4 Can there be autochthonous methods of constitutional interpretation?

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4.1 Introduction

It is common ground among theorists of constitutional interpretation that many logically defensible methods of constitutional interpretation exist. We have labels for these methods: originalism, textualism, living constitutionalism, structural interpretation, and many more. It is also common ground that observation shows that nations vary in the degree to which lawyers and judges within each nation use one or another method.

Note that these methods are transnational in the sense that they are discernibly similar from one to another nation. Originalism in Austria means examining the historical materials associated with the adoption of the Austrian constitution; originalism in India means examining the historical materials associated with the adoption of the Indian constitution. Of course, what those materials are may vary from one to another nation. We may have detailed records of the debates at one nation's constitutional convention but relatively little information about what the public heard about a proposed constitution's terms, and the opposite for another nation – rich information about the information available to the public and almost nothing about what the drafters argued about before presenting their proposal to the public. And of course, we might find different 'schools' of originalism, some emphasizing a specific set of relevant historical materials and others giving priority to a different set. And, further, the degree to which scholars and judges use each school's interpretive method might differ across nations. Yet, with all those qualifications, we can fairly talk about 'originalism' as a method of constitutional interpretation.

I could repeat the preceding exercise for each listed method of interpretation. At the end, we could colour a map of the world's nations using a handful of colours with a few shadings – navy blue, aquamarine, cornflower blue – to show each nation's preferred approach to constitutional interpretation. We might draw an analogy here to the effort in traditional comparative law to identify legal 'families'. And, as with that effort, we might ask, could there be a true outlier, a nation whose 'interpretive colour' differed from the ones used elsewhere on the map or that was not a member of any identifiable legal family? Such a nation would use what I call an autochthonous method of constitutional interpretation.

For my purposes, the term *autochthonous* refers to a phenomenon that (a) is present in one constitutional system but not in others and (b) arises from circumstances unique to the nation in which it occurs, where *unique* is defined to exclude cases in which there are general 'mid-level' similarities in social, economic, and political circumstances across nations. This chapter explores the possibility of autochthonous methods of constitutional interpretation.

At the outset I emphasize that my perspective is a broad, almost jurisprudential one. To distinguish my perspective from others, consider the following: We might observe shades of red and blue scattered around the world, and we might want to ask whether there might be some account given for the existence of these families of constitutional interpretation. So, for example, we might try to determine whether there is something like a distinctive populist method of constitutional interpretation – perhaps newly recognized as an addition to the list of methods.

My concern here is different. I am interested in examining the possibility that somewhere on the map there might be a single blot of a colour not used elsewhere. Again, can there be a truly autochthonous method of constitutional interpretation rather than a local variant on a recognized member of the family of methods?

4.2 Substantive constitutional provisions

I begin by distinguishing three matters of interest: substantive constitutional provisions, interpretations of those provisions, and the methods used to generate those interpretations. Substantive provisions vary among nations: Some nations guarantee social and economic rights, others do not; some nations protect a wide range of such rights, others a smaller set; some nations protect free expression generally, others provide specific protection for artistic expression. Sometimes, though not always, the choices of substantive provisions reflect specific national experiences and in that sense are autochthonous even if the experiences are similar to those elsewhere (where they might or might not have resulted in the inclusion of relevant provisions in the constitution).

For example, on one common account of constitution drafting, drafters should be particularly attentive to the risks their nations distinctively face – potential military coups, for example, or overreaching chief executives – and draft constitutional provisions directed to those risks. Because risks vary from place to place and from time to time, risk-related provisions will vary according to national experience.

A striking example is provided in the South African constitution. Many nations limit the time that a person can be held after arrest but before presentation to a judicial officer. Often these provisions state that the person must appear before a judge within a reasonable period. Not so in South Africa. Here is its constitution's provision on the matter:

> (1) Everyone who is arrested for allegedly committing an offence has the right— … (d) to be brought before a court as soon as reasonably

> possible, but not later than— (i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.[1]

It seems clear that the South African provision reflects the distinctive national experience of detentions under apartheid.

This South African provision can be seen as a species of the genus 'provisions dealing with pretrial detentions'. Consider the possibility of a constitutional provision at best loosely related to others in national constitutions – the 'unique' provision. Ecuador's 2008 constitution contains several such provisions, almost all of them resulting from the constitution drafters' desire to create a populist constitution as described in the constitution's elaborate preamble. Its Chapter Five established the 'Transparency and Social Control Branch of Government'. The branch includes the comptroller general and the human rights ombudsman office. These and other components resemble those in other constitutions. The Council for Public Participation and Control, in contrast, is unusual. Its role is basically to oversee the other components of the branch, and its selection method is usual: The National Electoral Council is to 'organize' a 'competitive and merit-based public examination process' for choosing from 'candidacies proposed by social organizations and the citizenry'.[2]

We can see this provision in two ways. It might be the local species of the genus, 'selection mechanisms for independent bodies' – the Ecuadorian analogue of judicial selection commissions. Or it might be a unique and innovative development – to pursue the metaphor, an example of speciation or the separating of a new species from prior ones. On the latter view, the provision might be autochthonous.

Using the word *innovative* to describe such provisions suggests that we can have a sense that something new – and for the moment autochthonous – might diffuse and then lose its autochthonous character. Again, Ecuador provides an example. Its 2008 constitution contains a chapter with four articles describing the 'rights of nature', the first of which asserts that 'Nature … has the right to integral respect for its existence and for the maintenance and regeneration of tis life cycles, structure, functions, and evolution processes'.[3] Scholars interested in the constitutional and nature see this as either a crystallization of inchoate ideas rattling around in other constitutional systems, or as foreshadowing a coming general recognition of ecological rights.[4]

In summary, many substantive constitutional provisions are at most nationally distinctive versions of provisions generically common in constitutions. That generic relationship counsels against treating them as completely

1 Constitution of South Africa, Art. 35 (1) (d).
2 Constitution of Ecuador, Art. 207.
3 Constitution of Ecuador, Art. 71.
4 Cf. Erin Daly, 'Constitutional Protection for Environmental Rights: The Benefits of Environmental Process' (2012) 17 International Journal of Peace Studies 71.

autochthonous. Some provisions, though, may be unique to their environments. If they then spread – populate other lands, so to speak – they might lose their nationally distinctive character and become generic.

4.3 Interpretations of substantive provisions

Interpretations of identical substantive provisions also vary, though here the case is complicated by questions of translation and contextual understanding. Consider a constitutional provision protecting individual privacy. We know that constitutions adopting such a provision – using exactly the same terms, whether in a common language (English in the United States and its subnational constitutions, French in France and Francophone Africa) or in translations that all agree are linguistically identical – can be interpreted to reach different results in different nations.

The reason is straightforward. I use the doctrine of proportionality as the vehicle for my explanation, but many other examples might be adduced. Suppose the proportionality analysis reaches the stage of proportionality as such (or *strictu sensu*, as it is sometimes put). A statute promoting some social goal will be unconstitutionally disproportionate if its intrusion on the constitutionally protected value – here, privacy – is not justified by the extent to which it advances the social goal. But, of course, the degree to which privacy is valued varies from nation to nation. So, a statute might be unconstitutionally disproportionate in a nation that places a high constitutional value on privacy but constitutionally proportionate in a nation that, while recognizing a constitutional right to privacy, places a smaller weight on it (enough smaller to shift the balance with respect to whether the statute advances the social goal enough to outweigh the intrusion on privacy).[5]

An imperfect example of this phenomenon is found in the Alaska Supreme Court's 1975 decision that the state's constitutional guarantee of a right to privacy gave Alaskans a right to possess small amounts of marijuana in their homes for personal use – a holding not reproduced anywhere else in the United States. A concurring opinion by Justice Boochever noted,

> Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.[6]

5 It is my understanding that the Alaska state constitution has been interpreted to give greater weight to privacy than has the US national constitution.

6 Tate v Ravin, 537 P2d 494, 512-13 (Alaska 1975) (Boochever, J, concurring). The example is imperfect because the constitution of Alaska contains an express provision guaranteeing a right to privacy, whereas the US Constitution's guarantee is non-textual (or is grounded in constitutional provisions that do not refer specifically to privacy).

National political and social cultures determine the weight given to at least some constitutional values. For that reason there can be varying substantive constitutional interpretations of identical provisions, grounded in national characteristics – autochthonous substantive interpretations. We might qualify this conclusion by challenging the premise that the substantive provisions are identical.

When comparing interpretations of assertedly identical provisions written in different languages, we must be attentive to the possibility that the provisions are not linguistically identical. The US Constitution provides, 'Congress shall make no law … abridging the freedom of speech, or of the press'. The French Constitution incorporates two provisions of the 1789 Declaration of Human and Civil Rights:

> Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi', and 'La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme: tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi.

A standard translation of those provisions is:

> No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order,

and

> The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.

Putting aside all the *other* words in these provisions, does *freedom* in the US Constitution mean the same thing as *librement* in the French?

Even apart from issues of translation, we might worry that context matters *within* a single language. As noted above, the Alaskan constitution values privacy more than the US Constitution does, and – I believe – it does so because Alaskans see themselves as the inheritors of a tradition of rugged frontier individualism. We might say that the historical conditions of Alaskan constitutionalism give the word *privacy* a distinctive meaning, different from the word's meaning in the continental United States.

That example illustrates a more general possibility. On some accounts of word- and phrase-meaning, such meanings are inextricably bound up with the entire social world within which the words are uttered (or, in the present context, written). If these accounts are correct, *all* substantive constitutional

interpretations are autochthonous. Even if one nation expressly and intentionally borrows a constitutional provision from another country with a common language, the provision's meaning will diverge from its meaning in the original nation.

If this is so, coming up with examples is close to impossible, and I cannot defend the one that follows except by an appeal to my sense of things. The example is the 'clear and present danger' test for determining when a constitution permits regulation of speech that the government says increases the risk of law-breaking. The phrase was introduced to US constitutional law by Justice Oliver Wendell Holmes in 1919,[7] restated in 1951,[8] and restated again in 1969.[9] In 1951, Chief Justice Fred Vinson 'interpreted the phrase' to mean that courts 'must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'.[10] In 1969 the Court explained that the phrase identified circumstances where advocacy of law violation 'is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.[11] Courts around the world have 'adopted' the clear-and-present danger test, but they vary widely in the meanings they actually give that test. The US Supreme Court's 1969 formulation, in particular, is not widely followed.[12] So: 'freedom of expression' comes to mean 'clear and present danger', but what *that* means varies from nation to nation.

There is a sense in which this analysis transforms the question at hand – Can nations interpret *identical* constitutional provisions differently? – into the prior one – Can nations have different constitutional provisions? And, just as the answer to the latter question is obviously yes, so should the answer to the transformed question be the same.

These qualifications do not undermine my basic point, though. Either the substantive provisions are autochthonous – 'privacy-indexed-to-Alaska' and 'privacy-indexed-to-the-rest-of-the-United-States' – or the interpretations of the provisions are autochthonous – 'clear-and-present-danger-indexed-to-the-United-States' and 'clear-and-present-danger-indexed-to-Australia'. Once again, we see the possibility of autochthony, here autochthony in constitutional interpretation at the level of specific provisions.

7 Schenck v United States, 249 US 47 (1919).
8 Dennis v United States, 341 US 494 (1951).
9 Brandenburg v Ohio, 395 US 444 (1969).
10 341 US at 510.
11 395 US at 447.
12 For a now-dated comparison between the United States and Canada on this question, see Kent Greenawalt, 'Free Speech in Canada and the United States' (1992) 55 Law & Contemporary Problems 5, at 13–15, which on my reading suggests quite tentatively that Canada's Supreme Court would temper the stringency of the *Brandenburg* version of the clear-and-present-danger test.

4.4 Methods of constitutional interpretation

Is the case different for *methods* of constitutional interpretation? I began this chapter by observing that constitutional theorists in the United States and elsewhere have developed lists of interpretive methods: originalism (with many variants), traditionalism, living constitutionalism (in Canada, 'living tree' interpretation), interpretation with reference to universal moral and political truths, and more. For the United States, Philip Bobbitt has called these 'modalities' of constitutional interpretation, and one modality is especially important in the present context. This is the modality Bobbitt calls, somewhat misleadingly, 'ethical' interpretation, by which he means interpretation with reference to what is described as a nation's ethos or normative self-understanding.[13]

The ethical modality is important here because it rules out one obvious possibility for autochthonous interpretive methods – interpretation in light of the distinctive characteristics of the nation's people. The Preamble to Ireland's 1937 Constitution makes explicit reference to that nation's specific national history and the religious composition of its (then) people.[14] Interpreting a constitutional provision – say, a guarantee that the state will not deprive people of life or liberty without due process of law – in light of the Irish Preamble might lead to Ireland-specific results (as it did with respect to abortion until the constitution was amended) but would not deploy an Ireland-specific modality of interpretation. Rather, it would deploy the universally available ethical modality. To revert to a previous formulation, it would be 'ethical-modality-indexed-to-Ireland', not 'Irish interpretation (in a modality unavailable elsewhere)'.

Something similar might be said about constitutional interpretation that takes the controversial idea of 'Hungarian identity' into account. Much of that identity is laid out in the 2011 constitution's preamble. The contrast with Ireland is instructive. In 1937 the description of Irish identity was not controversial within Ireland. By the twenty-first century the people of Ireland understood that national identity there had changed, and interpreting the constitution with an eye to the *1937* identity was no longer possible. That specific form of the ethical modality had become unavailable. In Hungary, the 2011 description of national identity was controversial from the outset. As I argue later, a modality's availability depends upon agreement within the legal culture that it is available. This might make might the ethical modality unavailable in Hungary.

Though the idea to which he refers is important, Bobbitt's term *ethical* is misleading because it might be confused with another modality of interpretation.

13 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1982). For Bobbitt, the core message of an 'ethical' interpretation is: 'That's simply not who we are as a people' or, conversely, 'This is who we are as a people'.

14 Similar references are not uncommon in other nation's preambles. For an overview, see Wim Voermans et al, *Constitutional Preambles: A Comparative Analysis* (Edward Elgar 2017).

Call it *philosophical*: constitutional provisions are interpreted with reference to the best available philosophical understanding of the concepts identified by their terms.[15] Of course, people will disagree about what that understanding might be. It might even be the case that disagreements will map systematically on to geography: we might find that a survey would show that a majority of jurists from Western Europe understand the word *equality* in one way, while a majority from Southeast Asia understand it differently. But, the philosophical modality of interpretation is universal rather than autochthonous, just as Bobbitt's ethical modality is: The outcomes might differ, but the modality of interpretation is the same everywhere.

So far, then, we do not have an account in which there can be autochthonous modalities of constitutional interpretation. Bobbitt's work provides the basis for such an account, though. He argues that in the United States the list of interpretive modalities available at any moment is limited.[16] This opens up the possibility of truly autochthonous interpretive methods. Consider the possibility that examining all the interpretive modalities we find in the world leads us to develop a 'set' of modalities consisting of N elements. If each nation uses only a subset of that set – if, for example, the United States does not use 'living tree' interpretation – and if each nation's subset differs from every other nation's (or perhaps if the sets fall into families, with each family different from the others), we might describe interpretive methods as autochthonous: The nation has a distinctive approach to constitutional interpretation, and we might then seek an explanation for why this nation chooses one subset of interpretive methods, that nation another.

This conclusion might be made even more plausible if we supplement Bobbitt's analysis with one offered by Richard Fallon.[17] According to Fallon, US interpretive methodology ranks the interpretive modalities, with originalism as the first, others following. The possibility of ranking modalities makes it even more plausible that nations would differ in interpretive methods. So, for example, the US approach might say, 'Follow the original understanding unless doing so would have disastrous contemporary effects', and the Canadian approach might say, 'Choose the interpretation that best fits contemporary circumstances – 'living tree' interpretation – unless that interpretation is flatly inconsistent with the semantic meaning of relevant constitutional provisions'. Again, we might seek explanations in national experience for the different approaches.

Note that the argument based on Bobbitt's work depends upon the assumption that the modalities available within a nation are limited to a subset

15 Here I refer to Ronald Dworkin's account of constitutional interpretation. See, e.g., Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1997). That book's subtitle refers only to the US Constitution, but Dworkin's body of work taken as a whole seems to me to suggest quite strongly that he believed that the 'moral reading' approach should be taken by every constitutional court.

16 Bobbitt (n 13) 6, 8.

17 Richard Fallon, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 Harvard Law Review 1189.

of all possible modalities. Of course, within any temporal period – short or long – we will find only some modalities deployed – no more than 'p' of the N possible ones. That might occur, though, only because the need for using a 'new' modality has not yet arisen. A truly autochthonous interpretation is not possible if interpretation everywhere can draw any element from the set of N modalities as needed, though it will appear at any moment that when closely analysed, every nation's interpretive method is autochthonous.

We have reached this point: Bobbitt claims that the modalities available within the United States at any moment are limited. If so, the United States might have an autochthonous method of constitutional interpretation. And, unless there is some reason to think that the United States is special with respect to having a limited set of available modalities, so might every other nation. The question then is, are the modalities of interpretation in the United States (and probably elsewhere) actually limited?

Imagine that a US-based lawyer makes an argument that the US Constitution, properly interpreted, protects a defendant's right to engage in some practice mandated by her religion because – and this is the key point – a specific Bible verse clearly indicates that secular authorities lack the power to prohibit the practice.[18] Other lawyers and all judges would reply that, whatever its merits as an interpretation of the Bible, the argument was not a *legal* argument. One might contrast this with an argument made to an Egyptian court that some constitutional interpretation was correct because it was supported by Koranic verses. In light of the provision in Egypt's constitution that 'The principles of Islamic Sharia are the main source of legislation' (in one translation), this would be a legal argument.

To oversimplify: theology is an available modality of interpretation in Egypt, but not in the United States. The reason is not that the two nation's constitutions themselves identify all the available modalities of interpretation. Nothing in the US Constitution – or in most other national constitutions – prescribes how the document is to be interpreted: Originalism in the United States and 'living tree' interpretation in Canada are imposed on the documents from the outside, so to speak. So too with religious arguments: They are excluded in the United States for reasons unconnected to the US Constitution's text.

The reason for the availability and unavailability of modalities of interpretation lies in national legal culture. And national legal culture is the product of the way lawyers are educated and socialized.[19] At any specific moment lawyers will recognize some arguments as legal, others as 'not legal'. Such recognition can vary from nation to nation, and so – again at any particular moment – national

18 In the 1940s lawyers for Jehovah's Witnesses made such arguments in presenting their cases to the US Supreme Court. See e.g. Appellants' Brief, Cantwell v. Connecticut [310 US 296], No. 632, Oct. Term 1939, p 14 (the challenged statute 'deprives [the defendant] of his liberty to worship ALMIGHTY GOD according to the God-given mandates recorded in Holy Writ'). The brief cited 24 cases and an equal number of Bible verses.

19 For a useful introduction to the role of socialization in creating legal cultures, see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press 2013).

methods of constitutional interpretation might be autochthonous. We can examine legal education and socialization in specific nations to explain why some arguments are accepted as legal and others not.[20] And, as before, national legal cultures are not set in stone. Innovations in legal education – including contact among lawyers and legal educators working in different traditions – can induce gradual changes in national legal cultures.[21]

One question lingers. Recall my earlier metaphor of a map with several basic colours, each of which came in several shades. We have reached the point where it is possible to see many nations each of which uses its own set of modalities, some of which other nations use, and each of which has its own ranking of modalities. Are these going to appear on the map as shades of a (quite muddy) single colour – blends with different proportions of red, green, and blue for each nation – or as clearly distinctive colours? Of course we will not be in a position to answer that question without doing a sort of research that, as far as I know, has not been done. I can report, though, my personal sense of things based upon my understanding of methods of constitutional interpretation in the United States, Australia, and Germany: They seem to me different enough to appear as different colours on the map.[22]

4.5 Conclusion

I conclude, then, that there might be distinctive national methods of constitutional interpretation. Constitutional interpretation in European populist regimes might be distinctive – not in terms of substantive interpretations of specific constitutional provisions (of course, that might be so), but in terms of the methods of constitutional interpretation that are deployed. Such distinctiveness would have to be rooted in distinctions among national legal cultures. I admit that I am quite sceptical about the possibility that relevant distinctions exist among those specific cultures as compared with the legal cultures in other parts of Europe, and so am sceptical about possible claims that there is a special way of interpreting constitutions in European populist regimes. But, at least as I have analysed the issue, the possibility that there is such a special way cannot be ruled out.

20 An important example might be the rather strong sense among Australian lawyers that the argument, 'This interpretation would better advance social welfare' – a pragmatic argument of a sort quite common in the United States – is not really a legal argument.

21 The importance of legal culture might be shown by 'failed' innovations, efforts by jurists to import other approaches into their nation's legal culture that nonetheless do not stick. The short life of the so-called 'Mason revolution' in Australian constitutional law might be an example. See Theunis Roux, 'Reinterpreting "the Mason Court Revolution": An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43 Federal Law Review 1.

22 I find the episode of the Mason Revolution in Australia quite instructive: During that period Australian methods of interpretation began to include hues similar to those dominant in the United States, but afterwards Australia reverted to a set of interpretive methods quite different from that used in the United States.