

Introduction

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The Challenges of Constitutional Interpretation

The provisions of national constitutions, like other laws, are often ambiguous, vague, contradictory, insufficiently explicit, or even silent as to constitutional disputes that judges must decide. In addition they sometimes seem inadequate to deal appropriately with developments that threaten principles the constitution was intended to safeguard, developments that its founders either failed, or were unable to anticipate.

How judges resolve these problems through 'interpretation' is problematic and controversial, mainly because legitimate interpretation can be difficult to distinguish from illegitimate change. Judges believed to have improperly changed a constitution while purporting to interpret it are vulnerable to criticism for usurping the prescribed power of amendment, violating their duty of fidelity to law, flouting the principles of democracy and federalism (if the amending procedure requires special majorities to protect regional interests), and straying beyond their legal expertise into the realm of politics.

How judges interpret other laws can also be controversial, but the stakes are much higher where constitutions are concerned. As fundamental laws, they allocate and regulate the powers of government and the rights of citizens. Their interpretation can have profound effects on the institutional structure of society, and the exercise of political power within it. It can affect the distribution of powers or rights between organs of government (legislature, executive, and judiciary), levels of government (national and state), and government and citizen. Moreover, legislatures can readily change other laws if they disapprove of the way judges have interpreted them, but constitutions are usually much more difficult to amend, and erroneous or undesirable judicial interpretations therefore more difficult to correct (except by the judges themselves).

On the other hand, the greater difficulty of amending constitutions might be regarded as a reason for judges to be more creative when interpreting them, compared with other laws. Consider the extent to which judges should remedy failures on the part of the constitution's founders to expressly provide for problems, whether or not they should have anticipated them. When interpreting statutes judges are often reluctant to rectify failures of that kind, preferring to leave it to the legislature to do so. But when dealing with a constitution, it is arguable that they should be more willing to provide a solution. If, because of the founders' oversight, a constitution might fail to achieve one of its main purposes,

the potential consequences are grave. They include the danger of constitutional powers being abused, of the democratic process or the federal system being subverted, of human rights being violated, and so on. If the constitution is difficult to amend formally, or if amendment requires action by the very politicians who pose the threat that needs to be checked, there may be good moral reasons for the judges to act. Yet there is an obvious risk of such reasoning being used to justify extensive judicial rewriting of the constitution, especially if the founders' purposes are pitched at a very abstract level ('they wanted to achieve a just society, and this is necessary to achieve justice'). Judges are not supposed to be 'statesmen', appointed to fill the shoes of the founders and continue the task of constitution-making as an on-going enterprise, correcting mistakes and omissions wherever they see them.

When constitutional provisions need to be interpreted can be as controversial as how they should be interpreted. When, for example, is a provision ambiguous? When its words, read literally, are capable of bearing more than one meaning? Or only when the ambiguity persists, after taking into account admissible evidence of the intentions, purposes, or understandings of those who adopted it? And when should such evidence be admissible? These are only some of the difficult questions that arise.

Much of the controversy surrounding constitutional interpretation concerns two issues. The first is a version of a conundrum that has perplexed lawyers for millennia: should the interpretation of a law be governed mainly by its 'letter', or by its 'spirit'? Should a constitution be regarded as a set of discrete written provisions, authoritative because they were formally adopted or enacted, or as a normative structure whose written provisions are founded on, and derive their authority from, more abstract principles and values that may not be expressly stated? To what extent should 'implications' and 'unwritten principles' be recognised and given effect?

The second issue is the extent to which the meaning of a constitution can, and should, be determined by the original intentions, purposes, or understandings of its founders. This issue pits so-called 'non-originalists' against 'originalists'. The former argue that the interpretation of a constitution in the modern world should be guided by contemporary needs and values, rather than the 'dead hand of the past'. The latter reply that such an approach would allow judges too much power to change the constitution according to their own political ideologies, contrary to the procedure for formal amendment prescribed by the constitution itself.

Both issues pose the following question: if the courts are the 'guardians' of their nation's constitution, what exactly is it that they are guarding? Is it a set of reasonably fixed rules and principles, laid down at the founding, that must not be changed except by formal amendment? Or does the force of those rules and principles ultimately depend on abstract principles and values, whose effective protection may justify considerable judicial creativity in response to perceived threats?

Comparing Interpretive Methods and Philosophies

There is a vast, theoretically sophisticated, literature dealing with these difficult normative, conceptual, and ontological questions, especially in the United States where they have been debated for longer than anywhere else. But as well as asking how courts *should* interpret constitutions, it can be of considerable interest to ask how in fact they *have* interpreted them, not only in one's own country but also elsewhere.

The American literature includes detailed studies of how the Supreme Court has interpreted its Constitution since it was adopted, the main outlines of which are to some extent familiar to constitutional lawyers elsewhere. But the practices of courts in other countries are much less well known. There are many differences between the Constitution and constitutional tradition of the United States, and those of other countries, which have affected the interpretive practices of their courts. Yet no substantial comparative study of constitutional interpretation in different countries seems to have been undertaken before, at least in the English language. Interpretive methodologies and philosophies have been largely ignored even in texts devoted to comparative constitutional law. The current leading text, for example, mentions constitutional interpretation only in passing.¹

We live in an era of 'cosmopolitan constitutionalism', in which lawyers and judges increasingly look beyond their own borders and borrow ideas from other jurisdictions.² The time is ripe for a comparative study of the methods by which constitutions have been interpreted. It should be of considerable interest to constitutional lawyers, judges, and legal theorists. Comparing legal practices in different countries can help broaden one's horizons, expand one's sense of what is possible, and dispel any sense of false necessity. Learning how foreign courts tackle similar constitutional problems may reveal that one's own courts 'simply fail to address adequately arguments that apparently sensible people in other nations have addressed.'³ Of course, it does not follow that practices appropriate in one country are universally applicable: another benefit of comparative study is that it can help explain differences by reference to institutional, political, social, and cultural circumstances. On the other hand, if it turns out that some approaches to constitutional interpretation are almost universal, that might strengthen the case in their favour.

Such a study should also be of interest to political scientists, who rightly regard constitutional courts as political institutions that wield enormous power. Whenever judges develop the law they exercise political power, and when that law is the nation's constitution, they exercise the highest political power that exists in a state. Political scientists often maintain that courts regularly change constitutions

¹ V Jackson and M Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999).

² See S Choudhry, *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2005) (forthcoming).

³ Jackson and Tushnet (n 2) 145.

through interpretation, but they rarely examine legal arguments with sufficient care to distinguish between different kinds of change, or consider the extent to which courts have legal authority (as opposed to political power) to do so. Like other political actors, courts are supposed to be constrained by laws, including the very laws they are charged with interpreting. Any study of the behaviour of political actors in a society that claims to abide by the rule of law must include an account of how effectively their exercise of power is ruled by law.⁴ How courts exercise their power to interpret constitutions—what considerations they take into account, explicitly or implicitly, and why—should be of vital interest to any student of constitutional politics.

This comparative study is primarily descriptive and explanatory, rather than prescriptive. It describes and compares the interpretive methods that have in fact been employed by courts in six countries, and the interpretive philosophies that have guided them, and it also seeks explanations for differences between their practices. The study includes some scope for critical comment, but only incidentally, and it certainly does not purport to propose a universal theory of how constitutions ought to be interpreted.

The study is limited to six countries to enable each to be examined in more depth than would otherwise have been possible. Australia, Canada, Germany, India, South Africa, and the United States were chosen for comparison because:

- (a) they each possess a written, federal (or quasi-federal⁵) constitution that has been the subject of interpretation by an independent judiciary;
- (b) their constitutions vary widely in age, from the oldest written constitution (that of the United States) to one of the youngest (that of South Africa);
- (c) the interpretation of each constitution, except for South Africa's, has had some influence on the design and interpretation of later ones;
- (d) they are institutionally, politically, socially, and culturally diverse.

They provide an opportunity to compare judicial responses to similar (and dissimilar) challenges in very different contexts.

An Outline of What Follows

Six scholars, all leading experts in their respective fields, have each contributed a chapter describing and explaining the interpretive methods and philosophies that have guided courts in the country they are familiar with, and how these have evolved since its constitution was first enacted. These chapters are arranged in

⁴ The concept of the 'rule of law' is, of course, a notoriously contested one, and itself the subject of political debate.

⁵ The South African Constitution is at most quasi-federal, and often described as a system of cooperative governance rather than federalism.

chronological order, from the oldest to the youngest constitution, to make it easier for readers to see how the interpretation of older constitutions has influenced the design and interpretation of later ones. The book concludes with a chapter in which I summarize and compare the information provided in the earlier chapters, attempt to explain significant differences between the interpretive practices of these courts, and draw some conclusions.

Before work on these chapters commenced, the authors met in person to agree on a common set of issues for examination. To facilitate comparisons it was agreed that, as far as practicable, these issues would be discussed in the same order in each chapter. The authors were permitted to depart from that order if there were a good reason for doing so. As it turned out, it was not possible for them to closely follow the same template: each had a distinctive story to tell, which had to be told in its own way.

These chapters begin with an introduction to the constitution in question: when, how, and by whom it was adopted or enacted, its main structural elements (the main institutions, powers, and rights that it creates and confers), and the method it prescribes for its own amendment. They then describe the court or courts that have had primary responsibility for interpreting the constitution, how their judges are appointed, how they select, hear, and decide cases, the extent to which their independence is protected, workload issues, and the legal culture in which they operate.

After describing the main types of interpretive problems these courts have faced, and their causes, the chapters turn to the interpretive methodologies that have been employed to resolve them. Only rarely do express constitutional provisions require specific considerations to be taken into account. For the most part, the courts have drawn on interpretive norms found in pre-existing general law, especially those governing the interpretation of statutes, or in the constitutional jurisprudence of other countries. A recurring issue has been the extent to which constitutions differ from statutes, and require different methods of interpretation. Most of the courts recognise that there are substantial differences, due to the intended longevity of constitutions, their inclusion of broad, abstract terms, and the difficulty of amending them.

Interpretation everywhere is guided by similar considerations, including the ordinary or technical-legal meanings of words, evidence of their originally intended meaning or purpose, 'structural' or 'underlying' principles, judicial precedents, scholarly writings, comparative and international law, and contemporary understandings of justice and social utility. The chapters discuss how these diverse considerations are combined to reach an overall conclusion, and whether they are prioritized or weighed up in some overall balance.

The chapters pay particular attention to the extent to which evidence of original intention or purpose is treated as significant, including whose intentions or purposes, the level of abstraction at which they are framed, and limits imposed on the kinds of historical evidence that is admitted. They also examine on what basis

and to what extent courts have been willing to recognize and enforce unwritten, supposedly implied powers, immunities, obligations and rights.

The chapters examine whether the courts' interpretive practices have changed over time, the apparent reasons for any changes, and whether the courts apply the same interpretive principles to different areas of constitutional law, such as federalism, separation of powers, and individual rights.

The chapters then reflect on the institutional, political, social, and cultural contexts that might help to explain differences between the practices of these courts. Contextual factors include interpretive traditions preceding the enactment of each constitution; judicial personnel (including selection, training, and background); the way in which cases are brought and argued before each court; the style in which judgments are written; the extent to which courts have been influenced by the practices of foreign courts; the prevailing legal and political culture, including traditional conceptions of the nature of law and the proper role of courts; attitudes and reactions of the other branches of government towards perceived judicial 'activism'; the difficulty of formally amending the constitution; and the extent to which judges have felt compelled to 'stretch' their constitutional authority in order to deal with problems such as corruption, oppression, and injustice.

The authors were invited to conclude their chapters with some overall critical observations, on issues such as whether the courts have been either too legalistic or too creative, and the contribution they have made to their societies.

The book ends with my attempt to summarise the information provided in the earlier chapters, compare the approaches of the various national courts, explain significant differences between them, and draw some conclusions.