and Kosovo on the Northern Ireland on the other hand: in South Africa the government of national unity was exclusively between political parties with no reference to ‘community’; whereas in Kosovo and Northern Ireland specific reference is made to the communities involved. One could say that South Africa encourage cross-community political parties, whereas the other two countries solidified a community-based approach within political parties.

¹⁸ The national assembly comprised of 400 seats. The government of national unity comprised 27 ministers. Three parties participated in the government of national unity after the 1994 election, the ANC (60%), NP (20%) and IFP (10%).

¹⁹ In the event that no party or only one party held 80 seats, the party with the largest number of seats after the majority party could designate a deputy president. Two parties ultimately made up the presidency, the ANC (president Mandela and deputy president Mbeki) and the NP (deputy president De Klerk).

²⁰ The meaning of the terms decision-making ‘in’ consultation and ‘after’ consultation was defined by the constitution as follows: ‘in’ consultation meant obtaining the *agreement* of the functionary with whom consultation is required (Constitution 1993, s 233(3)), whereas ‘after’ consultation meant that the opinion of the functionary is taken *into account* ‘in good faith’ and that the decision is made after ‘serious consideration’ of the opinion (Constitution 1993, s 233 (4)).

²¹ There has also been a strong anti-consociationalism opinion in Northern Ireland due to the ‘primacy’ it places on accommodation of identity, rather an encouragement for individuals to move beyond identity when making political choices.

²² Critics such as Dixon view consociationalism in Northern Ireland as a tool to manage rather than resolve conflict and criticise proponents of consociationalism of ‘primordial pessimism’ by relying on identity to design institutions rather than on integrative encouragement.

²³ Text of the Good Friday agreement is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf. It is particularly the composition of the executive and the consociational elements thereof that are of relevance to this article (O’Leary, 1999). The agreement had to be put to the electorates of Ireland and Northern Ireland for approval by way of a referendum. In South Africa the 1993 constitution which guaranteed the government of national unity was negotiated by unelected elites but it only had a limited lifespan, whereas in Kosovo the constitution was a product of the international community without a referendum or a constitutional assembly to legitimize it.

²⁴ At the time of the South African and Irish settlements, international efforts for different forms of consociational settlements were also under discussion in regard to Iraq, Afghanistan, Macedonia and Serbia/Kosovo (Guelke, 2011: 245.)

²⁵ Of the three case studies in this article, South Africa opted for an expiry date to its government of national unity, whereas Northern Ireland and Kosovo have agreed to ongoing grand coalition arrangements. Reynolds is of the view that ultimately the power-sharing arrangements in Northern Ireland would also be of a transitional, temporary nature, but the Good Friday agreement does not provide any mechanism for the arrangement to be discontinued or phased out (Reynolds, 2013: 534).

²⁶ A majority of the ‘unionist’ and ‘nationalist’ delegations must support the successful candidate. This provision was criticized by some as entrenching the societal divisions, but others argued that it was a compromise of necessity.

²⁷ See for example Northern Ireland Executive *Programme for government 2001-2002* (October 25, 2000). The agreement does not set out the consequences if a programme of government cannot be agreed.

²⁸ Although there is a common voters roll and freedom to establish political parties, elected delegates must after election identify themselves as ‘unionist’; ‘nationalist’ or ‘other’ for purpose of approval of cabinet and certain legislation where cross-community support is required. In the case of ordinary legislation the ‘other’ category may have a determinative vote, but for purposes of legislation that requires cross-community support the ‘unionist’ and ‘nationalist’ members of the assembly cast the determinative vote (McGarry and O’Leary, 2004: 33).

²⁹ This was the first time that the d'Hondt system was used to compose a national executive, albeit that it had previously been used at a local level in Denmark to facilitate the allocation of portfolios in municipalities (O'Leary, 2005). The essence is that the sequence by which parties elect portfolios is set by formula and if a party fails to take up a position in the coalition it forfeits its choice to the next party.

³⁰ The agreement does not contain any mechanisms or procedure to remove a minister or government. On the one hand this ensures stability of government, but on the other hand it may erode accountability since ministers may be beyond reproach since all parties are in effect also in the executive. In South Africa and Northern Ireland the lack of detail in regard to certain aspects of the settlement was described as 'constructive ambiguity', meaning it was in the interest of the process to leave some issue unresolved (Farry, 2018: 34).

³¹ The breakthrough was so remarkable that it was treated with 'biblical reverence' by its supporters. The 'troubles' as it is called started with the civil rights marches in the late 1960s (Coogan, 1996).

³² Whereas some criticize the consociational arrangements as being limited to short-term peacemaking, proponents argue that the long term prospect for peace is being harnessed due to the ability of leaders to work together and develop a mutual understanding of each other (White, 2018: 91). He emphasizes however that the success of consociational arrangements depend on the ability of leaders to see it as in their best interest. In South Africa, for example, both ANC and NP were of the view that their respective interests would be better served without the constraints of the government of national unity and hence the two parties opted for a majoritarian rather than a consociational approach.

³³ The Serbian community is entitled to one minister and the other minority communities are consulted about one minister also being appointed for them. In similar vein two deputy ministers are appointed from the Serbian community and two deputy ministers on behalf of the other minority communities.

³⁴ a 81 protects the rights of minorities to veto any legislation that affects their 'vital interests'.

³⁵ Note for example that following the 2014 election it took almost 6 months for a government to be formed.

³⁶ These deep societal divisions highlight the importance of 'political dialogue between elites' being an 'integral part' of a long term reconciliation strategy in deeply divided societies (Rice and Summerville, 2018: 123).

References

Andeweg, R.B. 'Consociational democracy'. *Annual Review of Political Science*. 3 (2000): 509-536.

Bae, S. 'The right to life v. the state's ultimate sanction: abolition of capital punishment in post-apartheid South Africa'. *International Journal of Human Rights*. 9(1) (2005): 49-68.

Baliqi, B. 'Innenpolitik unter Parteiensystem im Kosovo'. In *Die Republik Kosovo – Der jungste Staat Europas. Eine politische Bestandsaufnahme seit der Unabhängigkeitserklärung*, ed. O. Leisse, 42-61. Baden-Baden: Nomos, 2013.

_____. 'Promoting multi-ethnicity or maintain a divided society: dilemmas of power-sharing in Kosovo'. *JEMIE*. 17(1) (2018): 49-71.

Chaney, J.I. 'Self-determination: Chechnya, Kosovo, and East Timor'. *Vanderbilt Journal of Transnational Law*. 34(3) (2001): 455-467.

Constitution (1993) of South Africa. <http://www.justice.gov.za/trc/legal/sacon93.htm>.

Constitution (1996) of South Africa. <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>.

Constitution of Kosovo. <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>.

Coogan, T.P. *The Troubles: Ireland's Ordeal 1966-1996 and the Search for Peace*. Dublin: Head of Zeus, 1996.

De Villiers, B. 'Institutional design in deeply divided societies: South Africa and Kosovo and lessons for constitution drafting in emerging democracies – coalition and self-government'. *Journal of South African Law*. (2019). Upcoming.

Dixon, P. 'Why the Good Friday Agreement of Northern Ireland is not consociational'. *The Political Quarterly*. 76(3) (2005): 357-367.

Dugard, J. 'International human rights'. In *Rights and constitutionalism in South Africa*, eds. Van Wyk, D. J. Dugard, B. De Villiers and D. Davis, 171-195. Cape Town: Juta, 1994.

Editorial, 'South Africa shows the way'. *The New York Times*, June 19, 1995.

Farry, H. 'The morning after: an alliance perspective on the agreement'. In *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*, eds. M. Jakala, D. Kuzu, and M. Qvortrup, 34-46. Cham: Palgrave Macmillan, 2018.

Furman v. Georgia [1972] USSC 170, 408 U.S. 238, 290 (1972).

Good Friday Agreement.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

Guelke, A. 'International dimensions of the Belfast Agreement'. In *Aspects of the Belfast Agreement*, ed. R.A. Wilford, 245-258. London: Oxford University Press, 2001.

Kerr, M. *Imposing power-sharing: conflict and coexistence in Northern Ireland and Lebanon*. Dublin: Irish Academic Press, 2006.

Institute of Race Relations. *Capital punishment in South Africa: was abolition the right decision?*. Johannesburg: Institute of Race Relations, 2016.

Jakala M., D. Kuzu, and M. Qvortrup, eds. *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*. Cham: Palgrave Macmillan, 2018.

Kindler v. Canada (Minister of Justice) (1992) 6 CRR (2d) 193 241.

Klug, H. 'Striking down death – S v. Makwanyane and Another'. *South African Journal on Human Rights*. 11(2) (1996): 61-70.

Life Imprisonment case [1977] 45 BVerfGE 187 228.

Lijphart, A. 'Consociational democracy'. *World Politics*. 21(2) (1969) 207-225.

_____. 'Review article: the Northern Ireland problem; cases, theories, and solutions'. *British Journal of Political Science*. 5(1) (1975): 83-106.

- _____. *Democracy in plural societies*. New York: Yale University Press, 1977.
- _____. *Power-Sharing in South Africa*. Berkeley: University of California, 1985.
- _____. 'Constitutional design for divided societies'. *Journal of Democracy*. 15(2) (2004): 96-109.
- _____. 'Consensus and consensus democracy: cultural, structural, functional, and rational-choice explanations'. *Scandinavian Political Studies*. 21(2) (1998): 99-108.
- _____. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. San Diego: University of California, 1999.
- _____. 'Constitutional design for divided societies'. *Journal of Democracy*. 15(2) (2004): 96-109.
- _____. *Thinking about democracy: power sharing and majority rule in theory and in practice*. New York: Routledge, 2007.
- _____. 'Consociationalism after half a century'. In *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*, eds. M.Jakala, D. Kuzu, and M. Qvortrup, 1-9. Cham: Palgrave Macmillan, 2018.
- Loncar, J. 'Power-sharing in Kosovo: effects of ethnic quotas and minority veto'. In *Perspectives of a multiethnic society in Kosovo*, eds. J. Teokarevic, B. Baliqi, and S. Surlic, 359-373. Belgrade: Youth Initiative for Human Rights, 2015.
- Lustick, M. 'Lijphart, Lakatos and consociationalism'. *World Politics*. 50(1) (1997): 88-117.
- Maduna, P.M. 'The death penalty and human rights'. *South African Journal on Human Rights*. 12(2) (1996): 193-213.
- Malan, K. 'Johannes Althusius' grand federalism, the role of the ephors and post-statist constitutionalism'. *PELJ*. 20 (2017): 2-34.
- McGarry, J. and B. O'Leary. *The Northern Ireland conflict: consociational engagements*. Oxford: Oxford University Press, 2004.
- _____. 'Consociational theory, Northern Ireland's conflict, and its agreement, Part 1: What consociationalists can learn from Northern Ireland'. *Government and Opposition*. 41(1) (2006): 43-63.
- Neuheiser, J. and S. Wolff. *Peace at last? The impact of the Good Friday agreement on Northern Ireland*. Oxford: Berghahn Books, 2002.
- O'Leary, B. 'The Nature of the agreement'. *Fordham Journal of International Law*. 22 (1999): 1628-1638.

_____. 'Divisor methods for sequential portfolio allocation in multi-party executive bodies: evidence from Northern Ireland and Denmark'. *American Journal of Political Science*. 49(1) (2005): 198-211.

Rautenbach, I. and E. Malherbe. *Constitutional law*. Johannesburg: Butterworths, 2004.

Reynolds, A. 'A constitutional Pied Piper: The North Irish Good Friday Agreement'. *Political Science Quarterly*. 114(4) (2013): 613-637.

Rice, C. and H.J. Summerville. 'Dialogue, democracy and government communication: Consociationalism in Northern Ireland'. In *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*, eds. M. Jakala, D. Kuzu, and M. Qvortrup, 103-128. Cham: Palgrave Macmillan, 2018.

Rooney, K. 'Institutionalising division'. *Fortnight*. 371 (June 1998): 21-24.

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (June 6, 1995).

Simonsen, S.G. 'Addressing ethnic divisions in post-conflict institution-building: lessons from recent cases'. *Security Dialogue*. 36(3) (2005): 297-318.

Van Wyk, D. J. Dugard, B. De Villiers and D. Davis, eds. *Rights and constitutionalism in South Africa*. Cape Town: Juta, 1994.

Venter, A. 'The executive: a critical evaluation'. In *Birth of a constitution*, ed. B De Villiers, 172-184. Cape Town: Juta, 1995.

White, T.J. 'Consociation, conditionality, and commitment: making peace in Northern Ireland'. In *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*, eds. M. Jakala, D. Kuzu and M. Qvortrup, 85-102. Cham: Palgrave Macmillan, 2018.

Wolff, P. 'The Good Friday agreement: a way to a lasting settlement?'. In *Consociationalism and power-sharing in Europe: Arend Lijphart's theory of political accommodation*, eds. M. Jakala, D. Kuzu, and M. Qvortrup, 14-29. Cham: Palgrave Macmillan, 2018.

Zlotnick, M. 'The death penalty and public opinion – S v. *Makwanyane* and Other'. *South African Journal on Human Rights*. 12(2) (1996): 70-84.