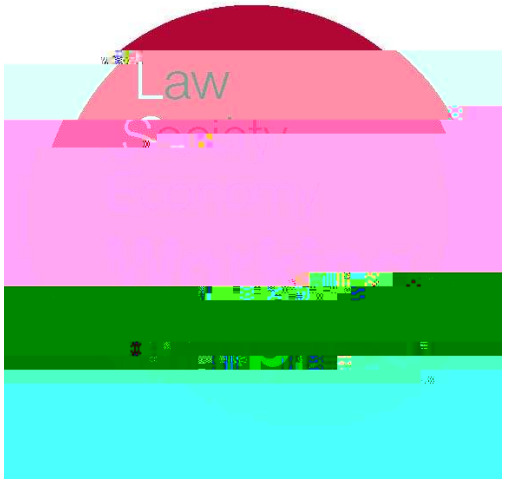

Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections

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Abstract: The controversy surrounding the judicial use of comparative constitutional law is not new. However, the debate has recently been reignited by a number of US Supreme Court justices who have spoken out on the use of non-US law in the Court. Scalia opposes, and Breyer favours, references to 'foreign law'. Their comments, made both within and outside of the Court, have led to a reaction by scholars. Arguably the debate is US-specific as it resembles the different views regarding constitutional interpretation, namely whether the Constitution's original, or rather its current, meaning is determinative. Yet the debate also raises broader issues of constitutional theory and politics: formal vs substantive legitimacy, globalisation of the courts, judicial sleight of hand, the cultural foundations of constitutional law, and the citation of non-primary sources of law in litigation. The present article explores these issues. It rejects radical approaches (either against or in favour of comparative constitutional law) and instead argues for a more modest process which both identifies the national specificity of law and grasps the mediating potential of law as a self-reflexive discourse.

INTRODUCTION

In 1997 US Supreme Court Justice Antonin Scalia asserted in Printz v United States that 'comparative analysis [is] inappropriate to the task of interpreting a constitution.[1] Since then the matter has been debated by judges in and out of the courts[2] as well as


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interpreting the Constiution. According to Scalia, the only legitimate way to change the Constitution is through the formal amendment process, and not through an active judiciary which (illegitimately) changes the Constitution based on its own preferences and prejudices (which may or may not include non-US law).[16] The current divide with regard to constitutional interpretation of the text is between 'original meaning' (the judge interprets statutes literally, based on 'the original meaning of the text, not what the original draftsmen intended'), and 'current meaning' (the meaning of the US Constitution should be tailored to contemporary and changing social circumstances).[17] Scalia argues that the Constitution has a meaning, and the historical and constitutional role of judges has been to determine its meaning.


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Dulles.[51]

are loosely linked up in a multi-level state-transcending system of governance which challenges national law. The new legal orders do not subscribe to a territorial pattern but to a functional pattern of regulating diverse sectors, interests, products and values.[69]

A summary response to network theory is that networks are not self-legitimating orders and do not enjoy an executive monopoly, and so cannot rival the sovereignty claim asserted by the states. Networks are necessary emanations of a functionally differentiated society, but the state is still the reference point of political and social development; it remains accountable for processes which it can neither steer nor control. The point to make in relation to originalism is that discourse theory (Habermas), systems theory (Luhmann), networks (Teubner), legal pluralism (de Sousa Santos) constitutional pluralism,[70] and cosmopolitanism[71] are theories that emphasise formal as well as substantive legitimacy, recognise the need to adjust legal reasoning to the complexities of modern society, and challenge the continued authority of classic sovereignty theory (which views the state as the enforcer of law, the sole provider of constitutions and the embodiment of sovereignty) in


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Manipulation

A final concern with the originialists' position is that it openly invites intellectual dishonesty. Scalia does not object to judges consulting foreign law; he objects to judges citing foreign law in judicial opinions.[100] Both aspects are open to criticism. First, it can neither be necessary nor acceptable for judges not to cite legal authority that filters into their opinion. Common law judges are required to provide a written and detailed opinion which, inter alia, cites, distinguishes or departs from precedent.[101] What benefit can be derived from artificially concealing the identity of a legal argument simply because it originates outside the jurisdiction?[102] Secondly, judges could also be positively encouraged to consult widely before reaching a decision. Niklas Luhmann points out that, when faced with a legal problem, the legal system draws a distinction between self-reference and external reference. Self-referentiality means that all operations and elements always refer to, and reproduce, the system. The system is normatively closed: it excludes morality which is external to, and thus not binding on, the legal system. External referentiality, on the other hand, prevents the system from standing still by cognitively opening it up to its environment from where it is fed with new information. Although the legal system may not refer to external norms (e.g. morality), it may (indeed it must) refer to external knowledge. The reference to (not the transfer of) knowledge remains an internal oper

CONCLUSION

The originalists' objections raise many additional issues. If comparative analysis is inappropriate to the task of interpreting constitutional law, does that make references to foreign law appropriate in relation to private law? Why is it acceptable to borrow from other legal systems when a new constitution is written, but not when it is interpreted? Finally, why is a historical legal approach legitimate (Scalia cites old

science embraces theories of knowledge (epistemology) and of learning (methodology), as well as the study of the principles of science (metaphysics),[114] and thus operates with a different logic than law.[115] Although only few scientitists have genuine Eureka moments, legal scholars do not generally develop hypotheses after a new discovery or an investigation based on the scientific method (i.e. conducting research, identifying the problem, stating a hypothesis, conducting project experimentation, and reaching a conclusion).

Furthermore, the analogy with natural sciences masks important differences particularly with regard to constitutional law. Comparative constitutional law oscillates between 'seeking similarity' and 'appreciating difference'.[116] Underlying comparative

Self-reflexion explains why the USA would not be bound by the dicta of a judge in Zimbabwe, but would want to cite a European Court of Human Rights case on the decriminalisation of homosexuality. Michelman and Kahn argue that comparative analysis allows US courts 'to clarify our picture of ourselves',[118] and that it helps 'us to understand who we are',[119] without having to engage in constitutional borrowing. Comparative law is a reflexive process in order to understand law.[120] Its purpose is not to import a final resolution or to contract out the judges' duty to decide hard cases.[121]

> [Law] operates reflexively. The mode of expecting is not random, nor is it left to simple social convenience. It is provided for in the legal system itself. In this way the system controls itself at the level of second-order observations, which is a typical condition for differentiation and operative closure […]. Law is not something that is simply maintained with the help of powerful political support and then, more or less, enforced.[122]

At one level, Scalia's objections, and the objections to his objections, tell a familiar story about the 'contradictory principles' of constitutional law. At another level, the entire judicial and scholarly debate about the rights and wrongs of using foreign law in the courts has 8NNNSb,582HTD26H8*8TSe,N2TDTHSl,85DD28T=*SfDD28Di=H27*7Sa,N2*N667Sb,582