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Constitutional Courts, Constitutional Interpretation, and Subnational Constitutionalism

by

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Abstract

This paper analyzes the impact of courts and different systems of judicial review on subnational constitutional autonomy. Focus is put on the question on which interpretive guidelines courts may draw when they assess the compatibility of state constitutions with the federal constitution and whether there is potential for interpretive federalism in subnational constitutional contexts. Three cases where subnational constitutional provisions were respectively dealt with in civil law and common law jurisdictions with different forms of constitutional review have been selected: The first case relates to the Austrian Constitutional Court's views on subnational direct democracy. The second case discusses the Spanish Constitutional Court's decision on the Catalanian Statute. Thirdly, the paper examines US federal courts' decisions which have recently prevented a constitutional amendment of the Oklahoma Constitution. While the arguments and methodology used in these decisions cannot be generalized, they nevertheless raise awareness for the tensions between federalism and judicial interpretation.

Key-words

Constitutional courts, constitutional interpretation, subnational constitutionalism, Statute of Catalonia, direct democracy, religious freedom



1. Introduction

Discussing constitutional courts and their impact on subnational^I constitutionalism entails a discussion on constitutional interpretation: it is ultimately up to courts to construe the two main legal reference documents in this context, i.e. the federal constitution and the state constitutions, which are subordinate to the federal constitution (Saunders 2011: 869). Interpretation will be needed in order to measure the scope for subnational constitutions that is provided by the federal constitution, but also for ascertaining whether a subnational constitution goes beyond this scope or not.^{II}

For the purposes of this paper, it will first be necessary to conceptualize what the impact of courts and different systems of judicial review on subnational constitutional autonomy is and on which interpretive guidelines courts may draw when they assess the compatibility of state constitutions with the federal constitution. The paper will then critically analyze three cases where subnational constitutional provisions were respectively dealt with in civil law and common law jurisdictions with different forms of constitutional review, namely by the Austrian Constitutional Court, the Spanish Constitutional Court and US federal courts. In the conclusion, the paper will explore the potential for interpretive federalism in subnational constitutional context.

2. Courts, Judicial Review, and their Impact on Subnational Constitutions

In a functional sense, constitutional courts exist in almost all (quasi-)federal states.^{III} They regularly (Watts 2008: 159) follow either the specialized or the integrated model,^{IV} even though specific constitutional courts in an organizational sense are provided only under the former model. This difference has no immediate methodological impact on the interpretation of either federal or state constitutions, but may entail certain propensities for more homogeneity and centralism on the one hand and heterogeneity and decentralization on the other hand, even though authoritative interpretation will be entrusted to certain apex courts in both cases.



Some distinction must be made, however, between systems under the specialized model that allow for a divided judiciary, including both federal and state constitutional courts as specific institutions, such as in Germany (Oeter 2006: 149 ff, 154), and systems under the integrated model that provide for decentralized constitutional review in a twofold sense:^V decentralized in the sense, that there are no constitutional courts as specific institutions (neither at federal nor state level), but a variety of ‘integrated’ courts that, among other issues, may deal with constitutional questions as well; and in the sense, that such ordinary courts exist both at federal and state level.^{VI} Most, though not all, federal systems provide for the co-existence and intertwining of courts within a multilevel judicial system, where different courts at federal and state level may express different views on interpretation (Saunders 2006: 365 ff). Both federal and state courts might therefore be concerned with subnational constitutional issues, if at different appeal stages. The compatibility of a state constitution with the federal constitution, however, will usually remain a question to be ultimately resolved by an apex (constitutional or supreme) court; this depends, of course, on the admission of the parties to appeal to these courts.

Considering other types of judicial review in this context, *ex-ante* review interferes more with federalism than *ex-post* review,^{VII} as it may prevent state legislation from entering into force at all; and strong-form review more than weak-form review,^{VIII} while a flexible dialogue between state or federal courts on the one hand and state legislatures on the other might (though not necessarily) be encouraged to a larger extent in weak- than in strong-form cases (Tushnet 2011: 326 f).

To assess the impact of courts on subnational constitutional autonomy, also the selection of judges will have to be taken into account, i.e. whether federal constitutions provide that these judges (or part of them) must have a ‘federalist’ background, e.g. if they need to be proposed by the states or must have their permanent residence outside the capital (Gamper 2013: 110 f). Whether the existence of state courts, including state constitutional courts, demonstrates a higher degree or consciousness of subnational constitutionalism, is questionable.^{IX} State legislatures and state courts may have closer relationships than state legislatures and federal courts, but this can hardly be generalized, since all courts are expected to work independently and since state influence on the appointment of federal judges, especially those at top level, could have a similar impact. Moreover, much depends on possibilities for appeal: The establishment of state



constitutional courts will have much less ‘federalist’ impact if appeals against their decisions can be lodged at federal (mostly, apex) courts; again, this will be mitigated, if these latter courts serve, as Hans Kelsen (1927: 179 f) put it, as ‘joint’ bodies of both levels in a functional sense. Where judges are largely proposed and appointed by federal bodies (Watts 2008: 159 f), there will be little doubt that the organization of that court has a federal imprint, even if the federal constitution intends it to function as an independent umpire between both levels.

3. Federalism and Constitutional Interpretation

Federal constitutions vary as to the degree in which they determine subnational constitutionalism. Older constitutions, such as the US constitution, are generally less detailed than more modern constitutions, while younger constitutions rather seek to avoid possible interpretive conflicts by being more specific through the entrenchment of explicit interpretation rules or exhaustive lists of definitions of legal terms. Whether federal constitutions presuppose subnational constitutional autonomy implicitly and just impose explicit limits where required, or whether they explicitly allow for broad autonomy within certain limits or whether they combine both systems, cannot be offhandedly assessed as ‘centralistic’ or ‘federalist’. Several federal constitutions that explicitly allude to subnational constitutional autonomy are, for instance, more restrictive than the US Constitution which does not explicitly mention state constitutions at all, while it nevertheless imposes a few limits applicable to them.^X In contrast, the South African Constitution explicitly mentions the provincial legislature’s power ‘to pass a constitution’ for a province (Sec 104 para 1 subpara a), but at the same time states in Sec 143 what the provincial constitution, if enacted at all, may do, must do or must not do, while the provincial constitution has yet to be certified by the Constitutional Court in order for it to become law under Sec 144.

Tricky interpretive questions may thus arise as to whether subnational constitutional autonomy does exist at all and how to construe its scope and limits. The more explicit a constitution is on subnational constitutionalism, the more efficient will a literal understanding tend to be, although even a rich and detailed constitutional language can neither exclude ambiguities nor interpretation *per se*. In most cases, however, other interpretive techniques than just literal interpretation will be necessary. This may require



consideration of the original intent of a provision, systematic contextualization or consistency with international or foreign law.^{XI} Courts accordingly adopt an extensive or restrictive approach, including the conception of the constitution as a ‘living tree’^{XII} which entails a more dynamic sort of interpretation that goes beyond the classical Montesquieuan notion of the interpreting judge being just the ‘bouche de la loi’ (Montesquieu 1748: Livre 11, Chapitre 6). This can be deemed necessary before the background of old and rigid constitutions,^{XIII} but appears also in ‘juristocratic’ jurisdictions, e.g. in the European context. Where a selective observance or at least consideration of unspecified international or foreign law or of constitutional principles is stipulated, interpretation may become more cosmopolitan, but also less predictable.^{XIV}

Problems of ‘correct’ constitutional interpretation may arise both with regard to the interpretation of the relevant federal constitutional provisions, but also with regard to the interpretation of subnational constitutional provisions that need to be consistent with the former. Even where authoritative interpretation concerning both layers of law is entrusted to one and the same court, this court may feel it expedient to construe them in different ways. This could be the case, for instance, if federal constitution and state constitutions contained different rules on their own interpretation.^{XV} Explicit rules on constitutional interpretation are helpful to identify the constitutional law-maker’s intention of how the constitution should be interpreted and thus form part of the constitutional design.^{XVI} Still, however, such rules can be counteracted by *de facto* disobedient courts and, moreover, cannot evade a logically irresolvable interpretive circle, namely that the rules themselves need to be interpreted.^{XVII} While the explicit entrenchment of interpretation rules makes judicial interpretation more predictable and democratic, the judge’s interpretive scope gets more restricted; this scope could still decrease, however, if the law-maker used a highly casuistic language instead of entrenching more abstract interpretation rules. As regards the relationship between federal and state constitutions, the scope of subnational constitutionalism will surely become less opaque if precise rules of interpretation apply, but it need not therefore be larger. However, as component states are usually represented in federal constitutional amendment procedures either directly or through a federal second chamber, they probably have more influence on the constitutional entrenchment of interpretation rules than on ‘independent’ judge-made interpretation.



4. Interpreting Subnational Constitutional Scope: Three Cases Compared

4.1. A Homogeneous Democracy? Lessons from Austria

In 2001, the Austrian Constitutional Court^{xviii} repealed a provision^{xix} of the constitution of the Austrian *Land* Vorarlberg which had provided for ‘popular legislation’ at *Land* level. Accordingly, if a *Land* citizens’ initiative had been successful, but not been implemented by the *Land* Parliament, a referendum was obligatory. A successful referendum would have compelled the *Land* Parliament to implement the initiative by adopting a respective law. The instrument had never been used in practice, which, however, was irrelevant in the Constitutional Court’s view. The mere possibility that ‘popular legislation’ could become a ‘rival instrument’ to the ordinary parliamentary processes of law-making was strongly disapproved by the Court.

The most interesting facet of this case was that the Austrian Federal Constitution did not – and still does not – include any explicit provision on direct democracy at *Land* level. Neither does it include any explicit provision on the methodology of constitutional interpretation.^{xx} It does include, however, explicit provisions^{xxi} on plebiscites at federal level which, indeed, do not mention popular legislation. As regards direct democracy at local level, Art 117 para 8 of the Federal Constitutional Act explicitly leaves it to *Land* legislation to regulate this issue.^{xxii}

While the representative system at *Land* level, i.e. provisions on *Land* parliaments, governments, governors and legislative procedures, is regulated by the Federal Constitution,^{xxiii} the lacuna on the issue of direct democracy is obvious. As *Land* constitutions may complement the Federal Constitution, as far as they do not violate it, it is uncontroversial that the *Land* constitutions may regulate direct democracy at *Land* level;^{xxiv} the crucial question was to what extent.

According to the Constitutional Court, the *Land* constitutional provision on popular legislation went beyond the constitutional scope given to the *Länder*. Although the Constitutional Court did (and indeed could) not base this opinion on any explicit federal constitutional prohibition, the main argument focused on the ‘principle of democracy’, being one of the leading principles of the Austrian Federal Constitution, which have an even higher standing than pieces of ‘ordinary’ federal constitutional law. Being



programmatically mentioned in Art 1 of the Federal Constitutional Act – a provision, which does not itself distinguish between representative and direct forms of democracy –, the principle becomes manifest through sundry pieces of ‘ordinary’ federal constitutional law, that, bundled together, reveal the predominantly^{XXV} representative nature of democracy at federal level. The Constitutional Court concluded from the relationship between representative and direct democracy at federal level – which the Court elevated to ‘the’ model inherent in the overall principle of democracy – that it applied to the *Land* and local level, too; the Court remarked only briefly that the principle of federalism, which is a leading constitutional principle as well, and the states’ constitutional autonomy, as an element inherent in this principle, ‘found their limits in the core essence of the principle of democracy’. The remark is ambiguous since it suggests in a way that the principle of democracy ranks higher than the principle of federalism. Apparently, however, the Court just wanted to convey the opinion that, while both principles stood at equal level,^{XXVI} ‘popular legislation’ implied a harder attack on the principle of representative democracy than federalism would suffer from the repeal of the *Land*’s constitutional provision which presented just a small part of the scope of subnational constitutionalism.

This example shows how a federal constitutional lacuna may be as detrimental to subnational constitutionalism as an explicit ban on ‘popular legislation’ at *Land* level would have been. It may be even worse as a state constitutional law-maker cannot clearly anticipate the scope left to a state constitution. As this case shows, all depended on the interpretation of provisions that included no explicit reference to the issue at stake. Neither did any constitutional rule explicitly predict the interpretive method by which the Constitutional Court would be guided. As it turned out, the Court mainly based its argument on original intent, arguing that the Federal Constitution’s founding fathers had regarded ‘popular legislation’ as an inappropriate instrument. The Court could not show, however, that this view had been explicitly taken with regard to ‘popular legislation’ at *Land* level, since the historical references had focused on federal ‘popular legislation’. The crucial interpretive question – whether the original intent of the founding fathers extended to popular legislation at *Land* level, even if the federal constitutional wording did not – is answered by the Court perfunctorily:



‘Due to the fundamental importance which was obviously attached to this question [... in the historical reference materials] one has to act on the assumption that the ‘extraordinary restriction’ and ‘general repression of the referendum’ did not just serve as a federal constitutional rule targeted at the federal level, but also as a key element of the fundamental constitutional principle of representative (parliamentarian) democracy which also binds the *Land* constitutional legislature.’

The interpretive technique used here represents rather a *petitio principii* than a historical verification of all possible *teloi* of the historical constitution-makers. Neither did the Court adopt a ‘consistency presumption’ (Gamper 2012: 217 ff), which is often applied in cases where it is (more or less) doubtful that a federal or *Land* law is consistent with the federal Constitution.

As the political demands for ‘popular legislation’ at federal level have become more frequent recently,^{xxvii} the 2001 landmark case still stands out as a highly topical and significant warning to entrench such an instrument without, paradoxically, risking an obligatory referendum due to the ‘total revision’ of the Federal Constitution caused by a massive upheaval of representative democracy. At local level, however, several examples of such ‘popular legislation’ mechanisms still exist,^{xxviii} even though they do not concern ‘legislation’ in a strictly technical context, since local government is not vested with genuinely legislative powers. From a structural perspective, however, the instrument is the same insofar as a citizens’ initiative may require a referendum that either supplants a decision by the elected local council or forces the local council to implement the request of the people. As yet, the Constitutional Court has not had occasion to review these instruments, which are only entrenched in *Land* ordinary legislation, while doctrine^{xxix} is split in its assessment as to their constitutionality.

4.2. The Concept of Nation in Spanish Consistency Interpretation

The scope of subnational constitutionalism was also a highly controversial subject in Spain, where the Constitutional Court issued a decision on the compatibility of the Statute of Catalonia with the Spanish Constitution.^{xxx} A first difference to the Austrian case is, of course, the fact that Spain is no full-fledged federal system, but a strongly regionalized or quasi-federal system. Accordingly, the statutes of the Spanish Autonomous Communities



are no genuine^{xxxI} state constitutions since they cannot be created autonomously, but depend on the (central) state's consent. According to Art 81 and Art 147 para 3 of the Spanish Constitution these statutes may only be amended by the approval of the *Cortes Generales* through an organic law. Although the statutes have a 'constitutional' subject-matter – Art 147 para 1 of the Spanish Constitution stipulates that the statutes serve as the 'norma institucional básica' of each Autonomous Community, while Art 147 para 2 and other articles enumerate some of the issues that have to be regulated in a Statute –, they are no regional constitutions in the sense of constitutions created *by* the regions (and only them) themselves but rather constitutions *for* the regions.

The Spanish Constitution is one of the few European constitutions which entrench an explicit rule on their own interpretation. According to Sec 10 para 2, provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.^{xxxII} This rule does not refer to other parts of the Constitution, though, and it has not been applied^{xxxIII} by the Spanish Constitutional Court, when it decided on 28 June 2010 that several provisions of the Catalan Statute violated the Spanish Constitution. Other provisions were declared 'to be not unconstitutional if and when they are interpreted under the terms established in the Grounds of the judgment'. The Constitutional Court thus partly applied the 'consistency method' and, in this case, required a certain reading of these provisions which, however, could also be read in a different manner.

Courts often choose a 'consistent interpretation' in cases where two or more different interpretations, that suggest either a constitutional or an unconstitutional meaning of a legal norm, would be equally^{xxxIV} plausible;^{xxxV} the mere presumption of 'consistency' suggests the constitutional compatibility of a norm. In federal systems, 'consistent interpretation' seems to be more favorable from the state perspective, since the contested provision is presumed to be compatible with the federal constitution and thus remains in force, though the very need to restrict the intended meaning of a norm may make its continued existence less desirable.^{xxxVI} Even if a court authoritatively demands a 'consistent interpretation', moreover, the risk will remain that other authorities will not follow this interpretation, which could entail tedious processes of repeated authoritative interpretation. If the court chose an 'inconsistent interpretation' and repealed the norm on account of its at least



potentially unconstitutional character, this would at least formally more interfere with subnational constitutional autonomy, but enhance legal certainty.

The preamble of the Catalan Statute contains the following text:

‘El Parlamento de Catalunya, recogiendo el sentimiento y la voluntad de la ciudadanía de Catalunya, ha definido de forma ampliamente mayoritaria a Catalunya como nación. La Constitución Española, en su artículo segundo, reconoce la realidad nacional de Catalunya como nacionalidad.’

The Constitutional Court did not find this provision unconstitutional, but held that the interpretation of the references to ‘Catalonia as a nation’ and to ‘the national reality of Catalonia’ in the preamble had no interpretive (and, probably, no other) legal effect. The reasons given for this are hardly convincing, though: the Constitutional Court first explained that preambles had no normative value in the sense that they could be directly challenged as unconstitutional or have legally binding effect, but that they had legal value as guidelines for interpreting legal rules and even constituted a particularly relevant element for the determination of the meaning of legislative intentions, and, hence, for the adequate interpretation of legislation. Two illogical corollaries, however, follow: first of all, the Constitutional Court states that the interpretation deriving from the preamble will never be able to be imposed on the interpretation that, on a sole and exclusive basis and with true normative scope, could only be applied to the Court’s own interpretive authority. The Constitutional Court’s role as supreme interpreter is, however, perfectly compatible with ‘legislative intentions’ as enshrined in preambles. It is for the Court to identify their ‘legal value’ and arrange for a corresponding interpretation; it could also be possible for the Court to identify other interpretive guidelines in the Statute itself and balance them against the guidelines in the preamble. The legal value of the preamble does not, however, concern the question whether the Court is the supreme interpreter or not, since this is a question of competence and not a question of interpretive methodology. The second problem stems from the Constitutional Court’s argument that the contested terms in the preamble reappear in the Statute itself and that it must be in the light of the judgment of these provisions that the Court pronounces on the interpretive value of the preamble, depriving it, if necessary, of the legal value intrinsic to it. The Court thus on the one hand admits the



legal value of the preamble and denies it on the other; while preambles usually serve as guidelines for the interpretation of doubtful provisions, the court rather interprets the provisions within the Statute autonomously and uses this interpretation as a guideline to interpret the preamble as irrelevant for interpretive purposes (instead of, for instance, holding the contested terms of the preamble effective, but only in accordance with the ‘reduced’ meaning insinuated to the Statute itself). This would be admissible in cases where other interpretive guidelines (such as the wording of the Statute, original intent etc) clearly plead for another meaning that prevails over a meaning suggested by the less normative preamble. The provisions of the Statute, however, are as ambiguous as the preamble. The preamble, for example, mentions Catalonia as a ‘nation’, followed by the sentence that the ‘Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality’. Why a nationality should be a ‘nation’ and have a ‘national reality’, but nevertheless be conceived as nothing but a ‘nationality’ remains as unclear as the question whether the constitutional ‘recognition’ is mentioned in order to point out that the Statute does not want to go beyond the Spanish Constitution or just in order to demonstrate a certain difference. The same is true for the challenged provisions in the Statute itself, as, on the one hand, Art 1 confirms the status of Catalonia as a ‘nationality’, whereas Art 2 para 4, for example, mentions ‘the people of Catalonia’ from which the powers of the regional *Generalitat* emanate; if the basis for regional institutions were wholly to be found in the Spanish Constitution, however, these powers could emanate solely from the Spanish people, which is indeed proclaimed by Art 1 para 2 of the Spanish Constitution.^{xxxvii} The literal and systematic meaning of both the preamble and the text itself thus is ambivalent. The distinct use of the terms ‘nation’ and ‘nationality’, which to some extent (e.g. ‘national symbols’, ‘people’) reappears in the Statute, is striking. Nevertheless, the Court stressed in the same judgment that the contested terms, notwithstanding the literal expression of its provisions, had to be interpreted within the limits of the Court’s ‘legal philosophy and in the sense acquired over the last thirty years by the categories and constitutional concepts on which they are based’. These, however, are no new arguments, but circular reasoning: the Court alleges that the Statute *must* conform to the Constitution (as understood by the Court) and thus declares irrelevant all parts that seem to be inconsistent. Strangely enough, other parts of the Statute were nonetheless declared unconstitutional.



What the Court does, in effect, is to uphold the Statute as far as possible, alleging its compatibility with the Spanish Constitution, mostly for the reason that the Spanish Constitution would not allow for unconstitutional statutes. Though, at first glance, this may be a favorable interpretation from the perspective of Catalonia, it is detrimental to its interests insofar as the very distinction that was evidently sought for by the use of different words was pronounced to be legally ineffective.^{XXXVIII}

4.3. Saving the State, Abandoning Religious Freedom? Interpretation Rules Revisited

A third case refers to the proposed ‘Save Our State Amendment’ to the Constitution of Oklahoma. The proposed Art VII-Sec 1 C of this Constitution would have read as follows:

‘The Courts ... when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law ...’

The proposal was adopted in a state legislative referendum on 2 November 2010,^{XXXIX} but did not enter into force, since a plaintiff, an American citizen of Muslim belief, sought to enjoin its certification by the Oklahoma State Board of Elections alleging that the amendment would violate the Establishment Clause and the Free Exercise Clause of the First Amendment to the US Constitution. Both the US District Court for the Western District of Oklahoma^{XLI} and, on appeal, the Tenth Circuit^{XLI} granted a preliminary injunction. On 15 August 2013 a permanent injunction was granted by the US District Court for the Western District of Oklahoma finding that the Oklahoma State Election Board should be permanently enjoined from certifying the results of the referendum on the proposed Amendment.^{XLII} The Court argued that the defendants had failed to assert a compelling state interest to justify a discrimination among religions and that the



unconstitutional Sharia law provisions were not severable from the remainder of the proposed Amendment. The Court also found that the balance of harms weighed even more in favor of plaintiffs' having their constitutional rights protected, since the law that voters wished to enact would have been unconstitutional. The permanent injunction would not be adverse to the public interest, though the public had an interest in the will of the voters being carried out, as the public had a more profound and long-term interest in upholding an individual's constitutional rights.

A weighing of interests would not seem to be in place where a state constitution is clearly found to violate the Federal Constitution under *ex-post* judicial review. In this case, however, the Court did not decide on a state constitutional provision, but on a proposal for such a provision that had already been adopted in a referendum. An (either preliminary or permanent) injunction against a proposed state law, being an instrument of *ex-ante* judicial review, interferes with the principles of democracy and the separation of powers more strongly than *ex-post* judgments, since in this case a democratically created piece of legislation is not even admitted to come into legal existence; systems of preventive review are nevertheless known to other federal or regionalized states as well, including even forms of abstract review.^{XLIII}

While the US Federal Constitution hardly contains rules on its own interpretation *strictu sensu*,^{XLIV} most US state constitutions contain such rules,^{XLV} and Oklahoma was not the only state that wanted or still wants to entrench a ban on the use of foreign and religious law (Davis and Kalb 2011: 6, Resnik 2012: 531). The proposed Amendment would have *also* served as an interpretation rule since it would have prohibited courts from both applying and considering Sharia Law, international law and the legal precepts of other nations or cultures as guidelines for their decision-making. There is, however, a significant difference whether international law, foreign national law or religious law is excluded from any kind of application or consideration. In the first two cases there may be specific legal obligations to consider them, if we think, e.g., of ratified treaties or private international law, so that it will not be possible to generally exclude them by a subnational constitution (Davis and Kalb 2011: 6 ff). Religious law or the legal precepts of other cultures may be enshrined in foreign national law (in the case of states governed by the Sharia);^{XLVI} however, it may also be an 'internal' kind of law that is tied in with no nation, but with persons that may even be Oklahoma citizens. If there were legal obligations to consider these latter precepts as they



emanate from the religious freedoms embedded in the US Constitution, this would need careful verification. Much too little consideration has been given to the question whether international, foreign and religious law must not, need not, may or even must be observed, distinguishing also between ‘application’ and ‘interpretive consideration’. Very few constitutions worldwide contain explicit provisions on this issue,^{XLVII} even though cross-judicial dialogue is becoming more and more crucial to courts all over the world.^{XLVIII}

The injunction in the Oklahoma case clarified that it would be unconstitutional to let such a clause enter into force; but open questions remain that are at least as important: will courts have to or may they just use these precepts, even though they are not explicitly allowed to do so (neither under the Federal Constitution nor under any State Constitution)? Do they have discretion to decide on both whether and how they use them? As long as the Federal Constitution does not explicitly regulate this question, courts will be pretty free to answer these questions, in particular so with regard to the use of foreign (national), religious or cultural law which may overlap or not, since religious belief is not the same as nationality and as it will be difficult to assess what ‘other culture’ means in multicultural societies. Whether this enhances the predictability of judgments in states governed by the rule of law or whether this is democratic – especially where judges are not democratically elected –, may be doubtful.

The very lack of relevant interpretation rules in the Federal Constitution could indicate that courts have wide interpretive scope as far as federal constitutional issues, such as freedom of religion, are concerned, while subnational constitutions might be free to regulate their own interpretation in other respects. In fact, the crucial question here does not so much concern freedom of religion, but rather the separation of powers, which, however, has not been examined in the aforementioned decisions: namely, that a subnational constitution prevents courts from using an interpretive method (let alone *applying* certain legal sources) which, in the courts’ opinion, they are at least not prevented (though perhaps not obliged) to use by the Federal Constitution.^{XLIX} From the perspective of freedom of religion, what is the difference between a court that, in the absence of any explicit rules, denies consideration of Sharia law – and hardly any Western court usually considers Sharia law, for reasons of secularism, equality between men and women, ‘negative’ freedom of religion etc – and a legislature that expressly prohibits its use? We yet have to wait for a case where a plaintiff appeals against the decision of a court that, for



whatever reason, declined to use religious law in its interpretation, alleging that the court violated federal constitutional rights for not using these legal sources; this could even become more complex in cases where different (and conflicting) religious precepts were involved.

4.4. Comparative Synthesis

Admittedly, these decisions alone cannot indicate a general tendency towards centralistic or anti-subnational case law in (quasi-)federal systems.¹ Nevertheless, they raise awareness for the tensions between federalism and judicial interpretation. All three cases are examples where subnational constitutional provisions were held to be (at least partly) unconstitutional, even though either the (quasi-)federal constitution or the subnational constitution or both of them could be read in different ways. In all cases, the (quasi-)federal constitution did not explicitly prohibit the respective unconstitutional provision, since the scope of subnational constitutions was nowhere exhaustively regulated as to its positive or negative content, while it was also clear that they were not permitted to contravene the (quasi-)federal constitution. In neither case did an explicit rule of federal constitutional interpretation advise judges on how to interpret either the (quasi-)federal or the subnational constitution; in the Spanish and US federal constitutions, some rather marginal interpretation rules are explicitly mentioned, but they did not concern the relevant cases. All decisions thus depended on the autonomous interpretation of courts, which, seen from the subnational constitutional perspective, took an unfavorable turn in the Austrian and US case. In the Spanish case, the Constitutional Court adopted a differentiated approach, since only part of the contested provisions were held to be unconstitutional; the Spanish Constitutional Court used a ‘consistency interpretation’ to the utmost, which, however, was neither entirely convincing from a legal point of view nor region-friendly in a political sense, since this interpretation was an absolute rebuff of any attempt to construe a ‘Catalan nation’. Neither the Austrian Constitutional Court nor the involved US courts cogitated much about federalism and the question whether certain ambiguities and lacking explicitness at federal constitutional level could be construed in a way that would make the subnational constitutional provision (or proposed provision) compatible with the Federal Constitution. While the Austrian Constitutional Court just remarked that the principle of federalism found its limits in the principle of democracy, the US District Court, when it



granted the permanent injunction, only indirectly alluded to federalism in so far as it held the will of the voters of Oklahoma to be less in the public interest than the upholding of an individual's constitutional rights. In the Austrian case, however, the principle of federalism was not held to be strong enough to legitimize the subnational constitutional provision, whereas the balancing between interests in the US case was already based on the prior assumption that federal constitutional rights would be obviously violated by the proposed Amendment. Whereas the Austrian Constitutional Court held it to be irrelevant that the contested provision had never been exercised in practice, the US District Court thought it relevant that the concern the 'Save Our State' Proposal sought to address had yet to occur, since no court in Oklahoma had ever applied Sharia law.

5. Conclusions

Interpretive federalism concerns interpretation at both constitutional levels. It is remarkable that in the US several states have already entrenched such interpretation rules in their own constitutions¹¹. State constitutions could thus become innovative labs dealing with constitutional interpretation; their comparative experiences could become relevant in both a horizontal and a vertical dimension (Williams 2009: 352). The question remains, though, which kind of interpretation may be applied at state level, whether it may differ from federal constitutional interpretation and how to identify federal constitutional standards in this regard. A pluralistic approach would, however, not always permit 'consistency interpretation' which seeks to harmonize and uphold multilevel legislations as far as possible, even if this neglects the original intent of state legislation.

First and foremost, however, clarity on the federal constitutional interpretive methods and guidelines, including possible references to binding supranational or international law, is essential for identifying the dimensions of subnational constitutionalism, also with regard to its own interpretation, in a predictable manner. This would enhance legal certainty and democratic legitimacy of judgments, while it would save subnational constitutions from risky amendments and years of waiting for sometimes unpredictable ultimate decisions. Nonetheless, textualization of interpretation rules cannot serve as a panacea for all possible questions of interpretation, since also the texts of such rules will need to be interpreted. In all cases compared here, and in the absence of any explicit interpretation rules that could



have been relevant in their respective contexts, judges felt rather free to rely on their own (or other courts' preceding) legal concepts and interpretation, in which federalism played hardly any role. Written rules on federal constitutional interpretation would probably not have increased the scope of subnational constitutional autonomy. But, modifying the words of a famous judgment,^{LII} 'not only must interpretation be done; it must also be seen to be done.'

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^I In this paper, the term 'subnational' refers to both the constitutions of the constituent states in federal systems as well as to regional statutes in quasi-federal systems, even though they may be no genuinely regional 'constitutions' in the former sense; on distinctions between subnational constitutions see Saunders (2011: 854 ff).

^{II} On two levels of constitutional interpretation see Martinico (2012: E 271).

^{III} See Saunders (2006: 365 ff). An important exception is the Swiss Federal Court which has only limited constitutional jurisdiction.

^{IV} See Stone Sweet (2012: 817 ff), Ferreres Comella (2011: 265 ff).

^V See also Michelman (2011: 278 ff).

^{VI} From a comparative perspective, Saunders (2006: 365 ff).

^{VII} On both types, Stone Sweet (2012: 823). It was thus considered an important improvement for the Italian regions that regional laws were no longer subject to *ex-ante* review, when the constitutional reform of 2001 (gazz. uff. no. 248) entered into force.

^{VIII} The terminology was coined by Mark Tushnet, see, e.g., Tushnet (2008). A typically weak-form instrument in a federal system is the Canadian notwithstanding clause (Sec 33 of the Canadian Charter of Rights and Freedoms).

^{IX} See, on this question DelleDonne (2012: E 309 ff), Resnik (2012: 536).

^X See, on a comparative basis, Saunders (2011: 856 ff).

^{XI} From a comparative perspective, Gamper (2012), Barber and Fleming (2007), Sampford and Preston (1996).

^{XII} *Edwards v A-G Canada* [1930] AC 136.

^{XIII} With examples Smith (1995).

^{XIV} Sec 39 para 1 subpara a of the South African Constitution, for example, requires courts to promote 'the values that underlie an open and democratic society based on human dignity, equality and freedom' when they interpret the South African Bill of Rights. These very general terms ('an ... society'; similarly, the ECHR reservation clauses) could be understood in diverse ways, so that this rule, being itself an interpretation rule, will require further interpretation. I would argue that Sec 39 is a rule belonging to the Bill of Rights and thus subject to its own interpretation standards, as expressed in Sec 39, which, apart from subpara a, include the binding or voluntary consideration of international and, respectively, foreign law.

^{XV} With regard to the US, see below.

^{XVI} Federal Constitutions hardly contain them (Gamper 2012: 31 ff); see, however, the UK devolution Acts (Sec 29 para 3 and 101 Scotland Act 1998, Sec 94 para 7 and Sec 154 para 2 Government of Wales Act 2006, Sec 83 Northern Ireland Act 1998).

^{XVII} Gamper (2012: 312 ff), with further references.

^{XVIII} VfSlg 16.241/2001. See Gamper (2003: 45 ff).

^{XIX} Art 33 para 6 Constitution of the *Land Vorarlberg*.

^{XX} See, with more detail, Gamper (2012: 101 ff).

^{XXI} Art 41 para 2, Art 43, Art 44 para 3, Art 49b, Art 60 para 1 and 6 of the Federal Constitutional Act.

^{XXII} With more details on the relevant *Land* legislation, Gamper (2011: 68 ff).

^{XXIII} Art 95 et seq. of the Federal Constitutional Act.

^{XXIV} Rill and Schäffer (2001: 26).

^{XXV} One important exception, which was totally neglected by the Court, is constituted by Art 44 para 3 of the Federal Constitutional Act that requires a referendum in case of a 'total revision' of the Federal Constitution



(which will happen if at least one core element of one of the leading constitutional principles is seriously affected by a constitutional amendment). Even though this provision has another content than ‘popular legislation’, it is nevertheless regarded as a significant part of the democratic principle which, according to the prevailing opinion, could itself only be abolished via a ‘total revision’.

XXVI Other cases dealt with by the Austrian Constitutional Court show that leading constitutional principles are rather flexible in their position *vis-à-vis* each other, see Gamper (2008: 22 ff).

XXVII See, on this issue, recent legislative proposals which have, as yet, not been adopted: LA 2177/A Blg NR XXIV. GP; *Abänderungsantrag zu LA 2177/A XXIV. GP*, 28 June 2013, *Beilage 1/3*; *Antrag gemäß § 27 Abs 1 GOG-NR zu LA 2177/A XXIV. GP*, 28 June 2013, *Beilage 1/4*.

XXVIII See, e.g., §§ 124 et seq. *Steiermärkisches Volksrechtsgesetz*, §§ 44 et seq. *Innsbrucker Stadtrecht*.

XXIX See Pernthaler and Gstir (2004: 750), Gamper (2011: 69 f), Poier (2010: 31ff), Oberndorfer (2008), Mayer (1995: 341 ff), Öhlinger (2012: 1055).

XXX STC 31/2010, de 28 de junio [de 2010].

XXXI See above fn 1.

XXXII It is doubtful whether this is a rule just on *constitutional* interpretation, as the ‘normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce’ possibly include other provisions than these rights and liberties themselves. Nevertheless, it would be highly inconsistent to construe the relevant ordinary or organic legislation in accordance with the aforementioned international treaties, while the rights and liberties themselves, being superordinate to ordinary or organic law, would be excepted.

XXXIII Although Art 2 of the Spanish Constitution entrenches the right to self-government of nationalities and regions it would not appear that this is a norm relating to the fundamental rights and liberties which are recognized by the constitution, since this right is not included in the catalogue of fundamental rights and public liberties (Art 15-29). Moreover, little would have been derivable from an interpretation based on the referred international legal sources, since these do not regulate subject-matters such as those of the contested provisions of the Statute.

XXXIV Norms that are as unclear as to allow both a consistent and an inconsistent interpretation may, at meta-level, be unconstitutional for the very reason of their being too uncertain; however, this will depend on the individual degree of the rule of law required by a constitution.

XXXV Where constitutions worldwide include interpretation rules, this mostly concerns consistent interpretation in a human rights context (see Gamper 2012: 7 ff); a famous example is Sec 3 para 1 of the UK Human Rights Act 1998. A general rule on consistent interpretation is provided by Art 28 of the Hungarian Constitution.

XXXVI There are cases, however, where state constitutions explicitly require to be interpreted in conformity with the Federal Constitution (e.g., Art I Sec 12 and 17 of the Florida Constitution).

XXXVII On possible shortcomings of subnational constitutions with regard to popular sovereignty see Saunders (2011: 869 ff).

XXXVIII The question remains, however, if regional legislation could draw on the allegedly ‘ineffective’ provisions (or rather their interpretation) and insinuate another meaning to them, since the Court’s ‘consistency interpretation’ may be authoritative in a concrete case, but will not absolutely prohibit state legislatures from applying another interpretation when they enact future legislation; see also Martinico (2012: 277) and Delledonne (2011: N 12). It would seem that the federal constitutional law-maker, by an explicit regulation of the relevant issue, could resolve that conflict much more efficiently than a court.

XXXIX State Question No. 755, Legislative Referendum No. 355.

XL *Awad v Ziriax (Awad I)*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010).

XL.I *Awad v Ziriax (Awad II)*, 670 F.3d 1111 (10th Cir. 2012).

XL.II *Awad v Ziriax (Awad III)*, CIV-10-1186-M (W.D. Okla. 2013).

XL.III See, e.g. Art 138 para 2 of the Austrian Federal Constitutional Act or the pre-legislative scrutiny on devolution issues according to the UK devolution Acts. From a comparative perspective, see Sonntag (2011).

XL.IV Such rules concern only selected matters, such as in Amendment IX.

XL.V See, with examples, Williams (2009: 352). Most of these rules, however, concentrate on the meaning of certain rights and sometimes just constitute legal definitions of constitutional terms.

XL.VI On this issue, Shinar and Su (2013: 74).

XL.VII See Sec 39 Constitution of South Africa, Art I Sec 3 Constitution of the Marshall Islands, Sec 11 para 2 Constitution of Malawi, Sec 39 Constitution of Papua New Guinea.

XL.VIII With examples, Groppi and Ponthoreau (2013).



XLIX A risk for judicial independence is seen by Davis and Kalb (2011: 10 f).

^L Constitutional courts do not always tend to centralistic case law (Schneider 2009: 14 f), though, with regard to selected examples, Sagar (2011: E 5). In spite of the judgment related above, the Austrian Constitutional Court, for instance, neither generally denied a certain scope of subnational constitutionalism nor the possibility to examine the compatibility of subnational legislation with subnational constitutions.

^{L1} See above fn xlv.

^{L11} *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

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