Canadian Journal of Law & Jurisprudence XXVIII No.1 January 2015, 5-27
© *Canadian Journal of Law & Jurisprudence* 2015 doi: 10.1017/cjlj.2015.15

Comparative Reasoning in Legal Adjudication

Damiano Canale

1. Does Foreign Law Really Matter in Domestic Adjudication?

The practice of making reference to foreign law by courts is one of the most widely discussed topics in contemporary legal scholarship. Although justifying a legal decision via a comparison between domestic law and foreign law has become a worldwide phenomenon, this practice continues to give rise to a number of related issues: the legitimacy of using foreign legal materials by domestic courts, the alleged *de facto* authority acquired by foreign law and its consequence on the structure of domestic legal orders, and the political significance of comparative reasoning with regard to the function of courts in the global scenario.[1]

Three different points of view toward these issues can be currently identified in the debate. According to some scholars, when performed in the courtroom comparative reasoning appears as a cosmetic exercise of erudition which does not deserve any serious consideration. From this perspective, making reference to foreign law is a rhetorical device which has been used by judges for at least two centuries and has no appreciable impact on case law.[2] Other critics regard the current use of foreign law by courts as a pernicious habit which undermines the authority of domestic law without producing any positive effect on adjudication. They believe that courts should be prohibited or at least discouraged from relying on foreign legal materials when rendering decisions since

Earlier versions of this paper were presented and discussed at seminars held at the University of Paris IX (Nanterre), Pompeu Fabra University (Barcelona), ITAM University Institute (Mexico City) and European University Institute (Florence). Thanks are due to the participants in these seminars for their comments and suggestions. I am also grateful to the editor of this journal for his valuable assistance in helping me to improve this paper.

1. The literature on comparative reasoning by courts has increased significantly in the last two decades and cannot be summarized here. For a reasoned reconstruction of this debate see Taavi Annus, "Comparative Constitutional Reasoning: the Law and Strategy of Selecting the Right Arguments" (2004) 14 Duke J Comp & Int'l L 301; Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013) at 9-18. Empirical research on the use of comparative reasoning by European courts has been carried out by Martin Gelter & Mathias M Siems, "Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe" (2014) 62 Am J Com L 35. The term "foreign law" will be used in this paper in a very broad sense: it will refer to legal norms which do not belong to the legal order in which a given court operates. Moreover, by "domestic law" I will not mean state-law only, but whatever set of norms which constitutes a legal order. It has to be noted that the subject of comparative reasoning by courts includes various sorts of foreign legal materials, such as judicial decisions, legal provisions, doctrinal opinions, etc. In this paper I will focus on the comparison between legal norms broadly seen as directives of action used by courts to decide a legal case.
2. See, among others, Austen L Parrish, "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law" (2007) U Ill L Rev 637; David Fontana, "Refined Comparativism in Constitutional Law" (2001) 49 UCLA L Rev 539.

this would preserve the stability and integrity of their own legal order.[3] On the contrary, others see this phenomenon in a positive light as it represents a valuable change in the general understanding of law by judges, a change that leads domestic courts to enter into dialogue with courts located in a different jurisdiction and to pursue forms of cross-fertilization and harmonization between legal orders. In this perspective, comparative reasoning is seen as an argumentative tool through which courts establish informal links between different legal orders, share information and adjudication standards, resolve potential conflicts between competing judicial regimes, or build up a systematic body of legal principles common to all jurisdictions.[4]

In relation to this, Fred Schauer has claimed that foreign law is not binding but has become authoritative, thereby changing the nature of law in the contemporary legal scenario: "The various contemporary controversies about citation practice [of foreign law] turn out to be controversies about authority, and as a result they are controversies about the nature of law itself."[5] According to Schauer, foreign law is at present treated as a set of content-independent reasons for judicial decision; it is not simply rhetorical support for adjudication. Obviously, the authority thereby acquired by foreign law is merely optional and not mandatory. Nevertheless, considering foreign law as authoritative could progressively affect the rule of recognition of a given legal order, i.e., the practice through which judges and other legal officials identify the sources of law. From this point of view, "citation practice reflects something deeper: a change in what counts as a legal argument. And what counts as a legal argument—as opposed to a moral, religious, economic, or political one—is the principal component in determining just what law is."[6]

The idea underlying this article is that the theory of legal argumentation could help us to elucidate the characteristics and functions of legal comparison in judicial decision-making and to determine whether Schauer's claim is true, that is, whether current uses of foreign law in legal adjudication give any evidence of a

---

3. See Eric Posner & Cass Sunstein, "The Law of Other States" (2006) 59 Stan L Rev 131 at 137; Antonin Scalia, "Foreign Legal Authority in the Federal Courts" (2004) 98 American Society of International Law Proceedings 305. In the U.S. more than twenty state legislatures have so far proposed measures that either bans state courts from relying on foreign legal materials or strongly disfavours this practice: see Martha F Davies, "Shadow and Substance: The Impacts of the Anti-international Law Debate on State Court Judges" (2013) 47 New England L Rev 631.

4. See Jeremy Waldron, *"Partly Laws Common to All Mankinds." Foreign Law in American Courts* (New Haven: Yale University Press, 2012) ch 3; Jörg Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (New York: Routledge, 2006) ch 3; Anne-Marie Slaughter, "Judicial Globalization" (2000) 40 Va J Int'l L 1103.

5. Fredrich Schauer, "Authority and Authorities" (2008) 94 Va L Rev 1935. According to Schauer, a norm is authoritative even as it provides content-independent reasons for action, i.e., when the reason to perform the action which is required by the law does not depend on the nature or merit of this action, but on the very fact that it is so required. On the idea of authority as content-independent see HLA Hart, "Legal and Moral Obligation" in AI Melden, ed, *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958) at 102; HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 254-55; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 35-37; Leslie Green, *The Authority of the State* (Oxford: Clarendon Press, 1990) at 41-62.

6. Schauer, *supra* note 5 at 1960.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

change in the nature of law. To this purpose, I shall provide a theoretical framework for distinguishing various forms of comparative reasoning which depend on implicit assumptions that often remain buried in judicial discourse. By clarifying these assumptions, and the structure of comparative reasoning in general, I will outline a systematic picture of this argumentative practice, a picture that shows under what conditions referring to foreign law in legal adjudication is justified on its own grounds. Thus, what follows can be considered a short guide for a consistent use of comparative reasoning by courts.

The article proceeds as follows. I will start by considering the standard account of this argumentative technique provided by argumentation theory (2.). I will then show that the label "comparative reasoning" refers to an argumentative toolkit which includes different standards of legal justification (3.). Distinguishing between different kinds of comparative reasoning will help to make explicit their inferential structure and implicit premises, and to determine how each type of comparative argument affects judicial decision-making (4. and 5.). This analysis will reveal the argumentative constraints (if any) placed on courts when making reference to foreign law, and help determine whether or not this phenomenon is changing what counts as law in contemporary legal systems (6.).

2. Comparative Reasoning and Systemic Argumentation

Traditionally, comparative reasoning is classified as a systemic argument in law. More precisely, it is a kind of *ab exemplo* reasoning, also known as *argumentum ex auctoritate*.[7] Arguments from authority justify a judicial decision based on one or more previous decisions provided by the same or other courts. These arguments are usually considered as a sort of systemic argumentation because they are connected to the ideal of the Rule of Law, which is considered as a fundamental virtue of legal systems: a legal system realizes this ideal in so far as it guarantees equality and legal predictability, regardless of the parties involved in a legal dispute or the judge who is deciding it. As Neil MacCormick put it, "faithfulness to the Rule of Law calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another."[8] And avoiding such variations requires the consistency and coherence of legal systems over time. However, the difference between comparative arguments and other arguments from authority is that the previous ruling to be considered in the justification process is provided by authorities operating in a different legal order than the court's own. The standard form of comparative arguments can be outlined as

7. Cf John Woods & Douglas Walton, *Fallacies: Selected Papers 1972-1982* (Berlin: De Gruyter, 1989) at 15-24; Frans van Eemeren & Rob Grootendorst, *Argumentation, Communication, and Fallacies. A Pragma-dialectical Perspective* (Hillsdale: Lawrence Erlbaum, 1992) at 136-37; Frans van Eemeren, *Strategic Maneuvering in Argumentative Discourse. Extending the Pragma-dialectical Theory of Argumentation* (Amsterdam-Philadelphia: Benjamins, 2010) at 202-03; Douglas Walton, Chris Reed, & Fabrizio Macagno, *Argumentation Schemes* (Cambridge: Cambridge University Press, 2010) at 314.

8. Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2009) at 143.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

follows: a judicial decision in legal order LO_1 is justified if it is coherent with the way in which cases that are relevantly similar to the one to be decided have been ruled in legal order LO_x.

This argument can also be described as an inference whose conclusion lays down an interpretive rule which a court may apply when determining the content of a domestic legal provision (i.e., the norm expressed by an authoritative legal text as a result of legal adjudication):

(1) Ascribe to legal provision P_1 belonging to legal order LO_1 the content N that is coherent with content N_x of provision P_x belonging to legal order LO_x/
(2) N_x is relevant to the cases covered by P_1/
(3) P_1 admits contents N_1, N_2, N_3…N_n/
(4) N_1 is coherent with N_x//
(5) Ascribe content N_1 to P_1.

Like every other systemic argument in law, this argumentative standard follows the intuition that the content of a legal provision is not atomic but rather holistic as it depends on the system of norms it belongs to. In short, legal contents depend on context: determining the norm expressed by an authoritative legal text is a holistic endeavor based upon connections between norms which are seen as a coherent systemic whole. But what does "coherence" mean here? This term refers to a relational property of norms that identifies the structure of a normative system and determines its membership conditions.[9] In this respect, norm N_1 and norm N_x are said to be coherent if N_1 and N_x do not provide incompatible legal consequences for the same case (consistency), or N_1 is a means to realize the end stated by N_x (teleological coherence), or N_1 and N_x specify the content of the same legal principle or value (axiological coherence).

Such a systemic whole does not, however, necessarily limit its contents to a given legal order, i.e., the set of legal norms that exist or are valid in a certain institutional organization such as a State or a supra-national regime.[10] Although the expressions "system of legal norms" and "legal order" are mostly used as synonyms in legal discourse, it is not so in argumentative discourse when a systemic argument is invoked by a court to justify its ruling.[11] In this particular context, the system of legal norms a court appeals to may be composed of the same elements that make up a legal order, but this is not always the case. It can be constituted by a sub-set of norms belonging to a legal order, by a single legal

9. As one can see, this meaning is not that of Dworkin, who uses the term "coherence" to refer to a methodology of legal interpretation according to which a court has to seek a reflective equilibrium between legal principles, on the one hand, and the judgment about what is right in the particular case, on the other. Cf Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 159-68.

10. On the existence of norms as members of a legal order, the identity criteria of legal orders, and the relationship between existence and validity of legal norms, see Joseph Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System*, 2nd ed (Oxford: Clarendon Press, 1980) at 187; Carlos E Alchourrón & Eugenio Bulygin, "The Expressive Conception of Norms" in H Hilpinen, ed, *New Essays in Deontic Logic* (Dordrecht: Reidel, 1981) at 95-124.

11. See Aulis Aarnio, *On Legal Reasoning* (Turku: Turun Yliopsito, 1977) ch 1.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

document, or it may include components that are not incorporated in the legal order in which the court operates, such as foreign or international laws, legal doctrine, conceptual distinction elaborated by legal scholars, etc. Consequently, in the argumentative practice of courts norms belonging to different legal orders can be considered members of the same systemic set of norms, whereas norms belonging to the same legal order can be seen as members of different systemic sets. In the context of legal argumentation, therefore, systems of legal norms are intellectual constructions elaborated by judges to pursue certain goals or protect certain principles or values.

As far as comparative reasoning is concerned, the system of legal norms a court relies on is composed of norms belonging to different legal orders: usually, one or more foreign norms (source) and one domestic norm (target). This systemic set is tailored to fit a judicial outcome whose legal effects are limited to the target legal order, but at the same time such effects are harmonized with those of the norms belonging to the source legal order.

3. Types of Comparative Reasoning

If we look at judicial practice in general, however, it is easy to see that comparative reasoning is used in many different ways. The expression "comparative reasoning" actually refers to a large family of argumentative tools which can be used in the justification of different rulings of the same case in different legal contexts and situations—such as between one State's law and a separate State's law.

The different kinds of comparative reasoning can be identified by reconstructing their standard argumentative form. The argumentative forms I present here simply explain how comparative reasoning is, in fact, used by courts: they are tools for a fine-grained analysis of the ways in which judges uphold their rulings.[12] Furthermore, comparative arguments, like any other form of judicial reasoning, can play different roles in the justification of a judicial decision. We will examine later whether courts consider them necessary or sufficient for justifying the decision of a legal dispute, or if comparative arguments are merely persuasive. For the time being, I will leave this question open and focus on the different uses of this argumentative technique.

First of all, comparative reasoning is used by courts as an *interpretive* or *integrative* argument.[13] In the *interpretive* case, comparing foreign and domestic

12. Notice that an argument which is logically invalid—in the sense that its conclusion does not necessarily follow from its premises—can still be a good legal argument in that the conclusion is taken to be legally justified in a certain legal order. See on this Frans van Eemeren & Rob Grootendorst, *A Systemic Theory of Argumentation. The Pragma-dialectical Approach* (Cambridge: Cambridge University Press, 2004) ch 7; Douglas Walton, *Informal Logic. A Pragmatic Approach*, 2nd ed (Cambridge: Cambridge University Press, 2008) at 150.

13. One might object to the notion that by interpreting a legal text courts always integrate or modify the content of the law. According to Hart, interpretation comes into play when a legal text is vague, so that the law does not provide a clear answer to a legal issue: HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1994) ch 7. Therefore, legal interpretation could not be based upon existing law: it would create new law which "integrates" the existing one. I find this picture not fully satisfying. Legal interpretation comes into play "when there is a possibility of argument as to the meaning of the law", i.e., when (actual or potential)

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

law is of help in justifying a way of understanding the content being ascribed to a domestic legal provision. In the *integrative* case, comparative reasoning is used to fill a gap in the law: it is assumed that the case is not covered by domestic law and can therefore be settled by foreign law. Let us examine more closely the two versions of the argument in question.

3.1. Comparative Reasoning as Interpretive Argument

When used as an interpretive argument, comparative reasoning can serve two main purposes, depending on whether the coherence relation the argument is based upon is considered in a *positive* or *negative* way.[14] A positive coherence relation licenses the interpreter to take N_1 and N_x as items belonging to the same systemic set of norms although they are members of different legal orders. This is the case of the standard argumentative form described above:

(A1) *N_1 of LO_1 is justified if N_1 is coherent with N_x of LO_x, N_x being relevant to the cases covered by N_1.*

In other words, the interpretive rules provided by this argument requires the court to interpret a given domestic provision so that its content is coherent with a foreign legal norm. In *Atkins v. Virginia* the U.S. Supreme Court held that the Eighth Amendment of the Constitution, which prohibited "cruel and unusual punishments", prohibits death sentences for criminal defendants who are mentally retarded. In justifying its interpretation of the term "cruel", the court claimed that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Although this factor is "by no means dispositive", its "consistency with the legislative evidence lends further support to our [interpretive] conclusion."[15] In this sense, the domestic constitutional norm and the corresponding foreign norms were considered by the court as belonging to the same systemic set, thereby justifying the regulation of the case adopted in another jurisdiction.

When used as a negative relation, on the other hand, the purpose of the coherence relation is to differentiate two systemic sets of norms in which the same legal term or phrase expresses different contents. In this case, comparative reasoning has the following form:

---

disagreement arises as to the content to be ascribed to an authoritative legal text on the basis of legal reasons, in spite of the fact that this text (or its content) is vague. See Timothy Endicott, "Legal Interpretation" in A Marmor, ed, *The Routledge Companion to the Philosophy of Law* (New York: Routledge, 2012) 112. In this view, legal interpretation identifies the content that an authoritative legal text can reasonably express in a given legal context. If this is the case, interpretive reasons or arguments can be clearly distinguished from integrative ones: interpretive arguments justify the interpretation of existing legal texts, whereas integrative arguments justify either the extension of a regulation to a case that is not covered by existing legal texts or the construction of implicit legal norms.

14. On the distinction between *positive* and *negative* coherence relations see Damiano Canale & Giovanni Tuzet, "Use and Abuse of Intratextual Argumentation in Law" (2012) 3 Cogency 33. See also Fontana, *supra* note 2 at 539.

15. *Atkins v Virginia*, 536 US 304 (2002), 316. In particular, the court took into consideration the point of view of the European Union and its Members States on the matter.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

(A2) *N_1 of LO_1 is* justified *if N_1 is not coherent with N_x of LO_x, N_x being relevant to the cases covered by N_1.*

Comparative reasoning shows here that a foreign legal solution does not fit the domestic legal context and has to be rejected: an interpretation of the domestic legal provision is justified when it is *incompatible* with the interpretation of the corresponding foreign legal provision.[16] Thus, if the domestic provision P_1 admits contents N_1, $N_2 \ldots N_n$, and N_1 is incompatible with the content N_x of the legal text P_x which is being compared, whereas $N_2 \ldots N_n$ are not so, then N_1 is justified. Comparative reasoning is used, in this sense, to distinguish two systemic sets of norms—which may correspond to two legal orders—that encompass different legal concepts and structure, or divergent cultural features, social needs, ends or values. In *Regina v. Keegstra*, the Supreme Court of Canada was asked whether communications which wilfully promoted hatred against Jews are protected by section 1 of the Canadian Charter of Rights and Freedoms, according to which the limitation of rights or freedoms is only permitted if it "can be demonstrably justified in a free and democratic society." The court claimed, among other things, that the experience of the United States in protecting free expression might be useful in the interpretation of this constitutional provision: "A collection of fundamental rights has been constitutionally protected for over two hundred years [in the United States]. The resulting practical and theoretical experience is immense, and should not be overlooked by Canadian courts." However, the Supreme Court of Canada claimed that American constitutional law should be examined "with a critical eye": "Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada's constitutional vision depart from that endorsed in the United States."[17] Consequently, the Court rejected the First Amendment jurisprudence of the U.S. Supreme Court, as far as hate propaganda legislation was concerned, and interpreted section 1 of the Canadian Charter as justifying legislative incursions placed upon free expression even where there is no clear and imminent danger of breach of peace.[18] To sum up, the domestic constitutional norm and the corresponding U.S. norm were taken to belong to different systemic sets based upon different principles and values, thereby justifying a

16. The incompatible relation between norms holds that it is not possible to comply with N_1 when one is complying with N_x and vice versa.

17. *R v Keegstra* [1990] 3 SCR 697, 740. As David Beatty has pointed out, "Although U.S. authorities are frequently referred to by the [Supreme Court of Canada], it has, for the most part, treated them very cautiously and usually as not being very helpful in fashioning solutions that are appropriate for Canada." David Beatty, "The Canadian Charter of Rights: Lessons and Laments" (1997) 60 MLR 481 at 482. Comparative reasoning has often been used in a "negative" way by the Supreme Court of South Africa in order to differentiate its interpretation of fundamental rights from the U.S. and Canadian adjudication on the matter: see, e.g., *S v Makwanyane* [1995] CCT 3/94 ZACC 3, paras 57 ff; *Carmichele v The Minister of Safety and Security* [2010] CCT 48/100 AHRLR 208, para 36; *Mohamed v President of the Republic of South Africa* [2001] CCT 17/01 ZACC 18, paras 46 ff.

18. The U.S. Supreme Court has sometimes adopted this kind of reasoning as well. See for instance *Roper v Simmons*, 543 US 551 (2005), 576-77.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

different regulation of similar cases. It has to be noted, however, that the negative comparative argument is not conclusive: it identifies the interpretive outcomes which cannot be accepted by the court but it does not establish the norm that is to be applied to the case. Other argumentative tools are needed to do this.[19]

3.2. Comparative Reasoning as Integrative Argument

As I have outlined above, courts make use of foreign reference not only to justify their judgments or decisions with regard to the interpretation of a domestic legal provision but also to fill a gap in the law. If a case is not regulated by the law known to a court, comparative reasoning helps courts to find a norm originating in a different legal order that can be applied to it. In these circumstances, the standard form of the argument is the following: if case C is not regulated by LO_1 but it is regulated by N_x of LO_x, N_x being applicable in LO_1, then the case should be regulated by N_x. Therefore,

(A3) *N_x of LO_x is justified in LO_1 if N_x is applicable in LO_1 and rules a case that is not regulated by any N of LO_1.*

This version of the comparative argument is not to be confused with analogical reasoning. Case C should not be regulated according to N_x merely because C has a relevant property in common with the set of cases covered by N_x. This argument simply justifies the application of a norm originating in a different legal order on the basis of a rule of reference (*renvoir*) that authorizes the judge to resort to external sources of law.[20] Comparative reasoning is used here, in particular, to determine which of the foreign norms that are applicable in the domestic legal order is to be applied.

This kind of comparative reasoning is used by courts operating in a supranational scenario, such as EU Courts: the norms compared belong here to legal orders with vertically integrated relationships and comparative reasoning shows how these legal regimes are mutually interlocked. According to art. 19 TUE (ex-art. 164 of the EC Treaty), for instance, EU courts have "to ensure that in the interpretation and the application of this Treaty *the law* is observed"

---

19. In *Henderson* the House of Lords used both the positive and negative version of comparative reasoning to justify its ruling. The Court examined how the problem of the possibility of concurrent claims from breach of duty under a law of contract and a law of tort had been solved in other jurisdictions, and took into consideration both legal orders in which a concurrent remedy is admitted and legal orders in which concurrence is rejected: *Henderson v Merrett Syndicates* [1995] 2 AC 145, 184-85. The same approach was adopted by the House of Lords in *White v Jones* [1995] 2 AC 207.

20. One of the necessary features of legal orders are their "supremacy claim": every legal order "claims authority to regulate the setting up and regulation of other institutionalized systems by its subject-community" and to reject any claim to supremacy over the same community made by another legal order. See Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 101-02 and 118. Therefore, foreign legal norms are not directly relevant in a domestic legal order: a legal order may attribute relevance to these norms by making reference (*renvoi*) to them or by giving legal effect to them. In these cases, domestic legal orders grant permission to foreign norms to operate in the domestic jurisdiction but without those norms thereby becoming part of the legal order in question.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

[my emphasis]. But what does "the law" mean in this context? Art. 19 TUE in fact empowers EU Courts to resort to comparative reasoning to fill a gap in EU law.[21] In *Factortame III* the ECJ held that "[s]ince the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty […], to rule on such a question […] by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States."[22] According to the ECJ, therefore, the term "law" in art. 164 refers to legal comparison: in order to fill a gap in EU law, EU courts are requested to compare different legal orders and single out the common principles thereof. In this case, comparative reasoning becomes a necessary argumentative tool when Community law does not provide an answer to a legal question.[23] The judgment will "tend to be the result of 'cross' contributions of different legal systems."[24] The origin of these contributions is not always explicitly declared by the ECJ. As a matter of fact, the ECJ usually applies one of the norms of one of the Member States and justifies this practice through comparative reasoning. Thus, a norm belonging to a source legal order is applied by a court operating in the target legal order.[25]

4. The Cherry-picking Problem

The interpretive and integrative versions of comparative reasoning in law just discussed face the same problems in legal adjudication. First of all, courts have to choose which foreign legal orders and provisions are *relevant* for comparative reasoning and worth being considered in judicial decision-making. This is the so-called "cherry-picking problem." There seems to be no general criteria for

21. See Koen Lenaerts, "Interlocking Legal Orders in the European Union and Comparative Law" (2003) 52 Int'l & Comp LQ 876.

22. Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA and Factortame* [1996] ECR I-1029.

23. Notice that EU courts resort to comparative reasoning also as an interpretive argument. In *Díaz García* (T-43/90), the CFI claimed that the provisions of EU law "which make no express reference to the law of the Member States for the purpose of determining their meaning and scope" must normally be given an "independent interpretation." The court considered, however, that "in absence of an express reference, the application of Community law may sometimes necessitate a reference to the laws of the Member States where the Community court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation."

24. Lenaerts, *supra* note 21 at 873. See also Pierre Pescatore, "Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des États membres" (1980) 32 Revue internationale de droit comparé 337.

25. In this paper I assume that there exists an EU legal order which is distinct from and in addition to the legal orders of the EU's Member States. This assumption is highly disputed, however: see, among others, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 2002) ch 7; Mattias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty" (2005) 11 Eur LJ 262; Julie Dixon, "How Many Legal Systems? Some Puzzles Regarding the Identity Conditions of, and the Relations between, Legal Systems in the European Union" (2008) 2 Problema. Anuario de filosofía e teoría del derecho 9.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

selecting the norms to be compared: courts feel free to pick and choose, from decisions and other legal materials around the world, those which they prefer as justification tools for their ruling, and "to ignore decisions that are to the contrary."[26] In *Lawrence and Tyron v. Texas*, the U.S. Supreme Court was asked to determine whether the Constitution's Fourteenth Amendment confers a fundamental right upon homosexuals to engage in consensual sodomy. In interpreting this constitutional provision, the court considered the view of Western civilized societies as a relevant subject for interpretive comparison.[27] In *Naz v. Government*, a constitutional case dealing with the same problem,[28] the Indian Supreme Court made an exceptionally wide use of comparative reasoning. However, it did not only take into consideration Western adjudication but also decisions made in Fiji, Hong Kong and Nepal, in order to remind the cynic, as a commentator pointed out, that "gay rights aren't some luxurious Western construct."[29] This seems to show, as Justice Scalia has pointed out, that "to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."[30] Accordingly, Justice Roberts noted that "in foreign law you can find anything you want": looking at foreign law for support "actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preference [and] cloak them with the authority of precedent."[31]

From a theoretical point of view, however, it does not suffice to say that comparative reasoning depends on a discretionary choice by courts. Since this kind of reasoning is widely used and accepted as a means of legal justification, the question is: under what conditions, if any, is picking a certain alien norm for comparative purposes justified? Are there no reasons at all that give grounds for choosing a particular regulation or legal order for comparison? The argument we have been considering so far has no answer to this question, as comparative reasoning cannot provide its own foundation. It has to be noted, however, that courts sometimes justify their choice by means of other legal arguments: they resort to a different argumentative standard to give grounds for comparing a certain foreign regulation with the domestic one. But it is not always so: in some cases, the reasons for picking a certain foreign norm remain implicit, with the result that comparative reasoning appears groundless. Yet what is implicit in judicial discourse can be reconstructed counterfactually.[32] When a court provides

---

26. Nelson Lund & John O McGinnis, "*Lawrence v Texas* and Judicial Hubris" (2004) 102 Mich L Rev 1555 at 1581.

27. *Lawrence and Tyron v Texas*, 539 US 558 (2003), 573. The Supreme Court has held that the views of "other nations that share our Anglo-American heritage, and by the leading members of the Western European community" were worth being considered in constitutional interpretation: *Thompson v Oklahoma* 487 US 815 (19988), 830-31.

28. *Naz Foundation* v *Government of NCT of Delhi* [2009] WP(C) 7455/2001.

29. Vikram Raghavan, "Navigating the Noteworthy and Nebulous in *Naz Foundation*" (2009) 11 NUJS L Rev 397. See also Madhav Khosla, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision" (2011) 59 Am J Comp L 909.

30. *Roper, supra* note 18 at 627 (Justice Scalia dissenting).

31. John G Roberts, "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary" (2005) 109th Cong 201.

32. On the idea of using counterfactual statements to make explicit what is implicit in an exchange of reasons in a discursive practice, see Robert B Brandom, *Between Saying and Doing. Toward an Analytic Pragmatism* (Oxford: Oxford University Press, 2008) at 80 and 96-98.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

no reasons for giving preference to a certain foreign norm or legal order, our question becomes: if that court had been asked to justify its use of foreign law in adjudication, what reasons could the court have provided in the light of the standards of legal justification accepted in the correspondent legal order? The answer to this question does not describe actual judicial reasoning but how a court could provide an adequate and complete justification of its argumentative choices in the considered legal context.

If one adopts this kind of analysis, it is easy to see that the justification process follows two steps. In order to determine which foreign norm is to be compared to their own, courts first look for a foreign norm or legal order that is relevantly similar (in the case of a positive coherence relation) or relevantly dissimilar (in the case of a negative coherence relation) to the domestic norm or order. On the basis of this similarity or dissimilarity, two norms belonging to different legal orders appear comparable, and the choice of the alien regulation is hence justified for comparative purposes.[33] The form of this argumentative step is as follows:

(B1) *If N_x of LO_x is relevantly similar to N_1 of LO_1, then comparing N_1 with N_x is justified*;

or

(B2) *If N_x of LO_x is relevantly dissimilar to N_1 of LO_1, then comparing N_1 with N_x is justified*.

(B1) justifies a positive use of comparative reasoning whereas (B2) justifies a negative use of this argument. Now, this first step simply provides a reason for distinguishing between comparable and not comparable legal norms. Other argumentative tools are needed to justify the choice of a *certain* alien norm or legal order among those that are comparable with domestic law. As a matter of fact, courts may resort to different arguments in order to select which alien norm or legal order are worth considering for comparative purposes. More precisely, courts may justify their choice as one determined by law through arguments from purpose, arguments from principles, arguments from consequences and historic-genetic arguments. A closer look at these arguments shows how this occurs:

(C1) *Argument from purpose*: The preference for alien norm N_x depends on the social or political ends pursued by the system of norms in which N_x is to be included. When N_x is considered a suitable means to achieve the goals of the legal system, then choosing N_x for comparative purposes is considered to be appropriate. In the ECJ's adjudication, for instance, the choice of the State norm to be used to fill a gap in EU law depends on which legal solution better suits EU legal purposes, namely European integration in a "Community based on the rule of law."[34] In other words, if a certain norm of a Member State is seen as a

33. This argumentative step is analogical in nature. The court is called upon to identify a common property of two or more norms which is relevant as to the case at hand. On the relevance criteria in analogical reasoning see Damiano Canale & Giovanni Tuzet, "The A Simili Argument: An Inferentialist Setting" (2009) 22 Ratio Juris 499.

34. Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para 23. See Miguel P Maduro, "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism" (2007) 1 EJLS 1; Lenaerts, *supra* note 21 at 873.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

suitable means to realize the ideal of the rule of law in the European community, then this norm can be considered as a part of the EU legal system and used to fill a gap in EU law.

(C2) *Argument from principle*: The preference for alien norm N_x depends on the legal principles characterizing the legal order in which N_x will be applied. If N_x is coherent with these principles, in the sense that it allows courts to better protect them, the use of N_x in comparative reasoning is justified. In *Atkins v. Virginia* and *Roper v. Simmons*, for example, the U.S. Supreme Courts took into consideration only Western legal orders, and the ruling of the ECtHR in particular, because they share with the U.S. federal order the same sets of fundamental rights and principles.[35] According to the Supreme Court, this common basis justifies legal comparison and the actual use of foreign law in the interpretation of the U.S. Constitution.

(C3) *Argument from consequences*: The preference for alien norm N_x depends on the social consequences it has triggered in its original legal context. If these consequences are considered relevant by judges in their own social context, then considering this norm as a subject of comparison is justified. In *Washington v. Glucksberg*, for example, the U.S. Supreme Court looked to Dutch experience with physician-assisted suicide to establish whether recognizing this practice as a fundamental right might encourage related forms of euthanasia or undermine medical ethics.[36] In such cases, comparative reasoning is used to settle factual disputes that influence the justification of a judicial decision.[37] Courts assume that they can learn from the experience of other courts and legal orders in the regulation of a certain social issue, since foreign law provides "a road map of consequences that are likely to follow."[38]

(C4) *Historical-genetic argument*: The preference for alien norm N_x depends on its origin and development over time. If the foreign legal order LO_x originates in the domestic legal order, or is a part of the same family or shares the same history, then it is justified to use N_x of LO_x for comparative purposes. In *Mohamed v. President of the Republic*, the Constitutional Court of South Africa was called upon to decide whether the deportation of an illegal immigrant to the United States, where he was accused of international terrorism, was in breach of the South African Bill of Rights, given that the immigrant could be convicted

35. *Atkins*, *supra* note 15 at 316; *Roper*, *supra* note 18 at 576.

36. *Washington v Glucksberg*, 521 US 702 (1997), 734.

37. See on this subject Basil Markesinis & Jorg Fedtke, "The Judge as Comparatist" (2005-06) 80 Tul L Rev 11 at 97. In *Printz* Justice Breyer claimed: "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v United States*, 521 US 898 (1997), 977.

38. William N Eskridge Jr, "United States: *Lawrence v Texas* and the Imperative of Comparative Constitutionalism" (2004) 2 ICON 555 at 560. See also Posner & Sunstein, *supra* note 3 at 139. Some commentators have observed, however, that "the experience from one country might shed minimal light on its possible consequences in another country" since any number of variables could have determined the observed outcomes, not just the law that is being discussed. Annus, *supra* note 1 at 338. Cf also Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale LJ 1225 at 1307.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

to death in the U.S. In order to deal with this issue, the Court extensively examined the adjudication of Commonwealth countries with regard to similar cases, assuming that the experience of those legal orders that share their historical inheritance with the domestic one is of great significance in constitutional interpretation.[39] In this sense, the development of a legal order over time is considered a suitable basis for legal comparison.

In the light of the foregoing analysis, it is apparent that the so-called "comparative reasoning" is a complex justification process including varying inferential steps. Firstly, this argument is used either to justify a judicial decision or to show that a decision is not justified. Furthermore, it serves to justify the interpretation of a legal provision or to fill a gap in the law. By using comparative reasoning to achieve one of these purposes, courts commit themselves to further argumentative moves, which can justify the selection of those alien norms that are suitable for legal comparison. Obviously, this does not remove the fact that comparative reasoning involves judicial discretion: this argumentative technique can be used to justify different interpretations of the same legal text and different solutions to the same judicial dispute. Nevertheless, making reference to foreign law puts a number of argumentative constraints on judicial choices: these constraints are expressed, firstly, by the rule of inference characterizing each version of the comparative argument and, secondly, by the interpretive rules or standards that justify its premises. These rules and standards provide what Michael Bratman calls "framework reasons" for decision-making: they frame and shape the justification process by fixing argumentative starting points, by filtering out some options from courts' deliberation and selecting the admissible ones.[40] Therefore, by analysing the inferential structure of comparative reasoning one may identify the appropriate and inappropriate uses of it: referring to foreign law will be inappropriate when it makes the judicial outcome inconsistent with its own premises.

This is only one part of the story, however. From the perspective of legal argumentation, the question becomes: what licenses a court to follow one of the argumentative routes outlined here rather than another? Under what conditions, for instance, are historic-genetic considerations preferable to the assessment of social consequences, or to compliance with legal principles, in order to justify the choice of a certain foreign norm for comparative purposes? What further argumentative commitment do courts undertake in this respect, and under what conditions could their choice be ultimately justified?

5. Normative Theories of Comparative Law

If we look at legal practice, it is apparent that the relationship between comparative reasoning and other forms of legal reasoning depends on some general assumptions regarding the nature and purpose of comparative law. These

39. *Mohamed*, *supra* note 17 at para 30.
40. Michael Bratman, *Intention, Plans and Practical Reason* (Cambridge: Harvard University Press, 1987) at 180.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

assumptions work as "meta-rules of legal argumentation"[41] in judicial discourse: they identify which of the argumentative paths described above is preferable. The theories of legal comparison developed by legal scholars over the last few decades play an interesting role in this respect, in spite of the fact that comparative law is sometimes seen as exhibiting "a lack of methodological reflection and theoretical foundation."[42] These theories, or some fragments of them, are actually used by courts as preferential rules to select which kind of comparative argument is to be favored. I am not claiming here that courts engage in theoretical reflections concerning the characteristics and purpose of legal comparison. When comparing norms belonging to different legal orders, judges do not ask themselves whether they must look at them in the same way as a foreign lawyer sees his or her own law, or whether they should look at foreign law from their own domestic point of view. Nor are judges interested in discussing epistemic issues concerning the accessibility of foreign legal experiences and practices.[43] Courts however often use claims borrowed from the theoretical debate on these issues or tacitly assume them when considering foreign legal materials. When included in judicial discourse, these claims outline a set of "judicial theories" of comparative law, very broadly conceived, that provide the foundation of comparative reasoning: they state how legal comparison should be carried out by courts. In this respect, three main normative standpoints can be identified: a *universalist*, a *genetic* and a *reflexive* theory of legal comparison. These can be roughly outlined as follows:

(D1) *Universalist theories of comparative law.* According to this view, the function of the law is to respond to social problems or protect common principles, assuming that all societies ruled by law (or a significant portion of them) face the same social problems or share the same basic principles. Thus, the universalist theory may have either a functional foundation, which relies upon common features of social agency,[44] or a cosmopolitan basis, provided by a set of principles

41. See Jerzy Wróblewski, "Legal Reasoning and Legal Interpretation" in C Perelman (dir), *Études de logique juridique* (Bruxelles: Bruylant, 1969) at 9.

42. Ugo Mattei & Mathias Reimann, "Introduction to the Symposium 'New Directions in Comparative Law'" (1998) 46 Am J Comp L 597 at 597. Approaches to comparative law in legal reasoning can be classified in many different ways according to different explicative purposes: see, among others, Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010); Rosalind Dixon, "A Democratic Theory of Constitutional Comparison" (2008) 56 Am J Comp L 947; Sujit Choudhry "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 Ind LJ 819; Tushnet, *supra* note 38. The classification proposed in this paper tries to highlight the normative conditions under which a comparative argument is taken to be sound by courts.

43. See on these issues Pierre Legrand, "How to Compare Now?" (1996) 16 Legal Studies 232; Geoffrey Samuel, "Epistemology and Comparative Law: Contribution from Sciences and Social Sciences" in M van Hoecke, ed, *Epistemology and Comparative Law* (Oxford-Portland: Hart, 2004).

44. Comparative functionalism assumes that "different legal systems give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation." Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Oxford: Oxford University Press, 1998) at 36. Thus, differences between legal systems are seen as accidents depending on contingent facts; moreover, by looking at the functional properties of regulations one can easily determine which legal solution to the same social problem is "clearly superior" to the others (*ibid* at 46).

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

or values that are common to all mankind.[45] In both cases, this theoretical stance allows courts to identify cross-cultural and institutional links between different legal orders that serve as a basis for comparison. Moreover, this approach makes room for the assessment of alternative regulations of a social issue or for the evaluation of different normative means used to pursue a moral or political aim.

This broad view on the nature of law and the function of comparative law justifies both teleological-comparative reasoning (C1) and comparative reasoning based upon principles (C2). In the first case, judges adopt a functional approach to legal comparison in the decision-making process; in the second case, they embrace a cosmopolitan, substantive approach. Understanding legal norms as responses to universal social problems, or as a means to protect common principles and values, actually makes it possible to identify which foreign legal order must be compared with the domestic one and to establish the most suitable solution to a legal issue. On this normative basis, legal decisions anchored to comparative reasoning are typically seen as a way to reform domestic law and to create a global uniform law: legal adjudication is seen as an activity whose moral and political relevance transcends national boundaries.[46]

(D2) *Genetic theory of comparative law*. According to this view, comparative law simply shows how legal orders develop over time. Legal orders often originate from a common social and cultural basis but then differentiate from one another as a consequence of their continuing evolution in a given context. This common source can be seen as a substantial basis for comparison: if one legal order (or one of its norms) derives from another legal order, then comparison is possible and may give useful information about the expected evolution of a given regulation and its practical consequences.[47] When thought of in this way,

---

See also Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) at 144.

45. Comparative studies characterize these principles and their source in a number of different ways. According to *strong comparative cosmopolitanism*, for instance, supranational legal principles are a precondition of legal orders, in the sense that their existence makes a legal order conceptually possible or in the sense that compliance with these principles is a precondition of intentional agency, independently of the conception of the good or comprehensive plan of life of the agent. See Peter Häberle, *Europäische Verfassungslehre* (Baden-Baden: Nomos, 2002) and Claudio Corradetti, "Can Human Rights Be Exported? On the Very Idea of Human Rights Transplantability" in AB Engelbrekt & J Nergelius, eds, *New Directions in Comparative Law* (Cheltenham & Northampton: Elgar 2009) at 41. On the contrary, *weak comparative cosmopolitanism* maintains that supranational principles are a result of a deliberation process in which members of a community submit their findings to peer review and mutual checking, such as in the process of scientific knowledge—cf Fedtke, *supra* note 4 at 82—or that comparative reasoning helps gain insights about moral and political conclusions which are more likely to arrive at a correct decision then a single curt alone: cf Posner & Sunstein, *supra* note 3.

46. The functional version of universalist theory is invoked in *Atkins*, *supra* note 15 at 310. A universalist theory based upon a set of principles common to all jurisdictions is outlined in *S v Walters* [2002] CCT 28/01 ZACC 6, para 52.

47. The classical source of this normative standpoint is Alan Watson's theory of legal transplant: see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974). On the basis of his investigation into Roman law heritage, Watson claimed that legal changes generally occur as a result of legal "borrowing" or "transplantation" from one legal order to another, due to the authority and prestige that a certain body of norms assumes toward other legal orders. In this view, legal borrowing characterizes the entire course of legal history and is largely independent from local factors.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

comparative law justifies the use of legal solutions elaborated in foreign legal orders which have historical communalities with the domestic regime. There is also another version of the genetic theory. The cultural and social differences between legal contexts are seen by some courts as unbridgeable, even if these contexts historically share the same origin. This standpoint stems from the idea that domestic legal experiences, and the set of general and particular norms they originate, cannot be reproduced.[48] Consequently, this version of the genetic theory opposes both comparative reasoning, when it is extended to alien legal cultures, and the idea of a global uniform law, which is seen as pursuing the domain of one particular legal culture over others. Therefore, the genetic approach provides reasons which underpin either a *positive* or a *negative* use of historical-comparative reasoning (C4): when used negatively, it leads judges to refuse the relevance of foreign law in legal adjudication or to use comparative reasoning to differentiate their own legal order from other legal orders;[49] on the contrary, a positive use justifies the transplant of foreign legal solutions into the domestic scenario.[50] The genetic approach can also justify the use of consequential-comparative reasoning (C3), which either vindicates the use of a foreign norm as an interpretive tool or excludes it from the set of norms that are considered suitable for legal comparison.

(D3) *Reflexive theory of comparative law*. Those who endorse this viewpoint claim that comparing foreign legal orders with the domestic one helps judges to take a step back from their own legal framework in order to better understand its characteristics. As Mary Ann Glendon paradigmatically pointed out, "comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self-understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems."[51] In other words, comparative reasoning is useful insofar as it leads judges to recognize false domestic necessities, to elucidate social needs and purposes, or to forecast the consequences of a regulation within the domestic legal scenario. When looking at the use of comparative reasoning by courts, two versions of the reflexive theory can be identified. The first version, which could be called *internal reflexive theory*, states that by looking at foreign law judges do not seek to achieve uniformity among a variety of legal orders but rather recognize the uniqueness of local legal experiences. In this sense, comparative reasoning is an instrument of self-reflection, which makes domestic judges aware of the peculiarity of their own legal order.[52] On the contrary the second version

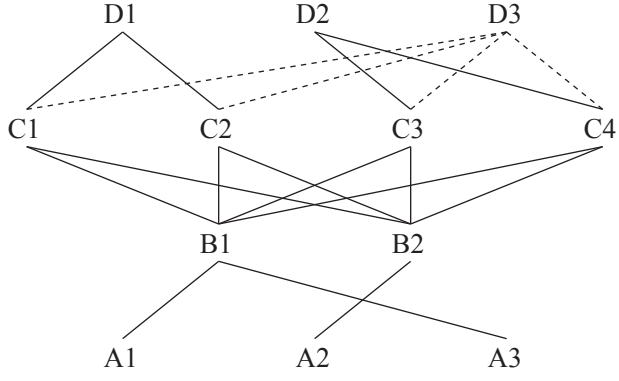
48. See Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37 MLR 1 at 7.
49. Cf *Printz*, *supra* note 37 at 921, para 11; *Stanford v Kentucky*, 492 US 361 (1989), 369; *Thompson*, *supra* note 27 at 868 (Justice Scalia dissenting); *R v Rahey* [1987] 1 SCR 588, 639.
50. See, among others, *United States v Then*, 56 F3d 464 (1995), 469 (Justice Calabresi dissenting); *Knight v Florida*, 528 US 990 (1999), 997 (Justice Breyer dissenting).
51. Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1989) at 142.
52. See on this Elese Øyen, "The Imperfection of Comparisons" in Id, ed, *Comparative Methodology: Theory and Practice in International Social Research* (London: Sage, 1990) ch 1; Pierre Legrand, "The Same and the Different" in P Legrand & R Munday, eds, *Comparative Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) at 240.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

of reflexive theory, that we could call *external*, takes into account the fact that, in the age of globalization, "citizens around the world are increasingly exposed to similar or even identical cultural influences" and face the same social and political problems, such as climate change and the threat of terrorism.[53] These common sources of social and political change tend to lead to parallel changes in domestic legislations and adjudication. In this sense, comparative reasoning is not simply a means of self-reflection but may provide a clearer insight into some evolutionary trends of regulation around the world which could be usefully considered in domestic law.

When interpreted as a normative discourse, therefore, reflexive theory does not license judges to legal borrowing or transplant. Foreign legal materials should not be used to fill gaps in domestic law nor should they be used directly to interpret domestic legal provisions. Legal comparison has an indirect effect on legal adjudication as it clarifies the internal or the external context of adjudication. When identifying the foreign norms to be compared with the domestic norms, reflexive theory licenses a wide range of argumentative tools. It is compatible with arguments from purpose (C1), arguments from principle (C2), arguments from consequences (C3) and historical-genetic arguments (C4). At the same time, however, this normative standpoint strongly influences the way in which legal comparison is carried out. In fact, it weakens the coherence relation between foreign and domestic norms generally required by comparative arguments, and presents foreign legal materials as a simple source of "inspiration" for the judge.[54]

All that being said, the general structure of comparative reasoning in contemporary adjudication can be outlined with the following scheme:



According to this normative approach to comparative reasoning, "analogies and the presumption of similarity have to be abandoned for a rigorous experience of distance and difference." Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" (1985) 26 Harv Int'l LJ 411 at 453. In other words, the purpose of comparison is to "make [its] object 'strange' to us." Jack M Balkin & Sanford Levinson, "The Canons of Constitutional Law" (1998) 111 Harv L Rev 963 at 1005.

53. Dixon, *supra* note 42 at 961. Cf Tushnet, *supra* note 38 at 1285.

54. A normative theory of this kind is outlined by Justice Kriger in *Du Plessis v De Klerk* [1996] (3) SALR 850 (CC), 911-18. For an analysis of this decision see Choudhry, *supra* note 42 at 859-60.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

The scheme shows under what argumentative conditions the use of comparative reasoning is justified in contemporary adjudication. These conditions are seen as sets of premises, inferentially articulated, which outline the alternative paths of legal justification a court may follow.[55] The scheme allows both a top-down and a bottom-up reading. If one reads it starting from the bottom, the scheme shows the alternative lines of argument that a court can resort to in order to prove that a certain use of foreign law is consistent and reasonable. For instance, the standard positive form of comparative reasoning (A1) is justified when the domestic and foreign norms are relevantly similar (B1); the foreign norm which has a similarity relationship with the domestic one can be selected either by an argument from purpose (C1), an argument from principle (C2), an argument from consequence (C3) or a historical-genetic argument (C4); if the foreign norm is chosen on the basis of purposive considerations, then the court subscribes to either a universalist (D1) or a genetic theory of comparative law (D2). (Notice that the inferential relation of (C1), (C2), (C3), (C4) with (D3) is marked with a broken line; it is so because the reflexive theory does not justify standard interpretive and integrative uses of comparative reasoning, i.e., the requirement of a coherence relation between a domestic and a foreign legal norm.) Conversely, a top-down reading of the scheme outlines how judges can consistently use comparative reasoning if they subscribe to a certain normative theory of comparative law.

It is worth noting that these sets of justification conditions cannot be reduced to the criteria of logical validity of legal arguments, nor do they follow from the general principles of practical discourse which govern an ideal communicative situation,[56] nor do they purport to provide a moral or political evaluation of the ways in which courts make reference to foreign law in adjudication. The justification conditions outlined above have been reconstructed by examining what courts in fact claim and do in contemporary legal practice, and depend on the material criteria of legal correctness that are accepted in the considered legal orders. So, they are *a posteriori* and revisable. Their function is to show what discretionary choices are actually made by courts when referring to foreign law in legal adjudication, and under what circumstances these choices are consistent and reasonable according to the argumentative standards followed by the same courts.

There is one more point to consider in this section. We have seen that the diverse theoretical standpoints on legal comparison are not neutral in the courtroom. Judges explicitly or implicitly rely on theoretical debates concerning the nature and scope of comparative law in order to lay down the normative foundation of their ruling. This has some interesting consequences on the impact of scholarly reflection and research on legal practice. Let us consider, for instance, the doctrines of "cross-fertilization" and "judicial dialogue" mentioned at the outset,

55. From a pragmatic point of view, such conditions make explicit the commitments that a judge undertakes when using comparative reasoning. By claiming (A1), for instance, a court implicitly commits itself either to (B1) or (B2), and may be asked to fulfil these commitments by claiming (B1) or (B2). If the court does so, this new speech act gives rise to further argumentative commitments as described by the scheme.

56. Cf Robert Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Oxford: Clarendon Press, 1989) ch 3.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

which typically endorse a universalist theory of comparative law. In fact, these doctrines work as a sort of self-fulfilling prophecy in legal practice.[57] The scientific explanation of what happens when courts rely on foreign law turns out to be a prediction that directly or indirectly causes itself to become true. It is so because courts use the explanation of their practice provided by legal scholars as a normative premise in the justification of their ruling, thereby determining the existence of the phenomenon that this explanation purports to account for. When this takes place, theoretical standpoints are actually used as meta-rules of legal justification, which are apt to underpin certain judicial choices and to reject others.

6. Is Comparative Reasoning Changing the Nature of Law?

Bearing in mind the foregoing analysis, we can now return to the question asked at the beginning: does reference to foreign law by courts reflect a change in the rule of recognition which characterizes contemporary legal orders, or even a change in the nature of law?

On the one hand, I am strongly sympathetic with Schauer's view according to which interpretive arguments are a relevant component in determining how a law should be read in a given social and institutional community. Judicial argumentation makes explicit the reasons that justify a judicial decision and leads us to identify the sources of law in a legal order. So, it is plausible to say that the judicial use of foreign law as an authoritative source of legal obligation would make a difference to the rule of recognition and the characteristics of legal orders in general. On the other hand, the idea that foreign law has become authoritative without being made so by a domestic authority, and that comparative reasoning by courts is changing the nature of law, needs the closer scrutiny I will provide here.

As we have seen in the introductory section of this article, according to Schauer a legal norm is authoritative when it provides content-independent reasons for action to its addressees: "We think of authority as content-independent precisely because it is the source and not the content of the directive that produces the reasons for following it. And so, when a rule is authoritative, its subjects are expected to obey regardless of their own evaluation of the rule or the outcome it has indicated on a particular occasion."[58] Now, if foreign law as such became authoritative, this would change the nature of law in the sense that the characteristics typically or overwhelmingly associated to this social phenomenon should be amended to include foreign sources. In Schauer's view, the nature of a human artifact such as law is not to be explained by reference to the necessary and sufficient properties for its existence but rather by what commonly or generally

57. Robert K Merton, *Social Theory and Social Structure* (New York: Free Press, 1968) at 477.

58. Schauer, *supra* note 5 at 1936. In this view, "if there is no way of telling whether an utterance is authoritative, except by evaluating its contents to see whether it deserves to be accepted in its own right, then the distinction between an authoritative utterance and advice or rational persuasion will have collapsed." Richard Friedman, "On the Concept of Authority in Political Philosophy" in R Flathman, ed, *Concepts in Social and Political Philosophy* (New York: Macmillan, 1973) at 132.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

characterizes the phenomenon being examined.[59] Thinking of foreign law as establishing legal obligation, for example, would change the identity criteria of legal orders, the long-established idea of positive law as the result of a supremacy claim of one legal order over others, and the role that law plays in forming the identity of a nation-state.[60]

It is beyond the purpose of this article to discuss whether legal authority is content-independent and how an inquiry into the nature of law should be conceived.[61] For the sake of argument, I shall take Schauer's theoretical assumptions for granted and examine whether his assessment of the use of comparative reasoning by courts is corroborated in any way by facts. To do this, some observations are in order here. Firstly, we have seen above that comparative arguments can be used with respect to their content in a positive and negative way. In the latter case, comparative reasoning supports the claim according to which foreign law is *not* authoritative in the domestic legal order. Foreign legal materials are here taken into account in order to protect domestic sources of law from the influences of foreign authorities. Obviously, this does not prove that foreign law cannot be authoritative by special or constitutional law but simply that comparative reasoning may justify the claim that foreign legal norms have no legal authority in a domestic legal regime. Secondly, in the examples considered so far courts make reference to foreign law as both a content-independent and a content-dependent reason for action. However, foreign legal materials are typically seen as content-independent reasons by those courts which consider reference to foreign law as superfluous or illegitimate. According to these courts, the fact that legal authority is content-independent makes foreign law irrelevant to domestic adjudication. On the contrary, those courts which regard the practice of using foreign reference in adjudication as valuable and legitimate typically treat foreign legal materials as content-dependent reasons: the relevance of foreign law in legal adjudication depends on its merits or demerits.[62] As a consequence,

---

59. Friedrich Schauer, "On the Nature of the Nature of Law" (2012) 98 Archives for Philosophy of Law and Social Philosophy 457. This conception of the nature of law is presented by Schauer as a challenge to the prevalent understanding of the jurisprudential enterprise at present days. According to this understanding, the task of jurisprudence is to identify the *essential* properties of law: the properties which all legal systems necessarily possess and which define law in all possible worlds. See, for instance, Joseph Raz, "On the Nature of Law" (1996) 82 Archives for Philosophy of Law and Social Philosophy 1; Robert Alexy, "On the Concept and the Nature of Law" (2008) 21 Ratio Juris 281.

60. Cf *supra* note 20. See on this Judith Resnik, "Law as Affiliation: 'Foreign' Law, Democratic Federalism, and the Sovereigntism of the Nation-state" (2008) 6 International Journal of Constitutional Law 33.

61. It is worth underlining that both universalistic theories and reflexive theories of comparative law assume that legal reasons are *content-dependent*. As Sujit Choudhry has correctly pointed out (see *supra* note 42 at 870), for universalism "the value of comparative jurisprudence lies precisely in his appeal on substantive principles of political morality." Similarly, a reflexive approach considers foreign legal norms as useful vehicles for self-reflection "because of the manner in which they reflect and gesture to factual and normative that lies underneath black-letter doctrine." Thus, to think of legal authority as content-dependent is one of the fundamental ingredients of the contemporary movements in favour of the use of foreign law by courts. From a descriptive point of view, however, the question whether the authority of legal norms depends on their moral or political merits is still open and cannot be discussed here. See on this Paul Markwick, "Law and Content-Independent Reasons" (2000) 20 Oxford J Legal Stud 579; Stefan Sciaraffa, "On Content-independent Reasons: It's Not in the Name" (2009) 28 Law & Phil 233.

62. Cf Khosla, *supra* note 29.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

from an empirical point of view, there is no clear evidence in the systems we are considering of an evolving process by which foreign sources of law become authoritative or binding in domestic legal orders. Thirdly, even if foreign law was used in a positive way and as a content-independent reason for adjudication, this would not be necessarily symptomatic of a change in the rules of recognition. When justifying their ruling, courts usually set up a complex argumentative path which includes several inferentially connected legal arguments. Some of these arguments are *sufficient* or *necessary* to justify a judicial conclusion: they make explicit what in fact counts as law in a given legal order. Thus, the legal reasons they express can be considered a part of the existing rule of recognition. On the other hand, some arguments are merely *optional*: they are used to strengthen the conclusion a court has reached but are not incorporated in the rule of recognition; what counts as law does not depend on them.[63] It can be said therefore that comparative reasoning seems to make a difference in what counts as law only if foreign law is used as both a content-independent *and* a sufficient or necessary reason for adjudication. Now, the important question is whether foreign law is used this way in contemporary legal practice. As far as we can see in the jurisdictions considered in this article, this does not seem to be the case.[64] Let's consider two examples that might seem to support Schauer's thesis.

In *The State v. Makwanyane*, the Constitutional Court of South Africa was asked whether section 277(1)(a) of the Criminal Procedure Act of 1977—according to which the death penalty is a competent sentence for murder—was consistent with the Republic of South Africa Constitution of 1993, which had come into force after the conviction of the defendant. The Court was to determine whether the death penalty was in breach of section 11(2) of the new Constitution, which prohibits "cruel, inhuman and degrading treatment or punishment." To justify the settlement of this dispute, the court resorted *only* to foreign law: the South African Court took into consideration the approach of a large number of foreign legal orders to the same issue, and examined how foreign courts had interpreted analogous constitutional provisions.[65] The court here considered foreign law as a *sufficient* reason for justifying its ruling on the matter. It should be pointed out, however, that the South African Constitutional Court set up its argumentation this way in keeping with section 35(1) of the Constitution, according to which "In interpreting the provision of this Chapter a court of law […] may have regard

63. Schauer correctly points out that optional sources of legal justification are not to be confused with persuasive sources or arguments. Persuasive sources are not authoritative by definition, since their persuasiveness depends on their content and not on their source. On the contrary, optional sources can be content-independent: Friedrich Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Boston-New York: Harvard University Press, 2009) at 69. On the very idea of persuasive legal source and argument see Richard Bronaugh, "Persuasive Precedent" in L Goldstein, ed, *Precedents in Law* (Oxford: Clarendon Press, 1987).

64. See on this the results of the empirical survey carried out by Gelter & Siems, *supra* note 1.

65. "In the course of the arguments addressed to us, we were referred to books and articles on the death sentence, and to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals. The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue." *Makwanyane*, *supra* note 17 at para 34.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

to comparable foreign case law."[66] Therefore, the use of foreign law as a sufficient condition for legal justification in *Makwanyane* does not give evidence of a change in the existing rule of recognition, since domestic law explicitly permits reliance on comparable foreign legal materials. Foreign law is here a conclusive reason for adjudication because domestic law endows it with legal authority.

The adjudication of the European Court of Human Rights (ECtHR) provides a second example worth considering for our purposes. The European Convention of Human Rights (ECHR) confers upon the ECtHR compulsory jurisdiction over individual applications claiming a violation of Convention rights, once national remedies have been exhausted. Under Articles 8-11 of the ECHR, however, Member States may limit some of the rights protected by the Convention if those limitations "are necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of rights and morals, or for the protection of the rights and freedoms of others." In order to determine whether a rights limitation by a Member State is necessary, the ECtHR works out a necessity test based upon comparative reasoning. If the court finds that the majority of Member States consider the restriction under review as a necessary means to achieve one of the domestic goals listed above, then this limitation falls under the margin of appreciation of those States and does not infringe the Convention. The ECtHR is to adopt comparative reasoning in order to work out the necessity test: considering foreign law is here a *necessary* means for justifying ECtHR's ruling. Nevertheless, this fact does not turn national laws into sources of legal obligation within the framework of the ECHR's regime. Comparative reasoning simply shows how the multilevel structure of the Convention works: this kind of reasoning displays how the legal orders of the Member States, on the one hand, and ECHR legal order, on the other, are connected to one another as a result of the Convention itself.[67]

Finally, Schauer's claim generates a further worry distinct from the above examples. If a legal norm originating in a foreign legal order were treated by domestic courts as a sufficient or necessary reason for adjudication, *and* this occurred independently of any domestic provision permitting the use of foreign law, then this norm could no longer be considered a *foreign* legal source within the jurisdiction: it would be incorporated as such into the domestic legal order through judicial decision-making. But claiming that comparative reasoning establishes a coherence relationship between two norms belonging to the *same* legal order would be self-contradictory: the reasoning of the court could not be considered a form of legal comparison by definition since it would not be comparing two legal orders. One might counter this objection by claiming that Schauer is actually describing an evolutionary process. At the beginning, courts rely on foreign law for comparative purposes and consider comparative reasoning as an optional means of legal justification. Courts then begin to treat foreign

66. *Makwanyane*, *supra* note 17 at para 34.

67. On the use of comparative reasoning by the ECtHR see Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe" (2012) 1 Global Constitutionalism 53.

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press

law as authoritative, thereby changing the rule of recognition of their legal order. By the end of the process, therefore, courts would have changed what counts as law in their own legal regime. However, this reconstruction does not truly reflect what courts actually say and do. If we look at legal practice, when courts make reference to foreign legal norms they do not claim that these norms are a part of their own legal orders: courts simply treat foreign law as a foreign legal item which is worth comparing to domestic law. Nor could courts do otherwise; in fact, if foreign law were considered part of the domestic legal order according to a new rule of recognition, no comparison would be needed.

To sum up, comparative reasoning is neither sufficient nor is it necessary for justifying judicial decisions in contemporary legal practice. Even in cases where reliance on foreign law appears conclusive, this simply indicates either the existence of a domestic norm permitting courts to rely on foreign legal materials, or shows how different legal orders are interlocked in supranational regimes. Outside of these cases, courts treat foreign law as merely persuasive when performing comparative reasoning. The same can be said for those cases where a foreign ruling is compared to domestic law only because it is widely cited in other jurisdictions around the world or is provided by prestigious and highly regarded courts. When this occurs, foreign law does provide content-independent reasons for adjudication but is not legally authoritative in the domestic legal order in question. In such cases, prestigious courts of other jurisdictions exert a form of practical authority on domestic judges which explains why the ruling of these highly regarded courts is persuasive.[68]

As a result, if we think of legal authority as content-independent, as Schauer does, and analyze the kind of reasons provided by foreign law in comparative reasoning, then the current uses of foreign law by courts cannot be seen as a practice which is changing the nature of law. This does not mean to say that the judicial use of foreign legal materials will not give rise to new forms of legal organization in the near future. The fact that comparative reasoning is typically or overwhelmingly used by courts as a persuasive means of legal justification is not without consequences. The persuasive character of foreign law may bring a court to accept the substantive, content-dependent reasons underlying a foreign solution to a judicial dispute. Now, if the acceptance of these reasons leads courts to consider foreign law as a necessary or sufficient means for justifying their ruling, independently of any domestic provision permitting them to make reference to foreign legal sources, then we will face a change in the rule of recognition and in the distinctive characteristics of contemporary law.[69] As previously mentioned, claiming that such a change is already in place might be an effective way to bring it about.

---

68. The fact that a foreign ruling provides content-independent reasons for domestic adjudication does not make it a legally authoritative pronouncement in the domestic legal order: not every content-independent authority is a legal authority, nor can the practical authority outlined here be seen as a moral authority. Cf Raz, *supra* note 20 at 270.

69. As Richard Bronaugh has pointed out (*supra* note 63 at 247), "persuasive precedents are powerful and fair instruments of invention because, when convincing, they will show ways in which—again rationally and in all fairness—the fetters of binding precedent can be slipped."

https://doi.org/10.1017/cjlj.2015.15 Published online by Cambridge University Press