A Comment from a South African Perspective on Directive and Transformative Constitutionalism in Comparative Constitutional Law

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Abstract: This special issue demonstrates the importance of attending to the reception of constitutional concepts in overlapping transnational and local contexts and, for Africans including South Africans, the importance of attending to the economic structures embedded in constitutional political texts. The most significant difference between directive constitutionalism and transformative constitutionalism is the constitutional audience or actor the concepts are primarily addressing – the legislature or the judiciary. This significant distinction reveals a fault-line within the South African development of transformative constitutionalism. This comment begins to explore how the focus within transformative constitutionalism on the judiciary – judges as audience – came to be. During the negotiations/compromise to end apartheid and to establish a democratic constitution, the actors were at times various times speaking to a future audience of legislators and at other times were speaking to an audience of judges. One early 1990 South African constitutional analysis focused on the Constitution to be drafted as a document not only aimed at legislators but indeed embodying constitutional directives in directive constitutionalism's sense of the term. Two years later, the most influential writing on directive principles primarily viewed the idea through the then-ongoing debate over the timing and content of the South African Bill of Rights to be enforced by the judiciary. Within the broad church of transformative constitutionalism in South Africa, a democratic tradition of constitutionalism has persisted since the years of the late 1980s and early 1990s but is probably best described as minority or contesting. South African constitutional theory could use a bit less transformative and a bit more directive constitutionalism.

Keywords: Constitutional Directive Principles; Transformative Constitutionalism; Directive Constitutionalism

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As South Africans say, it is a "pleasure" to offer these brief comments based on the four articles in this important contribution kicking off a needed comparative constitutional discussion on directive constitutionalism (DC) and transformative constitutionalism (TC). On the basis of brief overviews of each of the articles, this Comment discusses the relationship between the two concepts from the South African perspective and reflects on one or two of the specific findings. While it is beyond the scope of this comment to discuss the role of these two concepts in the broader dynamics of comparative constitutional law, this contribution is the welcome first step in that direction. Indeed, this special issue is particularly important as the comparison of the two concepts is a productive and valuable one for South Africa at this time. As I explicate more fully in the first argument below, I am of the view that South African constitutional theory could use a bit less transformative and a bit more directive constitutionalism. Secondly, I argue that, taken as a whole, these articles demonstrate generally the importance of attending to the reception of constitutional concepts in overlapping transnational and local contexts and, for Africans including South Africans, the importance of attending to the economic structures embedded in our prime political texts.

Familiar with this theory, Mariana Canotilho's article explores and compares the key ideas driving and shaping both Constitucionalismo Dirigente and Transformative Constitutionalism, arguing that they are properly understood as two intertwined models, both effectively variants of 'social state constitutionalism'. Aligned with the focus of most comparative constitutional scholars, when defining TC Canotilho understandably zeroes in on the 1998 SAJHR article by Karl Klare, 'Legal Culture and Transformative Constitutionalism'.[1] While she argues that the theories are dominantly similar, what is most interesting is where and how she notes these concepts differ. For Canotilho, the two differ in terms of the main state actor they are addressing (the judiciary (DC) or the legislator (TC)).[2]

In his contribution, Deo Campos Dutra asks a series of important questions that he argues have not often enough been asked within the framework of Brazilian constitutional law, effectively constructing a critical comparative legal method for Brazilian constitutionalists.[3] This work is based upon the work of Gunther Frankenberg and is worked out through an examination of the quite uncritical and objectified reception of DC and the real

1 *Mariana Canotilho*, "Constitucionalismo Dirigente" and Transformative Constitutionalism: Common Elements, Differences, and Methodological Challenges, Verfassung und Recht in Übersee 56 (2023), in this special issue, *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), pp. 146-188.

2 *Canotilho*, note 1.

3 *Deo Campos Dutra*, The Theories of Constituição Dirigente and Transformative Constitutionalism and Their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law, Verfassung und Recht in Übersee 56 (2023), in this special issue.

risk of a similar reception of TC.[4] Dutra's examination reveals a fundamentally transnational process, the migration of DC from Portugal to Brazil and of TC from South Africa to Brazil both taking place in a broader international context. Indeed, Dutra interestingly goes so far as to note that TC has arguably migrated to Brazil from the Global North.[5]

The article by Florian Hoffmann and Fabio Carvalho Leite also takes a Brazilian focus, diving deep into the national interaction of democratic evolution and the relationship between the branches as demonstrative particularly of DC.[6] In tracing this story, Hoffmann and Leite make a helpful distinction between the original concept of a 'directive constitution' and the understanding eventually underlying the regime as it resulted in Brazil of a 'directive constitutionalism'. In their latter sense, directive constitutionalism Brazilian style can no longer be identified with the initial concept and is now composed of a dance whereby a self-empowered judiciary interacts with that first concept, with continuously ambiguous results.

The fourth of these pieces arguably brings the widest lens to this special issue as Luís António Malheiro Meneses do Vale sees DC at the crossroads of constitutional thought, also building in part from Frankenberg.[7] Do Vale's argument is that DC may be seen as a global transforming resource with attention to the concepts of New International Economic Order (NIEO) and the constitutionalist developmental projects (including that in Brazil) that DC has inspired. Do Vale's straightforward focus on the international context provides an important supplement to Mariana Canotilho's more domestic origins reading of DC, identifying an important globalist point of similarity between DC and TC.

Do Vale and Dutra both can speak in the register increasingly adopted in South African constitutionalism treating themes of conquest, decoloniality, postcolonialism and compro-

4 *Günter Frankenberg*, Critical Comparisons: Re-Thinking Comparative Law New Directions in International Law, Harvard International Law Journal 26 (1985), pp. 411–456.

5 *Dutra*, note 3.

6 *Florian F. Hoffmann / Fabio Carvalho Leite*, Transformation by Decree? A (Brief) Reflection on the 'Directive Constitution' (Constituição Dirigente) in Brazil, Verfassung und Recht in Übersee 56 (2023), in this special issue.

7 *Luís António Malheiro Meneses do Vale*, Asking for Directions: The Origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought, Verfassung und Recht in Übersee 56 (2023), in this special issue.

mise.[8] More generally, there appears to be a very productive potential route for straight-on comparative constitutional conversation between South Africa and Brazil, often understood as within the Global South, to which this special issue contributes.[9]

To move to the central argument of this Comment, Mariana Canotilho's point regarding the way in which DC and TC are fundamentally geared to different audiences within the domestic constitutional state is a pivotal and generative one. This is a point that should be incorporated and taken more fully into account in the South African and other domestic contexts. Moreover, as we shall outline in greater detail below, the legislature or the judiciary – this significant distinction between TC and DC reveals a fault-line within the South African development (and arguably reception) of TC.

To begin by stating the obvious, in the South African legal sphere, a central paradigm for justifying, understanding, and assessing the social change functions and potential of law, legislatures, and the courts has been that of transformative constitutionalism. Further, I would agree wholeheartedly with Canotilho that the focus of TC in the South African context has been on the judiciary.

It is hard to question the dominance of that focus. One has only to read for the purposes of marking a year's worth of second year law school essays in constitutional law to understand the extent of the dominance and the depth of the proposition that courts and rights can drive social change. The instrumental power of the judiciary and the symbolic power of the bill of rights are fused in the minds of most students into a single simple mantra: the courts must be all powerful and are (nearly) always right. This happens, it must be said, despite the best efforts of many of their teachers.

Nonetheless, the story of how that focus within transformative constitutionalism on the judiciary – judges as audience – came to be is instructive and worth beginning to explore. Let us admit, at least for purposes of inquiry and comment, that South Africa was the birthplace of transformative constitutionalism, half the specific topic of this special

8 *Firoz Cachalia*, Democratic Constitutionalism in the Time of the Postcolony : Beyond Triumph and Betrayal, South African Journal on Human Rights 34 (2018), pp. 375–397; *Heinz Klug*, Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa, South African Journal on Human Rights 34 (2018), pp. 469–491; *Tshepo Madlingozi*, On Settler Colonialism and Post-Conquest Constitutionness: The Decolonising Constitutional Vision of African Nationalists of Azania/South Africa, in: Decolonizing Constitutionalism, in: Boaventura de Sousa Santos / Sara Araújo / Orlando Aragón Andrade (eds.), Decolonizing Constitutionalism: Beyond False or Impossible Promises, Oxfordshire 2023, pp. 168-192; *Sanele Sibanda*, When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism, Law, Democracy and Development 24 (2020), pp. 384–412.

9 *Michaela Hailbronner*, Transformative Constitutionalism: Not Only in the Global South, The American Journal of Comparative Law 65 (2017), pp. 527–565; *Philipp Dann / Michael Riegner / Maxim Bönnemann*, The Global South and Comparative Constitutional Law, 2020; *Michaela Hailbronner*, Overcoming Obstacles to North-South Dialogue: Transformative Constitutionalism and the Fight against Poverty and Institutional Failure, Verfassung und Recht in Übersee 49 (2016), pp. 253–262.

issue. In that particular context, national constitution-making at the end of apartheid took place against the background of an involved and inherently limiting international order.[10] As Klug tells the story, it was a necessary but not sufficient condition of a shared South African rights tradition that enabled the major political actors to turn towards the crucial understanding of a justiciable Bill of Rights.[11] Klug insists that "while it may be reasonable to believe that the victims of apartheid would support the introduction of a bill of rights in response to the massive denial of rights under apartheid, there is less reason to believe that there should be an equivalent faith in the judiciary as the upholders of such rights."[12] During the negotiations to end apartheid and to establish a democratic constitution, the actors were at times various times speaking to a future audience of legislators and at other times were speaking to an audience of judges. Once a text was finalized – referring here to the 1996 Constitution – the simultaneity of those discourses continued. Nonetheless, while not determinatively so, the discourse of rights has an affinity for an audience of judges.

In order to distinguish precisely between those two discourses present at the South African constitution's creation, it is helpful to have regard to Canotilho. In explicating DC, Canotilho has a clear definition of the original core concept of constitutional directives. *Directive* constitutionalism is similar to TC in constructing a theoretical framework that revolves around the notion of a constitution that commands political powers, in order to establish a specific political, economic, and social project for a society. Within this explication of DC, Mariana Canotilho establishes an important distinction between the so-called *programmatic norms*, which essentially determine the goals or main tasks of the State in an abstract way, and *constitutional directives* ("imposições constitucionais"). Whereas the former are usually conceived as political statements, without any binding legal value, the latter are positive rules, aimed at all the powers of the State, but especially at the legislator, imposing concrete and material obligations.

As is alluded to by do Vale, Stu Woolman's use of aspirational constitutionalism and scaffolding tracks onto this distinction at the heart of DC, thereby sounding another note of South African resonance for this special issue.[13] Woolman's characterization of the South African constitution as aspirational is apt. Still, Woolman appears unduly pessimistic, certainly from a DC constitutional directive point of view, in overstating the number and strength of the necessary preconditions for economic change through the constitution.[14] Nonetheless, as we shall note briefly in concluding below, the proof of this proposition is

10 *Heinz Klug*, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction, Cambridge 2000.

11 *Klug*, note 10, pp. 73–76.

12 *Klug*, note 10, p. 47.

13 *do Vale*, note 7, *Stu Woolman*, South Africa's Aspirational Constitution and Our Problems of Collective Action, South African Journal on Human Rights 32 (2016), p. 157.

14 *Stu Woolman*, Understanding South Africa's Aspirational Constitution as Scaffolding I. Twenty Years of South African Constitutionalism, New York Law School Law Review 60 (2015-2016), p. 286; *Woolman*, note 13, p. 157.

yet to be made, as a number of non-rights provisions in the South African including section 217 dealing with public procurement are now being stress-tested.

As this special issue implicitly encourages comparative constitutional scholars to do, it is a worthwhile exercise to excavate readings of TC that overlap yet differ with DC in particular national contexts. This can be done, as in this special issue, in Brazil or South Africa, as well as elsewhere, perhaps particularly within lusophone or other civil law-influenced jurisdictions such as Mozambique. Following this lead, we can identify some early South African constitutional analyses that focused, in Canotilho's terms, on the Constitution as a document not only aimed at legislators but indeed embodying constitutional directives in her sense of the term.

One location (of many) framing the potential of South African constitutionalism in the late 1980s and the early 1990s was a 1989 special issue of an American student-edited journal (with this Comment's author on staff), the *Columbia Human Rights Law Review*.[15] A minority view expressed support for a specific constitutional mechanism akin to DC constitutional directives. In his article[16] in that 1989 special issue, African National Congress (ANC) stalwart Nathaniel Masemola discussed the topic of what he termed "Principles of State Policy". In his view, advocating for the superiority of the ANC position over the then-current position of the apartheid government:

"No provision is made for principles of state policy in either the ANC Guidelines or the SALC Report. Such principles, however, are to be found in the constitutions of several countries, such as India, Pakistan, and Nigeria (citation omitted). These principles are not justiciable rights, but are norms of a political, social, economic, and cultural kind that impose duties on governments acting across the economic and social spectrum to guarantee the people greater freedom. Since these principles are not justiciable, their implementation is vested in specialised commissions. Although the ANC Guidelines do not explicitly provide for such principles, their provisions for affirmative action are comparable and could achieve the same purposes as would be achieved by explicit principles of state policy. In this respect, too, the ANC Guidelines are a step ahead of the SALC Report."

The term "directive principle" is then directly picked up in a later work of Dennis Davis, penned and published before the adoption of a Bill of Rights in the 1993 (interim) Constitution.[17] Neither Masemola's 1989 nor Davis's 1992 piece engages with Canotilho's 1970s DC concept. While Masemola's framing arguably accords with or at the very least fits within the paradigm of DC, Davis's 1992 writing is best read to primarily view

15 *Stephen Ellmann*, Human Rights in the Post-Apartheid South African Constitution, Columbia Human Rights Law Review 21 (1990 1989), pp. [iii]-[iv].

16 *Nathaniel M. Masemola*, Rights and a Future South African Constitution: The Controversial and the Non-Controversial Human Rights in the Post-Apartheid South African Constitution, Columbia Human Rights Law Review 21 (1990 1989), pp. 45–58.

17 *D. M. Davis*, Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles, The South African Journal on Human Rights 8 (1992), p. 475.

the idea of directive principles through the Indian constitutional experience[18] as well as fundamentally through the then-ongoing debate over the timing and content of the South African Bill of Rights. This Bill of Rights/judiciary framing is shown in his engagement with other scholars in this piece and is clear in its title: The Case against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles. Shown also in contemporary African constitutionalists, this framing is demonstrated in the language in this 1992 article discussing these directive principles.[19] The principles are not at core legislative (contrajudicative) duties; they are guides to judicial interpretation. Indeed, six years before Klare's *SAJHR* article and the very much during the round-table negotiating process[20], Davis (as well as others) was using the language of transformation, clearly addressing himself more to the judicial than to the legislative audience, albeit noting a tilt towards rights rather than politics.[21] His words hit the transformation theme thrice:[22]

"A transformed jurisprudence will not occur overnight. Our legal community is schooled in a laissez faire positivism, the modern exponent of which is HLA Hart. Even Dworkin is avant garde for most of our lawyers! Consequently, legislative assistance is needed to assist in the development of a transformed concept of equality. Therein lies the importance of directive principles. A constitution which includes directive principles is an exercise in constitutional integrity for it announces clearly and unequivocally that second- and third-generation rights can only be protected by way of negative constitutional review. For this reason, the inclusion of such 'rights' as directives of state policy with clear provision that they be used as interpretative guides as well as basic principles of administrative review proclaims an honest constitutional process and affords the opportunity for lawyers to engage in a jurisprudence of transformation, an exercise that attempts to alter the content of the key legal concepts such as equality."

Within the broad church of TC, a democratic tradition of constitutionalism has persisted since the years of the late 1980s and early 1990s but is probably best described as minority or contesting rather than dominant. In distinction from the judiciary-focused dominant reading, this tradition persists, articulated among political scientists as well as legal scholars. The approach of democratic constitutionalism draws on the work of Firoz Cachalia[23],

18 *Theunis Roux*, The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis, Cambridge 2018, pp. 146–192.

19 *Berihun Adugna Gebeye*, The Potential Role of Directive Principles of State Policies for Transformative Constitutionalism in Africa, Africa Journal of Comparative Constitutional Law (2017), pp. 1–34.

20 *Andrew Arato*, Post Sovereign Constitution Making: Learning and Legitimacy, Oxford 2016.

21 *Davis*, note 17, p. 490.

22 *Davis*, note 17, pp. 487–488.

23 *Firoz Cachalia*, Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint, New York Law School Law Review 60 (2015-2016), pp. 379–406.

James Fowkes[24], Sithembile Mbete,[25] Steven Friedman,[26] and Brian Ray.[27] All of these scholars see and emphasize a fundamentally legitimate role for politics and social action in South African constitutionalism, holding up a distinctly democratic/legislature focused tradition within South African understandings of transformative constitutionalism.[28]

Of additional interest to the tracing of the constitutional directive concept in South Africa should be the several statutes that the 1996 Constitution mandated. Some of these were in rights-regarding fields. Those fields included the subject matters of equality[29] as well as the rights to access to information[30] and administrative justice.[31] Other statutes mandated by the 1996 Constitution were in more structural or even economic fields less easily understood and less easily identified with rights-enforcement. Perhaps most prominent here is public procurement (section 217), a field of economic activity thoroughly entangled with affirmative action/black economic empowerment, as arguably prefigured by Masemola.[32]

Three decades after constitution-making, the primary debate around the first set of rights-enforcement statutes is firmly within the judicial discourse. For instance, in the sphere of access to information and informational privacy, the most significant issues have to do with matters of interpretation such as the content of the right and the extent to which these constitutionally mandated statutes cover their respective fields.[33]

24 *James Fowkes*, The People, the Court and Langa Constitutionalism, Acta Juridica 2015 (2015), p. 75–87; *James Fowkes*, Building the Constitution, Cambridge 2016; *James Fowkes*, Transformative Constitutionalism and the Global South: The View from South Africa, in: Armin von Bogdandy et al. (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017, pp. 97–122.

25 *Sithembile Mbete,* The Economic Freedom Fighters - South Africa's Turn towards Populism?" *Journal of African Elections* 14 (2015), pp. 35–59.

26 *Steven Friedman,* Enabling Agency: The Courts and Social Policy, Transformation: Critical Perspectives on Southern Africa 91 (2014), pp. 19-39.

27 *Brian Ray*, Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave, Cambridge 2016.

28 *Jonathan Klaaren*, Regulatory Politics in South Africa 25 Years After Apartheid, Journal of Asian and African Studies 56 (2021), pp. 86–88.

29 *Shireen Hassim*, Decolonising Equality: The Radical Roots of the Gender Equality Clause in the South African Constitution, South African Journal on Human Rights 34(2018), pp. 342–358.

30 *Raisa Cachalia*, Botching Procedure, Avoiding Substance: A Critique of the Majority Judgment in My Vote Counts, South African Journal on Human Rights 33 (2017), pp. 138–153; *Jonathan Klaaren*, My Vote Counts and the Transparency of Political Party Funding in South Africa, Law, Democracy, & Development 22 (2018), pp. 1–11.

31 *Jonathan Klaaren,* Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information, South African Journal on Human Rights 13 (1997), pp. 549–564.

32 *Glenn Penfold /Pippa Reyburn*, Chapter 25 Public Procurement, in: Stu Woolman (ed.), Constitutional Law of South Africa, South Africa 2003, p. 37.

33 *Firoz Cachalia /Jonathan Klaaren*, Towards a Public Law Perspective on the Constitutional Law of Privacy in South Africa in the Age of Digitalization, Journal of African Law (2023), pp. 9–11.

We see a very different picture for the non-rights structural statutes. The field of public procurement is demonstrative here. There are in nearly equal measures large doses of confusion, conflict, and corruption. The constitutionally endorsed statute recently proposed and tabled in Parliament by the South African National Treasury has failed to attract approval across government or from business and labour.[34]

Davis paints the current challenge to the national transformative constitutionalism paradigm in the following terms:[35]

"irrespective of the divisions of opinion as to what the courts' appropriate role was at the dawn of constitutional democracy, in the context of the far more fractured state of our present politics, courts are required to step up to the jurisprudential plate, to ensure that both the procedural and substantive commitments enshrined in the text are able to percolate into the political and economic reality of contemporary South Africa."

To repeat what it both stated and explored above, in meeting its current challenges, South African constitutional theory could use a bit less transformative and a bit more directive constitutionalism. Canotilho argues that recent work on directive principles appears to "achieve a successful synthesis of some of the fundamental elements of directive constitutionalism and transformative constitutionalism".[36] Recent scholarship by Profs Khaitan and Weis has explored and debated important aspects of this topic such as the relationship between the structure and the practice of directive principles.[37] This scholarship should go forward with an appreciation – as informed by this special issue – of the overlap and the difference between DC and TC and should be grappled with in domestic contexts such as Brazil and South Africa.

34 Public Procurement Bill B-18 2023 (30 June 2023) (as introduced by the Minister of Finance in Parliament), https://static.pmg.org.za/18-2023_Public_Procurement_Bill.pdf.

35 *Dennis Davis*, Twenty Years of Constitutional Democracy: A Preliminary Reflection, New York Law School Law Review 60 (2015-2016), pp. 39–56.

36 *Canotilho,* note 1.

37 *Tarunabh Khaitan*, Constitutional Directives: Morally-Committed Political Constitutionalism, The Modern Law Review 82 (2019), p. 621; *Lael K. Weis*, Constitutional Directive Principles, Oxford Journal of Legal Studies 37 (2017), pp. 916–945; *Lael K. Weis*, Environmental Constitutionalism: Aspiration or Transformation?, International Journal of Constitutional Law 16 (2018), pp. 836–870.