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Comparativism and Federalism

Kirk W. Junker

In addition to comparing the various formulae for federalism that the participating states practice, the participants in this Seminar explored insights into the nature of federalism itself. John D. Richard, Chief Justice of the Federal Court of Appeal in Canada, framed the Seminar by asking how one might understand "federalism." Is it, for instance, a power tension between the national and local? Or is it a subset of the tension between cultural homogeneity, cultural nationalism, or globalization on the one hand, and the resistance or subversion by smaller groups on the other hand? And as commentary to the answer to all of these questions, he noted the growing irrelevance of the nation-state in the shadow of non-governmental organizations and supra-national organizations such as the World Trade Organization or the European Union.

It is also, of course possible to consider federalism in complementary and voluntary modes, rather than those in tension. In the remarks with which he opened the Seminar, John P. Flaherty, Chief Justice Emeritus of Pennsylvania, reminded us that William Penn voluntarily relinquished the personal power that the British monarch had granted to him through the land that took his name and became a state. This theme of personal choices and their influence on democracy remained a theme throughout the Seminar. In his comments to Judge Brooks Smith's presentation, Professor Ken Gormley said that to his mind, the real reason that United States' federalism works is the voluntary relinquishing of power by all three federal branches of government. And midway through the Seminar, Professor Bruce Ledewitz, in commenting upon the courageous work of Dr. Allan R. Brewer-Carías in the government of Venezuela, emphasized that it is people, not structures, who make democracy.

In these considerations of federalism the audience heard not only from a mixture of countries, but from a mixture of persons:
judges, legislators, ministers, trial lawyers, and academics. This mixture of countries and legal roles within these countries inherently lends itself to making comparisons — comparisons regarding the various forms of federalism constructed and maintained by the various federal states represented at the Seminar, but also comparisons between and among various roles of legal actors within those federal states.

During the Seminar, Professor Alejandro M. Garro was the first person to make explicit the inherent comparativist nature of this gathering. I am happy to have been asked to comment specifically on the contribution by Peter J. Tettinger, who is both a state constitutional court judge for the state of Northrhine-Westphalia in Germany and a Professor of Law at the University of Cologne. But given the insightful comments already made by Professor Ronald A. Brand and Dr. Louis G. Ferrand regarding Professor Tettinger's paper, it would seem more purposeful and less redundant in my contribution to say a few things in conclusion of the Seminar, and consequently return to some ideas about comparativism itself.

A. IS LAW A SCIENCE?

Christopher Columbus Langdell, the famous Dean of Harvard Law School who introduced the "case method" to the study of law in the United States, announced in 1886 that "[L]aw is a science" and "that law books were to us all what laboratories of the university are to the chemists and physicists. . . ."2 In the Duquesne Seminar, it would be perhaps illustrative of Langdell's assertion that law is indeed a science to note that the remarks that Professor Brand has prepared in response to Professor Tettinger's paper turn out in large measure to assess the same topics that I had prepared to discuss in response to Professor Tettinger's paper, without either of us having consulted the other beforehand. More broadly, if indeed law is a science, a question for us becomes whether we can contribute to the science through comparative legal study. And if we can, to what end? Non-lawyers, beginning

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students, and cocktail party interlocutors often approach comparative study as though it is intended to deliver to us the answer to the question of which legal system is better. Given that legal systems serve different cultures with different norms, values, and expectations of their respective legal systems, it would seem to be an unanswerable question.

In their gold-standard treatise on comparative law, Konrad Zweigert and Hein Kötz, Director of the Max Planck Institute in Hamburg, have written that "it is beyond dispute today that the scholarly pursuit of comparative law has several significant functions. This emerges from a very simple consideration, that no study deserves the name of science if it limits itself to phenomena arising within its national boundaries." They go on to list particular practical benefits of comparative law that call for close attention. First, comparative law is an aid to legal reform in developing countries, as Dr. José Gamas-Torruco reported during this Seminar. Second, in the development of one's own domestic legal system, comparative law engenders a necessary critical attitude, more than local doctrinal disputes can. Third, comparative law is an aid to the legislator. Fourth, comparative law is a tool of construction. And fifth, comparative law enriches the curriculum of the universities.

To this fifth point I might add three points of my own. First, we may want to recall the historical fact that the common law itself was born when Duke William of Normandy defeated Harald near Hastings in England in the year 1066. After his victory, William sent out his own men to observe and record the practices of the local sheriffs in the various shires of his new territory. Borrowing perhaps from the ancient practice of consulting the _jus gentium_ when _jus civilis_ provided no answer in Rome, William distilled the solutions that were common among the sheriffs, and from those solutions he invented a body of law common to all the shires of the territory.

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4. Id. at 16. Here it should perhaps be noted that although the excellent English language translation of Zweigert and Kötz translates "Wissenschaft" into "science" in English, the German notion of "Wissenschaft" is both in usage and denotation broader than the native English use of "science." German uses "Wissenschaft" more in the way that Romance languages use variants on the Latin "scientia," that is, to mean "having knowledge." Thus, for example, it might not be quite the point of contention to call the study of literature or history a _science_ in French or a _Wissenschaft_ in German, as it might be to call it a _science_ in English.
My second point is that even within standard common law study in the United States, the case method means the production and study of knowledge that takes cases from a variety of state and federal jurisdictions at all levels, and regularly mixes them together in training law students not to memorize particular rules for particular local courts, but rather to learn both the geographic breadth and historic depth of possibility in the resolution of social disputes before the law.

My third point regards not domestic law and federalism, but domestic law as a source of international law. The famous Article 38 of the Statute of the Court of International Justice, establishing the Court's jurisdiction, provides that there are three primary sources of law. One of these three sources is custom. Custom, as a term of art, requires that one determine what the comparative domestic legal practices of a sufficient number of states are. And this leads us back to the words of Hein Kötz. As Kötz says:

If one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who is corralled in his own system.5

And so we see that the study of comparative law is not just a decorative exercise for traveling academics, but instead goes to fundamental questions of knowledge production, of the nature of law, and of human behavior. Furthermore, it is worth remembering that some of what we can expect to learn through comparison cannot be anticipated — that is, known in advance, not even by framework, because that would act as providing prejudice — a particularly important word for jurists to use carefully. Thus, this consideration of comparativism comes last in the Seminar — after an iterative exploration and practice of comparison over the last two days.

5. Id. at 15.
B. GERMAN AND EUROPEAN FEDERALISM

The tensions announced by Justice Richard are held in balance not only by powers distributed between federations and their various constituent parts, but by a balance of power among branches of domestic governments. Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit, and formerly of the United States District Court for the Western District of Pennsylvania and the Court of Common Pleas of Blair County Pennsylvania, stated early on in the Seminar that he finds the current relationship of the judiciary to the legislature to be the most tense in his more than sixteen years on a variety of benches.

Illustrative of Judge Smith’s observation is perhaps the fact that Congressman Pat Toomey opened this Seminar by stating that United States’ judges ought only to consult United States’ sources of law. United States Supreme Court Justice Antonin Scalia might agree with Toomey, but Justice Sandra Day O’Connor and Chief Justice William Rehnquist have used opportunities not only inside the framework of case opinions (ten opinions in 2004, as Professor Brand has noted), but outside the courtroom as well to go on record to state otherwise. At a German-American law symposium in 1989, Rehnquist said:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriv-
ing constitutional courts in the world today... that approach will be changed in the near future. 6

Ten years later, at a conference at Georgetown Law School in 1999, Chief Justice Rehnquist repeated:

But now that constitutional law is solidly grounded in so many countries, I am simply repeating now what I've said previously: it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process. U.S. courts and legal scholarship in our country generally have been somewhat laggard in relying on comparative law decisions of other countries.

We had a judicial exchange program between Canada and the United States about ten years ago, and one of the things the justices of Canada's Supreme Court asked was, 'We cite your Constitution; why don't you cite ours?' What I answered that time was that the Charter of Rights and Freedom was only seven years old. Of course, now their Charter of Rights and Freedom, adopted in 1982 is about seventeen years old, so it's less defensible to say that we're not familiar with it.

As I predicted in the past, with so many thriving constitutional courts in the world today, we'll see a change in this approach in the U.S. courts... 7

Rehnquist concluded by stating that the 1999 conference where he presented these remarks was a step in the direction of making that change. One might expect that this Seminar would be another such step.

And at Georgetown just three weeks before the Duquesne Seminar, Justice O'Connor said that the Supreme Court is increasingly


7. William Rehnquist, Introductory comments delivered at the conference "Comparative Constitutional Law: Defining the Field" (held at Georgetown University Law Center on September 17, 1999, in conjunction with the 1999 meeting of the American Association of Comparative Law) reprinted DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW ix (Vicki C. Jackson and Mark Tushnet, eds., Praeger 2002).
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taking cases that demand a better understanding of foreign legal systems. A recent example was the 2003-2004 term’s terror cases involving the United States’ detention of foreign-born detainees at Guantanamo Bay, Cuba. “International law is no longer a specialty. . . . It is vital if judges are to faithfully discharge their duties. . . . International law is a help in our search for a more peaceful world,” she said.8

Moreover, in the context of knowledge production, current Harvard Law School Dean Elena Kagan has launched a curriculum review at Harvard to re-examine how law is taught. This is the first such effort since the deanship of Christopher Columbus Langdell, who first maintained that law is a science in United States’ legal education more than one hundred years ago. Kagan has stated that she is confident that the review will turn up the need for competencies that are different for today’s world, including an intensified focus on international and comparative law.9

But despite these assertions, and perhaps in reaction to them, the United States’ Senate put forth a resolution in 2004:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.10

In the balance, one might conclude that United States’ courts and academies of law find that the production of legal knowledge is benefited from comparative law. If so, then we need to look to the specifics of how the knowledge available to these institutions is bettered. Professor Tettinger’s paper offers some examples of where we might find them.

As is the case with the current German Federal Council, the Bundesrat, Judge Brooks Smith reminded us earlier that originally the United States Senate was to have been appointed by the several states. Today, the vertical structure of federalism found in

10. Interpretation of the Constitution, S. 2323, 108th Cong. § 201(2004) (resubmitted as S. 520 (2005) and H.R. 1070 (2005)) (the purpose of this resolution is to limit the jurisdiction of Federal courts in certain cases and promote federalism).
Article 23 of the German Basic Law inserts state government directly into federal government. Professor Brand's comments on Articles 23 and 24 of the German Basic Law explain and analyze this point more fully. But the balances of federal power in the German Basic Law would seem to create some discontent among those who must understand, work, and live within it.

In the past year, federalism in Germany has become a topic of discussion beyond the inner circle of jurists. In the opening address to a conference at Ditchley Park, London, "Germany in a New Century," the German Ambassador's Office in the United Kingdom characterized the problem as follows:

Implementing the necessary reform policy often comes up against the inflexibility of German federalism. All the major projects of recent times (tax, health and labour market reform, immigration law) have required the approval of the Bundesrat, the Second Chamber of the German Parliament. Again and again it's been apparent that the checks-and-balances system created after the Second World War to prevent absolute power has today become a brake on reform.

We therefore now need to modernise our federal system. The ultimate aim is to make a clear assignment of decision-making at all levels in the federal system, in such a way that responsibilities will be clearly related to the power to raise revenue. And the scope for blocking decisions must be limited. The review of our federal structure now being carried out by the Parliamentary Commission on Federalism is therefore urgently necessary. Apart from anything else, it's damaging for Germany to be constantly in the middle of an ongoing election campaign.¹¹

While many compromises were made in areas such as taxation and education during the more than one year of discussions, in the end, the Commission was unable to facilitate any change — the effort ended with no changes to the German federal structure.¹²

¹² Deutsche Presse Agentur, Entsetzen über Scheitern der Staatsreform:
The call for clarity included in the call to re-design German federalism is reminiscent of the mandate of the Laeken Declaration whereby the shared sovereign power of the European Union with its constituent member states was called to task for being less than clear. By comparison, as Professor Gormley has pointed out during this Seminar, the United States' electorate generally has no idea what a federal state is, despite the fact, as Professor Alejandro Garro stated, not only are there nearly three hundred million Americans living in a federal state, but approximately forty per cent of all persons worldwide.

Returning to the German Basic Law, I would like to go beyond Articles 23 and 24, and revisit Article 25 for a moment. Therein it states that “[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.” This example of shared sovereignty, taken from the German Basic Law, the constitutive law of the most recently-created federation in this seminar, presents an example of alternatives to competitive sovereignty. Furthermore, Germany's integration of governments does not stop with the federalism inside its own borders between its Länder (states) and the Bund (federation). Professor Tettinger's colleague at Cologne, Professor Stephan Hobe, has used Article 25 of the German Basic law as the springboard for his idea of an “open constitution.”

As with all members of the European Union, part of the sovereignty of the German nation-state is volunteered to the Union. During the drafting of the recent Treaty Establishing a Constitution for Europe, comparative practices abounded. In fact, rumor was that the Chair of the Intergovernmental Conference (known colloquially as the “European Constitutional Convention”), former French President Valery Giscard d'Estaing, carried with him the biography of United States' Constitutional Convention delegate John Adams. Other continual references to the United States' Philadelphia Convention were daily throughout the 2003 conference, as well as the negotiations that ultimately produced a signed Treaty in Dublin in June of 2004.

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On a related note, at the Duquesne Seminar, Professor Keith S. Rosenn noted that in preparation for the 1891 constitution in Brazil, a Brazilian delegation was sent to observe the United States Supreme Court. Even before the constitutional treaty considerations of the European Union, the Union functioned both to represent states and individuals, much like the United States Senate and House of Representatives, respectively. In her comments on the presentation of Justice Richard, Professor Moira Phillips of Osgood Hall made the point that with transparency and communication being far more fluid today than ever before, it may be less necessary to administer government locally.

In recognition of the abilities of the communication media of which Professor Phillips spoke, the European Union was mandated by the Laeken Declaration to incorporate not only more transparency in European government, but to provide transparency regarding the deliberations during the Intergovernmental Conference. These steps toward an open constitutional structure that functions transparently to extend federalism cooperatively beyond national borders may find traction outside the European Union as well. The new African Union has made clear that while the work of the old African Union was to rid African nations of imperialism and colonialism, the new Union is looking toward the European Union as a model for economic and governmental restructuring.

C. CONCLUSIONS

This Seminar has been entitled Federalism in the Americas . . . and Beyond. I would like to conclude with a few remarks about the significance of having added the word “beyond.” Scholarly papers in the natural sciences often end with statements such as “more research is necessary.” Social critics might jump on such statements as being too obviously self-serving in their efforts to obtain further funding. If one is in the habit of attempting to determine the meaning of texts by exploring the psychology of the authors and constructing their “intent,” then that sort of social critique on such apparently self-serving statements may indeed undermine the entire text. But there are valid alternative ways of reading and interpreting texts.

In his contribution, Judge Brooks Smith explicitly declined to use that sort of psycho-analyzing of the writer. In the production of knowledge, leaving that critique behind is a way of analyzing forward, rather than backward. But to say what “federalism”
means is also to note how it contributes to the production of knowledge — for science to pursue its goals, it must act in the present with a view forward, not backward. Federalism is a governmental concept that concerns itself with balance — but it is not necessarily competitive. It involves juggling two powers in the air at the same time, as Professor Gormley metaphorically described it. He also noted that when federalism works, it is voluntary.

That point is historically proven not only in the experiences of the general sharing of legal power but also in specific areas of the law, as with the co-operative federalism used in the United States in the area of environmental law, generally, and mining law, in particular. Additionally from the sub-discipline of environmental law, an area in which I have both practiced and researched, one can find a model for federalism that is not necessarily competitive in the principle “think globally; act locally.”

Canadian media theorist and literary critic Marshall McLuhan felt people subscribed to a “rear-view mirror” understanding of their environment, a mode of thinking in which they did not foresee the arrival of a new social milieu until it was already in place. Instead of “looking ahead,” society tends to cling to the past. We are “always one step behind in our view of the world,” and we do not recognize the technology which is responsible for the shift. By “technology,” I would suggest that McLuhan was not limiting his critique to material gadgetry, but was critiquing our social and linguistic tools as well.

Justice Richard asserted that whatever its merits, comparativism cannot have as its goal the establishment of a hierarchy. Dr. Antonio Lordi offers a theoretical alternative to the comparative study of law (in particular, contract law) that he calls “complementary” rather than comparative. Federalist states are, of course, not the panacea to all governmental structural woes. In Professor Tettinger’s contribution, we have seen that both the European Union and the Federal Republic of Germany have taken formal steps to clarify and simplify the public law relationship of the whole to its parts. Yet we must remain open to the possibility to the failures of federalism. As Professor Garro reminded us,

17. Antonio Lordi, Toward a Common Methodology in Contract Law, 22 J. L. & COM. 1 (Fall 2002).
"[F]ederalism in Argentina has been more of [a] failure than a success." A forward-looking federalism is co-operative, not competitive. It shares sovereignty through proportionality and subsidiarity, and it voluntarily relinquishes power. We have had real examples of both in this Seminar.