GLOBAL CONSTITUTIONAL LAW

Laura Aquilina[368]

ABSTRACT

In this article, the author tackles two different legal aspects of the developing area of Global Constitutional law. The first essay draws a comparison between the varying theories and opinions of two authors in the field; Dieter Grimm and Mattias Kumm. The work of these two authors is outlined and compared. The second essay deals with the way in which a US Supreme Court judgment (Roper vs. Simmons) addresses a problematic facet of Global Constitutional Law. The case itself is outlined, along with its dissenting opinions.

KEYWORDS: GLOBAL CONSTITUTIONAL LAW- ROPER VS SIMMONS

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Table of Abbreviations

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

EU: European Union

GCL: Global Constitutional Law

GFCC: German Federal Constitutional Court

MS: Member State/s

UK: United Kingdom

UN: United Nations

US: United States

WTO: World Trade Organisation

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Part I

In this part, the author draws a comparison between the varying theories and opinions of two authors in the field of global constitutional law; Dieter Grimm and Mattias Kumm. The work of these two authors is outlined and compared, resulting in a determination of which position is the most persuasive in the author's view.

1. 'Grimm on the Issue of the 'Global Constitutional Law'

'After 225 years, constitutionalism seems now to have reached the peak of its development.' - Grimm

1.1. External Culmination vs. Internal Erosion

Dieter Grimm, a professor at Humboldt and Yale universities and former member of the German Federal Constitutional Court, holds a traditional position on the issue of the 'Global Constitutional Law' (GCL), saying that the 'external success' of constitutionalism, through the development of international law and actors, has brought along with it an 'internal erosion' of national constitutional law. States have lost the monopoly of public power over their territory, hindering the achievement of constitutionalism altogether.[370] Internal erosion arises due to the fact that the Constitution and the State Powers are no longer the only powers on the scene, but other actors begin to feature, such as the European Union (EU), which interfere with the serenity of Member States (MS).

Developments at international level do not concern a constitution with legal force, but acts which eventually end up in the constitutions of MS. In Europe, for example, the European Convention of Human Rights (ECHR) and EU primary law are analysed in terms of constitutional law. Authors also view public international law (such as the United Nations (UN) Charter and texts of other international organisations such as the

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[370] D. Grimm, *The achievement of Constitutionalism and its Prospects in a Changed Word, in The Twilight of Constitutionalism?,* M. Loughlin and P. Dobner (ed), Oxford University Press, 2010.

World Trade Organisation (WTO)) as acquiring constitutional status and are being interpreted as constitutions. Even global public policy networks and self-organisation processes of private global actors are discussed in terms of constitutionalism. All of these were previously not regarded as constitutions.

1.2. Definition of Constitutionalism

To appreciate the effect of this development on national constitutions[371], a clear definition is necessary. Grimm defines 'constitutionalism' by reference to history, starting from before the two revolutions against Britain and France, through the Reformation and French Revolution and into the modern day. He outlines 5 characteristics of constitutionalism: (a) the modern constitution is a set of legal norms emanating from a political decision; (b) the purpose is to regulate the establishment and exercise of public power; (c) the regulation is comprehensive as there are no extra-constitutional means of exercising public power; (d) constitutional law finds its origin with the people as the only legitimate source of power; and (e) constitutional law is a higher law, enjoying primacy over all other laws and legal acts.

This gives a different definition of a constitution to that which we are accustomed to (democracy, rule of law, separation of powers and fundamental rights). Yet, Grimm mentions two elements of constitutionalism: the democratic element and the rule of law element. He adds that the constitution could only emerge through two preconditions. Firstly, there must be an object (a state) capable of being regulated. Secondly, the state's public power is without an external competitor within the territory. Consequently, the state's legal force ends at the border of the territory, and no foreign power can bind the domestic sphere. This highlights the importance of the boundary between the internal and external. Nevertheless, he adds that 'above the state was no lawless zone', and rules of public international law apply, limited to external relations of states and cannot interfere with internal affairs. Thus, constitutional law (internal law) and international law (external law) could exist independently of each other.

1.3. The Present and Future: The Blurring of Two Boundaries

Grimm maintains that we live in a period of erosion of statehood, with the blurring of two traditional boundaries. The boundary between public and private has become porous due to expansion of State tasks which require the State to seek help from private

[371] Grimm defines a 'constitution' as a coherent and comprehensive regulation of the establishment and exercise of public power. See reference in (n 1).

actors and rely on negotiations with them rather than legal orders addressed to them. Thus, agreements replace laws. Private actors have a share in public power without the requirements of legitimation and accountability that the constitution establishes for public actors.

The boundary between inside and outside became permeable when States began to establish and transfer sovereignty to international organisations to enhance their problem-solving capacity. A classic example of this would be the UN and international courts. As a result, states did not remain as sovereign as they had previously been.

The shift is particularly clear on a European level, where one finds the Council of Europe and its judicial acts through the European Court of Human Rights (ECtHR), binding all 46 MS. Above all, the power of the EU has a bigger effect on MS sovereignty as it encompasses legislative, administrative and judicial acts. Regardless, MS retain the power of self-determination. However, EU law claims primacy over domestic law, and hence the state is no longer the exclusive source of law within the territory. On this note, reference can be made to the recent Swiss Referendum. The primacy of constitutional law is no longer exclusive, and although it prevails over ordinary domestic law, it does not prevail in general. Furthermore, although the constitution still emanates from the people, not all public power taking effect within the state finds its source within the democratic legitimation of the people any longer. For this reason, Grimm maintains that statehood is eroding, that the constitution has shrunk in importance, and that only when national constitutional law and international law are seen together is one able to obtain a complete picture of the legal conditions for political rule in a country.

The question which arises is whether the loss of importance which the constitution suffers at national level can be compensated for at international level. Grimm brings up 'constitutionalisation' as a constitution-building process beyond the state which applies to international political entities and international legal documents and is even extended to rule making of public-private partnerships on the international level and of globally active private actors. Grimm also wonders whether there exists an object capable of being constitutionalised at international level. Although certain entities, such as the EU, may come close, certain elements still lack, such as, *inter alia*, how the Treaties are not an expression of self-determination of a people or society, and how the Treaties lack democratic origin. Grimm further states that a constitution could possibly originate from a treaty should the test of provision for amendments be satisfied, since if amendment power rests not in the hands of the MS but in the hands of the newly created state which has gained power of self-determination, then the legal foundation would have turned into a constitution. However, this of course is not the case.

At a global level, Grimm also refers to institutions such as the WTO, International Monetary Fund (IMF) and International Labour Organisation (ILO) which although are of great importance, are limited in competencies and have a non-democratic structure, all of which keeps them from being called 'constitutions.

2. Kumm on the Issue of the 'Global Constitutional Law'

'The language of constitutionalism has become widespread among international lawyers.' - Kumm

Mattias Kumm, a professor of Law at New York University, holds an opposite position to Grimm and could be identified as one of the strongest supporters of GCL. He speaks about the cosmopolitan turn in constitutionalism.

2.1. 'Constitutionalism' vs. 'constitutionalism'

Kumm differentiates between constitutionalism with a 'big C' and 'small c'. The former depicts traditional domestic constitutionalism, linked to a written Constitution's ultimate legal authority in the service of the democratic people governing themselves ('We the People'), as embodied in Grimm's position. The latter describes constitutionalism in respect of international law, a coherent legal system with some structural features of domestic constitutional law, but not connected to establishment of an ultimate authority, coercive powers of state institutions or self-governing practices of a people. Regardless of this clear distinction, when constitutional vocabulary is used beyond the state, the aura of legitimacy and authority associated with 'big C' Constitutionalism is often conferred on intentional practices, creating an illusion upon a deeply fragmented global arena. This, says Kumm, is 'the core of the skeptic's challenge'.[372]

2.2. Statist Paradigm vs. Cosmopolitan Paradigm

'Cosmopolitan constitutionalism establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law.' - *Kumm*

The statist, traditional paradigm seeks to ensure that international law remains firmly grounded in state consent. Thus, international law matters only if and to the extent that the national Constitution so determines, without acknowledging constitutionalism beyond the State. This reflects Grimm's traditional idea.

[372] M. Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and beyond the State, in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, Jeffrey L. Dunoff and Joel P. Trachtman (eds), Cambridge University Press, 2009.

Contrarily, Kumm advocates for the cosmopolitan paradigm, encouraging the progressive development of international legal authority, in which arrangements are assessed in terms of public reason (where legal authority rests on formal, jurisdictional, procedural, and substantive principles) rather than the people's democracy. It is worth noting that Kumm does not claim that international law is inherently legitimate, nor does the cosmopolitan paradigm embrace a simple international legalism that suggests that everyone has an innate disposition to follow international law. The cosmopolitan paradigm uses a holistic cognitive frame to establish and identify an internal connection and common basic structural features between national and international law, which connection extends to the development of legal authority, procedural legitimacy, and the practice of human and constitutional rights.

Cosmopolitan constitutionalism views national constitutional practice as an integral part of a global practice of law and conceives public international law in light of basic constitutional principles. Ultimate authority is thus, vested in the principles of constitutionalism that inform legal and political practice nationally and internationally.

2.3. Constitutional Pluralism

Cosmopolitan constitutionalism creates a third position to describe the relationship between national and international law, that of Constitutional Pluralism, which goes beyond the traditional monism and dualism. Kumm feels that it is a mistake to imagine the world of law as a hierarchically integrated whole, as monism does, and that it is also a mistake to imagine national and international law as strictly separate legal systems, as dualism does. Rather, common principles underlying both national and international law provide a coherent framework for addressing conflicting claims of authority in specific contexts. These principles may favour the application of international rules over national rules, or vice versa. This is a very different approach to that of Grimm, who would not accept international rules taking primacy over national rules, and possibly even over the national Constitution.

Nevertheless, although Kumm maintains that international legal sources can prevail over national ones; this is limited by the guarantee to protect countervailing constitutional principles relating to jurisdiction, procedure, or substance.

3. Brief Overview of Other Perspectives

3.1. Anne Peters: Compensatory Constitutionalism

Anne Peters is a constitutional and international lawyer whose ideologies oppose Grimm's, yet have some common features, showing that there are objective elements in GCL. She discusses de-constitutionalisation on the domestic level, an idea similar to Grimm's erosion of sovereignty.

State Constitutions can no longer regulate the totality of governance in a comprehensive way and are thus, no longer self-sufficient 'total Constitutions'. For this reason, Peters asks for compensatory constitutionalism, since only the various levels of governance, taken together, can provide full constitutional protection. For a traditional constitutional lawyer like Grimm, it is difficult to agree that international rules and principles deserve the label of 'constitution', and thus, this is where Peters differs from Grimm. A traditional constitutional lawyer is unable to agree with the continuing process of the emergence, creation and identification of constitution-like elements in the international legal order as he would have to admit that there is a legal order above the Constitution.

Peters also shows how international actors can effect constitutional national sources for the best, using the example of the South African apartheid system. International law can help legal orders which diverge from basic fundamental principles of human rights, democracy and rule of law to readdress them. Thus, the international and national can no longer be neatly separated and the relationship between them cannot be described as a clear hierarchy, but rather as a network.

Peters identifies three democratic deficiencies within nation States: (1) due to global interdependence, State activities became far reaching and extraterritorial, political decisions on environmental and nuclear subjects affect people in other states which have not elected the decision-makers making these decisions. This leads to an indirect decline of democracy; (2) mobility and the transnational character of issues diminish the nation state's power to solve problems by itself; (3) lack of democratic mandate for or control of non-state international actors. In order to regain control, States have to cooperate with international organisations, through bilateral and multilateral treaties. In conclusion, if we want to preserve a minimum level of democratic governance, we

must move 'beyond the State' and establish compensatory, transnational democratic structures.[373]

3.2. Teubner: Societal Constitutionalism

Teubner highlights that constitutional theory's challenge today is both privatisation and globalisation. Constitutionalism must move 'beyond the nation state' in a double sense: into the transnational sphere and into the private sector. He brings in sociological aspects: sectors of world society begin to develop step by step their own constitutional norms. Pressing social problems that accrue within autonomous world systems produce social conflicts resulting in legal norms of a constitutional quality, these norms then become aggregated, over time, into sectoral constitutions of world society. His analysis is based on empirical observations.

3.3. Maduro: Global Governance

Maduro argues that constitutionalism is applicable to global governance, which is the ensemble of the public, private, formal, informal, regulatory bodies to which the national states devolve part of their power for regulatory norms. He draws a line between constitutionalism and national constitutions, saying that constitutions are sources of law and that constitutionalism is both a philosophical and normative theory. Traditionally, constitution and power coincided in the same locus: the state. Contemporary constitutionalism advances a shift of power from inside national borders to outside. To move constitutionalism to the arena of global governance is to move it beyond a normative theory of social decision making. Having constitutionalism without a constitution. Even if such a move is necessary and possible it does not mean that such a form of constitutionalism can and should overcome constitutionalism linked to national political communities.

4. The Most Persuasive Position: a Personal Opinion

Following an objective overview of various positions, I will now seek to determine which position persuades me the most. Grimm is strongly hesitant about the construction of a constitution at a global level. In fact, in his opinion, the EU Treaties, the WTO, etc., cannot be considered constitutions. He maintains that strengthening the International level could only happen if the international order could develop into an object capable of being constitutionalised and which has a democratic governance on

[373] A. Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law*, 19, 2006.

the global level, which he sees as highly unlikely. Thus, Grimm finds it preferable to drop the notions of constitutionalism and constitutionalisation altogether, since they are misleading in that the loss national constitutions suffer from internationalisation and globalisation could not be compensated for on the supranational level. International actors are not a solution for this erosion. He refers to this as an illusion.

Kumm outlines three main negative elements of the statist paradigm: (a) it exaggerates ideals of coherence and legitimacy of domestic constitutional practices; (b) casts suspicion over legal practices 'beyond the state'; (c) neglects the connection between domestic legitimacy and the global legal context in which these practices take place. Furthermore, the conceptual structure of the statist paradigm, with its sharp and basic distinction between State law and international law, distorts complex legal and political realities, making it no longer satisfactory.

On the other hand, the cosmopolitan paradigm provides a unifying framework for the analysis of at least four phenomena: (a) the interface between national and international law; (b) expansion of governance structures within international law (such as global administrative law); (c) functional reconceptualisation of sovereignty; and (d) basic structural features of contemporary human rights practice.[374] Cosmopolitan constitutionalism presents a legal argument and not just an ideal one. It deals with a basic conceptual framework to organise legal materials and structure legal debates. Although the cosmopolitan paradigm might not be morally attractive since people think of themselves primarily as national citizens, using an example of religion, Kumm maintains that just as religion can flourish in a country without an official religion, so national patriotism and democratic self-government can flourish within a national constitutional framework that is conceived within a cosmopolitan paradigm. Kumm also states that the idea of self-governing free and equals cannot be developed within absolute nationalism, as this goes against the horizon of a liberated humanity.

A traditional position (depicted by Grimm) has a tendency to be more structured and possibly more convincing since it is based on established constitutional law practice. However, we must acknowledge that as the world evolves, legal elements must evolve too, and the world is evolving in a globalised way, meaning that our laws, values and norms will evolve similarly, requiring authors such as Kumm to begin to draw up theories to ground the developing global practices. For this reason, I believe that the traditional position deserves reconsideration in the light of globalisation. I thus,find Kumm's theory more persuasive, albeit avant-garde. Lastly, I would like to add that the international and national already complement each other and should do so even more in the future.

[374] This latter point can be understood through Roper vs. Simmons.

Part II

1. Roper vs. Simmons: Case Summary

In this article, the author explores the way in which a US Supreme Court judgment (Roper vs. Simmons) addresses a problematic facet of Global Constitutional Law by outlining the case itself, along with its dissenting opinions.

1.1. Facts of the case

Simmons, the defendant, planned, detailed and committed the robbery and murder of Shirley Crook at age 17. On turning 18, he was sentenced to death. The case revolved around the death penalty for minors.

The Court at first sentenced him to death; however he filed numerous petitions arguing for his minor status. Although rejected at first, soon enough, the Court in Atkins v. Virginia (2002) held that the Eighth Amendment[375], applicable through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons then argued that, with the same reasoning, the Constitution also prohibits the execution of a juvenile who was under 18 when committing murder, putting mentally retarded people in a comparable position to the immature development of a minor.

1.2. The Verdict

The case was decided in 2005 by the US Supreme Court. The Court agreed with Simmons' arguments, sentencing him to life imprisonment without eligibility for release, although Stanford v. Kentucky (1989) rejected the idea that the Constitution bars capital punishment for juvenile offenders under 18.

The US Supreme Court referred to positions of other States to extract that a national consensus has developed against the execution of minor offenders, where it saw the rejection of the juvenile death penalty in the majority of States, the infrequency of its

[375] The Eighth Amendment of the United States (US) Constitution prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishments. It is worth noting the contradiction between the Eighth Amendment and allowing for the death penalty.

use even where it remains on the books, and the consistency in the trend toward abolition of the practice, concluding that today's society views juveniles as, in the words of the Atkins case describing the mentally retarded, 'categorically less culpable than the average criminal.'

The Court also concluded that according to the Eighth Amendment of the Constitution, and keeping in mind the instability and emotional imbalance of young people, sentencing a minor to death is cruel and unusual punishment.

The US Supreme Court confirmed this verdict by reference to foreign precedents and sources of law which do not apply the death penalty against juvenile offenders. The judgement highlights the importance and supremacy of the American Constitution then goes on to say that 'It does not lessen our fidelity to the constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'[376]

Previous cases, such as the Atkins case and Thompson v. Oklahoma (1988), also make reference to foreign laws. The Court in Roper v. Simmons mentions Article 37 of the UN Convention on the Rights of the Child, which every country in the world has ratified save for the US and Somalia. It contains an express prohibition on capital punishment for crimes committed by juveniles under 18. The Court states that the US stands alone in a world that has turned its face against the juvenile death penalty. Reference is made to United Kingdom (UK) legislation, due to historic ties and origins of the Eighth Amendment. The Court explicitly says that '[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.'

2. Dissenting Opinions

2.1. Justice O'Connor

Justice O'Connor is not convinced of a national consensus being reached about abolishing capital punishment for under-18 offenders, let alone an international consensus, and thus, feels that 'the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.'[377]

[376] *Roper v. Simmons* (2005)

[377] ibid.

Yet she disagrees with Justice Scalia's opinion that foreign and international law have no place in American Eighth Amendment jurisprudence. She admits that the Court consistently refers to relevant foreign and international law when assessing evolving standards of decency. She feels that the Eighth Amendment draws its meaning directly from the maturing values of civilised society, which are neither wholly isolated from, nor inherently at odds with, values of other countries. Therefore, although she sees congruence between American and international values, in her opinion, the case at hand presents no domestic consensus and the recent emergence of otherwise global consensus cannot change that.

2.2. Justice Scalia

'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.' - Justice Scalia

Justice Scalia starts off his dissenting opinion by reference to Alexander Hamilton. He outlines the mockery which the opinion in this judgement makes of Hamilton's expectation as he points out how the Court concluded that the meaning of the American Constitution has changed over the previous 15 years since the Stanford v. Kentucky judgement, and not that the Court's decision had been wrong.

He justifies his dissent in this case by saying that the Court, as the sole arbiter of America's moral standards, discharges such immense responsibility by taking guidance from the views of foreign courts and legislatures, and he does not believe that the meaning of the Eighth Amendment and any other provisions of the American Constitution, should be determined by such views. He further comments that the views of American citizens themselves and of national legislatures are irrelevant or frivolous to the current Court verdict, while the views of other countries and of the international community 'take centre stage'.[378]

Scalia mentions the Court's reference to the International Covenant on Civil and Political Rights, which the Senate ratified subject to a reservation regarding capital punishment. He sarcastically comments that, '[u]nless the court has added to its arsenal the power to join and ratify treaties on behalf of the United States,' this evidence does not favour, but rather refutes, the position taken in this judgement. It goes to show that the US has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. Scalia further notes the inconsistency in the Court's reference to the UN Convention on the Rights of the Child, as it also

[378] ibid.

prohibits punishing under-18 offenders with life imprisonment without the possibility of release, and therefore the Court is still not in line with the international community.

Scalia maintains that foreign law should also not be considered because foreign authorities do not speak about issues typical to the US, such as how the sentencing authority can withhold the death penalty from an under-18 offender and mitigate the punishment.

More fundamentally, Scalia believes that the Court's basic argument, that American law should conform to the laws of the rest of the world, ought to be outright rejected, as in many imperative respects such laws differ from American national law. Scalia goes on to give examples of important differing laws, such as abortion, where he further says that 'although the Government … urged the Court to follow the international community's lead, these arguments fell on deaf ears.'

Scalia expresses how the Court's special reliance on UK laws is probably the most indefensible, as although it is true that the US shares a common history with the UK, and that English sources are often consulted in regard to the meaning of a 18th century constitutional text, the Court has long rejected a purely originalist approach to the Eighth Amendment. Rather, the Court seeks to determine current standards of decency within the nation. In Scalia's opinion, this gives all the more reason not look to a country (UK) that has developed in tandem with European continental influences and whose positions have changed over the years, such as allowing all but the most serious offenders to be tried by magistrates without a jury, which, if taken into consideration, would curtail the American right to jury trial in criminal cases.

Lastly, Scalia comments on the Court's attempt to praise the Constitution and assure that reference to foreign law underscores the centrality of the same issues within the American heritage of freedom. The strong-minded judge believes that the foreign sources were cited to set aside centuries-old American practice, a practice which a large number of States still adhere to, and that the foreign sources, rather, only affirm the Justices' own opinion as to how the world, America and this case ought to be.

3. Problematic Facet of 'Global Constitutional Law': Use of Foreign Law

It becomes evident that the problematic facet of 'Global Constitutional Law' is the use of foreign law in the above judgement. The statements outlined by Justice Scalia contrast greatly with the decision of the Court, and serve as effective food for thought. Although the above dissenting opinions perfectly outline the issue at hand, I would like to discuss this facet further.

3.1. Transnational Judicial Dialogue

The US Supreme Court did not only rely on its interpretation of the American Constitution, but also on foreign sources of law in its constitutional analysis. The transnational dialogue which constitutional courts of the world engage in is legal, but a large role is also played by the culture and attitude of the constitutional judges. In fact, this case engaged in a deep world-wide discussion, allowing for a transnational dialogue. For this reason, global constitutionalism can be created through formal channels but also through cultural channels. Constitutional courts all around the world are increasingly citing and referring to foreign legal precedents in a wide range of legal issues, mainly constitutional and fundamental rights issues. These interactions among world courts have thus developed a transnational judicial dialogue where courts use comparative public legal analyses to foster cross-fertilisation of ideas and practices. Anne-Marie Slaughter describes this as a 'process of collective judicial deliberation on a set of common problems.[379] This statement is bold and revolutionary as she speaks of something outside the traditional national judicial deliberation, which a scholar such as Grimm (see discussion in Part I above) would be accustomed to, as judicial deliberation in a national constitutional order takes place among nationally elected judges. A collective global judicial deliberation fosters the idea of a world-wide deliberation among judges appointed in different countries, an idea which seems peculiar at first glance and which has created a lot of discussion and contradicting opinions.

The increasing reference to foreign sources of law on the part of several constitutional court judges indicates a desire to participate in this transnational judicial dialogue. This phenomenon attracted many American scholars but there is great division on this topic among US constitutional court justices. This is clearly seen in the Roper vs. Simmons case as although the majority opinion refers to foreign law, Justice Scalia, one of the greatest constitutional scholars with a traditional and conservative outlook, strongly dissents. Scalia, the father of originalism[380], has stated that 'I probably use more foreign legal materials than anyone else on the court… of course they are all fairly old foreign legal materials, and they are all English,'[381] referring to the foundations of the US

[379] Anne-Marie Slaughter, *A Typology Of Transjudicial Communication* (1994) <https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=https://www.google.it/&httpsredir=1&article=2120&context=lawreview> accessed 3 December 2018.

[380] Interpreting the US Constitution as the founding fathers would have done.

[381] Melissa A. Waters, Justice Scalia On The Use Of Foreign Law In Constitutional Interpretation: Unidirectional Monologue Or Co-Constitutive Dialogue (2004)

Constitution. Scalia believes that foreign materials are irrelevant to an interpretation of the US Constitution. However, he has also said that the use of foreign legal materials is legitimate in certain cases, such as when federal courts interpret a treaty to which the US is a party.[382] In his remarks at the American Society of International Law Conference in March 2004, Scalia concluded that '[c]omparative study is useful ... not as a convenient means of facilitating judicial updating of the U.S. Constitution, but as a source of example and experience that we may use, democratically, to change our laws - or even, if it is appropriate, democratically to change our Constitution.'[383] The emphasis on 'democratically' here indicates that the legislator is better suited to change the interpretation of national legislation than the judge is, since the legislator is 'democratically' elected. The use of the word 'democratically' can also show how constitutional judges of foreign countries cannot form a legitimate source of interpretation for other countries.

3.2. Foreign Law Debate: Moshe Cohen-Eliya and Iddo Porat

Moshe Cohen Eliya and Iddo Porat, professors at the University of Israel, speak of a culture of authority and a culture of justification.[384] A difference between the two is represented by the role of text and its interpretation in constitutional law. In the case of the former, the court is an institution which must base its legitimacy on the authority of the constitutional text authorising the court to review governmental action. While in the latter culture, the judiciary's role is to demand that the government justify its actions, downplaying the importance of the text.

On this note, we can compare originalism to anti-textualism. Originalism is a very American concept where the judges recognise that they are not governing the state and that their only role is to interpret the constitution in the manner in which the founding fathers originally intended. Anti-textualism, on the other hand, does not pay very close attention to the text as it believes that values change over time.

<https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1222&context=tjcil> accessed 3 December 2018.

[382] Scalia, Antonin. "KEYNOTE ADDRESS: FOREIGN LEGAL AUTHORITY IN THE FEDERAL COURTS." *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 98, 2004, pp. 305–310. *JSTOR*, JSTOR, www.jstor.org/stable/25659941.

[383] (n 7)

[384] M. Cohen-Eliya, I. Porat, Proportionality and the Culture of Justification

It is also worth mentioning the divide between conservatives and liberals. Conservatives believe that each country is unique with its own culture and characteristics and feel that interpreting a constitution by relying on foreign sources of law would lead to illegitimacy. Liberals, however, see themselves as citizens of the world, finding no reason why not to refer to experiences of other countries.

The use of foreign law is not without its flaws. Many identify the concept of a 'race to the top' where judges refer to cases in which a bigger protection of human rights was adopted. Another is that of 'cherry picking', a practice of picking a reference which best suits the case at hand and best fulfils the result the judge wishes to achieve.

Another useful point is Justice Breyer's attempt to introduce proportionality into American constitutional law in the Heller Case, which may be problematic since it disregards the different cultural meanings that are associated with proportionality in Germany and balancing in the US. Justice Scalia in fact rejected Breyer's suggestion, arguing that adopting the proportionality approach would water down the rights enumerated in the Constitution.[385] In one of their writings, Cohen-Eliya and Porat concluded that 'The use of the term proportionality may help to open the door for European influences on American constitutional law. Arguably, such a move should have been done more openly by making the reference to foreign law explicit rather than implicit.'[386]

4. Concluding Remarks

By way of conclusion, although the majority of Justices in Roper vs. Simmons looked towards foreign sources of law to base their judgement, the use of foreign law remains hotly debated with many contrasting viewpoints. Nevertheless, when taking into consideration the current ongoing globalisation which the world is facing, reference to foreign law will become increasingly more inevitable.

[385] M. Cohen-Eliya, G. Stopler, Probability Thresholds as Deontological Constraints in Global Constitutionalism

[386] M. Cohen-Eliya, I. Porat, The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law