

Comparative Law and its Influence on National Legal Systems

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Comparative Law and its Influence on National Legal Systems

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I.	Introduction	1
II.	Comparative Law and the National Legislatures.....	2
III.	Comparative Law and the National Courts.....	5
	1. Introduction.....	5
	2. Voluntary Recourse to Foreign Law in Domestic Disputes	7
IV.	The Legitimacy of Comparative Law Influence: Why Comparative Inspiration?	11
	1. A Categorization of Types of Comparative Influence.....	11
	2. The Legitimacy of Comparative Reasoning.....	14
V.	Motives, Strategies and Differences among Countries in Valuing Foreign Law..	16
	1. Introduction.....	16
	2. Motives and Strategies in Comparative Reasoning.....	17
	3. Differences in the Extent to which Different Legal Systems are Open to Foreign Influence.....	19
VI.	Finally: The Influence of Comparative Reasoning on National Law	22

I. Introduction

This contribution does not deal with comparative law as an academic discipline, but focuses on some of its more practical applications.¹ It is well-known that, alongside the scholarly pursuit of knowledge of similarities among and differences between legal systems, comparative law may also fulfil a role in national legal practice. The most obvious example of this is the use of comparative law by national legislatures and courts in creating, reforming and interpreting national law.² This practical use of comparative law by national institutions has increased considerably over the last few decades. Particularly in Europe, comparative reasoning seems to play an ever larger role in drafting statutes and deciding cases. Still, in legal systems that have been mainly national in outlook and character over the last two centuries, many aspects of this recourse to foreign law are far from clear. One of the key questions is the extent to which it is legitimate for a court to refer to foreign law in a purely domestic dispute. While in Europe the drawing of comparative inspiration in such cases is usually met with enthusiasm, this is different in the United States, where it is keenly debated whether such ‘comparative reasoning’ is allowed, particularly in constitutional cases.

In this chapter, the scholarly state of affairs regarding the influence of comparative law in national systems is critically assessed. In so doing, emphasis is put on private law and constitutional law, as these are the two areas where comparative inspiration is discussed most vigorously. The structure is as follows. In sections II. and III., several types of use of comparative law by national legislatures and courts are distinguished and various examples of such influence are given. This provides the background for a critical evaluation of this influence in the subsequent sections. Apart from the legitimacy question and the question of how to categorise the different uses of foreign law (both discussed in section IV.), two other important points need to be addressed. The first is why a legislature or court actually refers to foreign law: is it always to find a better solution or are there more strategic reasons? The second is how to explain the different extent to which countries are open to foreign influence. Both questions are discussed in section V. It then remains to consider what the exact influence of comparative law arguments on the legislature's or court's reasoning is. Despite sometimes abundant references to foreign law in explanatory memoranda to legislation or in court decisions, the true effect of comparative reasoning remains somewhat unclear. By way of a summary, section VI. addresses this point.

II. Comparative Law and the National Legislatures

The use of comparative law while drafting new legislation is as old as the phenomenon of statutory law itself. It is well known that the law of the Twelve Tables (450 B.C.) was influenced by Roman visits to foreign (in particular Greek) cities and even the Code of Hammurabi (1,700 B.C.) is presumably based upon the laws then prevailing in the Near East. In fact, the modern science of comparative law was primarily provoked by the wish to look at foreign law to improve national legislation. This discipline of 'législation comparée', as propagated by the *Société de Législation Comparée* (founded in 1869), led to the study of foreign codes not only in France but also in other countries. Famous examples of drawing inspiration from foreign law are to be found in Germany, where the Prussian company law of 1843 was partly based upon the French Commercial Code of 1807 and where the large nineteenth century unification projects in the areas of private law, procedural law and criminal law were inspired by extensive comparative research as well.³ There is also abundant evidence of such influence of foreign law on national legislation in other countries. When Alan Watson held that the migration of ideas between legal systems is 'the most fertile source of (legal) development',⁴ he referred mainly to legislation being adopted by countries other

than those for which it was originally passed. More examples include income tax, which was imported from England to the European Continent around 1800, Austrian competition law, which formed the basis for the German *Kartellgesetz* of 1923, the Swedish institution of the ombudsman, which was taken over in many countries, and the French *Loi Badinter* (1985), which regulates the compensation of victims of traffic accidents and which was itself based upon comparative research and subsequently influenced other European countries' legislation. The wholesale importation of civil codes into other countries is also a well known phenomenon. Thus, not only did the French *Code civil* serve as a model for many countries in Europe and South America, the Swiss Civil Code of 1907 was taken over in Turkey (1926), and the drafts of the 1900 German Civil Code, together with French law, played a large role in the drafting of the Civil Code of Japan (1896). The new civil codes of the Netherlands (1992) and Québec (1994), and the new German law of obligations of 2002, were also based upon extensive comparative reasoning. Likewise, it is no coincidence that most European countries have enacted rather similar laws in the fields of environmental liability, company law, social security and family law. Sometimes it seems as if one can meticulously trace the migration of an institution from one country to another: thus, same-sex-marriage was first recognised by statute in the Netherlands in 2002, subsequently accepted in Belgium and most of the Canadian provinces in 2003 (followed by the whole of Canada in 2005), accepted in the state of Massachusetts (2004) and Spain (2005), and its introduction is now being discussed in many other countries. Of special importance is the influence of Western law on the former communist countries of Central and Eastern Europe: the new codes in the areas of civil, commercial and criminal law were usually based upon extensive comparative considerations. The same is true for China, which also based its new contract code of 1999 on comparative research.

In most of the above examples, the respective governments had resources available to integrate comparative law findings into the drafting of new legislation. In civil law countries such as Germany and France this has even become routine: in the drafting of any major new statute, the ministry of justice usually looks for inspiration to the laws of other countries. In this respect, it sometimes solicits opinions on foreign law from comparative law research centres, but not infrequently it relies on research by its own civil servants. This is different in many common law jurisdictions, where a ministry of justice in the Continental style does not exist.⁵ However, one cannot say that there is less influence of foreign law on these countries' legal systems, only that such influence takes a different form. In the United Kingdom, it is

through the English and Scottish Law Commissions that comparative law finds its way into legislation. Section 3(1)(f) of the Law Commissions Act 1965 states that one of the functions of the Law Commissions is ‘to obtain such information as to the legal systems of other countries as appears to the Commissioners likely to facilitate the performance of any of their functions’ (that is: systematically developing and reforming the law of England and Scotland). An example is the (English) Law Commission’s report on ‘Privity of Contracts: Contracts for the Benefit of Third Parties’. It not only discussed the laws of other common law jurisdictions, but also stated that a factor in support of reform of the third party rule in English law was that ‘the legal systems of most of the member states of the European Union recognise and enforce the rights of third party beneficiaries under contracts.’⁶ The report led in the end to the Contracts (Rights of Third Parties) Act 1999.

In the United States, the American Law Institute (founded in 1932) makes use of comparative law in drafting the Restatements of Law. Model codes (like the Model Penal Code) are also inspired by other legal systems, and even in the field of competition law the federal legislature benefited from European experience in reviewing the Sherman Antitrust Act of 1890.⁷ Generally speaking, however, the American debate is less enlightened by foreign law than is the case in Europe: reference to foreign law is made, but it seems to play a less important role than in European countries. This may be linked to the fact that inter-state comparison (i.e. among the fifty three American jurisdictions) is much more important than comparison with legal systems outside the United States. ‘The American common law’, as Zaphiriou states, ‘contains contrasts that are almost as instructive and often more constructive than any comparison with the law of a foreign country’⁸

When confronted with these examples, one can only agree with Schlesinger:⁹ little new legislation is enacted, in Europe and elsewhere, without at least some comparative research, and *every* legal system contains imported elements. The above examples raise several questions. One is what the *exact* influence of the comparative argument has been on new legislation: it is often very difficult to establish the extent to which foreign law was decisive for the way in which a national statute was drafted. Same-sex-marriage offers a good example of this: the mere fact that the Dutch recognised this type of marriage in a statute is not likely to have played as important a role as prevailing societal and cultural opinion in the Belgian, Canadian and Spanish decisions to adopt this institution as well. In other words: these ‘importing’ countries would probably have accepted same-sex-marriage even *without* the Dutch example. It is also important to note that the most common way in which foreign law

permeates national law is through national legal writing; for often legal academics take up a point from some foreign legal system, make it part of the national discourse and thus bring it to the notice of the legislatures of their respective countries. Ludwig Raiser's book on standard contract terms of 1935,¹⁰ based upon comparative considerations, was received in German doctrine and this in turn influenced the German legislature to introduce, in 1976, a special statutory regime on this topic.

In the literature on comparative inspiration of the legislature, one finds few attempts to categorize different types of foreign influence. One may distinguish between the wholesale importation of large pieces of law (like a complete civil code) and the adoption of specific rules. One might also distinguish between the voluntary and mandatory borrowing of foreign law. In instances of mandatory borrowing a state is obliged to adopt a foreign statute, as in the case of the importation of a civil code by way of colonization or conquest. In most cases, however, the national legislature's reasons for drawing inspiration from foreign law are far more subtle; indeed, they may not differ fundamentally from those explaining why national courts look at foreign law. These reasons are being explored in section V, *infra*.

III. Comparative Law and the National Courts

1. Introduction

A national court making use of foreign materials is often considered to be far more exciting than a national legislature doing the same thing. The reason for this is probably that in the traditional view a court, unlike the legislature, has to *apply* national law, not to *create* it. At the same time, however, this statement makes clear that there can be very good reasons for a court to look at foreign law, in particular where national law does not offer a solution to the case at hand, either because the applicable rule is unclear or because there is no rule available at all. It is the famous Art. 1 of the Swiss Civil Code which relates the task of the court to that of the legislature by stating that:

If no relevant provisions can be found in a statute, the judge must decide in accordance with customary law, and, in its absence, according to the rule which he would, were he the legislator, adopt. In so doing he must pay attention to accepted doctrine and tradition.

In principle, this opens up the national debate to foreign influence and in Swiss practice the *Bundesgericht* does indeed often refer to comparative law in difficult cases. In other countries

courts are more reluctant to do so, but there, too, the use of comparative law by courts is on the rise.

Before an overview of national court practice in respect of this 'voluntary' or 'optional' recourse to foreign law is given, it is useful to remember that there are also cases in which it is mandatory, or highly desirable, for a court to look at law of foreign origin.¹¹ The most obvious example is when conflict of laws rules oblige the court simply to apply another country's legal system, for example because of a choice of law by the contracting parties. But it can also be that private international law requires some sort of comparison with the court's own national law, as in cases of *qualification*: if a foreign rule that does not have an equivalent in the forum state needs to be applied, it must first be compared with the law of the *lex fori*.¹² Another example in which a court is obliged to compare legal systems with each other is offered by Arts. 5 and 6 of the Rome Convention of 1980,¹³ which protect the consumer and the worker by offering them the minimum protection of their own legal system in cases where a less favourable legal system is declared to be applicable. And since Art. 288(2) EC-Treaty on the delictual liability of the European Union and its agents prescribes that this liability is to be determined 'in accordance with the general principles common to the laws of the member states', the court can only derive such principles from a comparison of the laws of the member states.

There are also cases in which a court is not required to take account of foreign law, but in which it seems highly desirable to do so. This is the position if the field of law is so international that reference to foreign authorities is natural. Obvious examples are maritime law and transportation law, both of which are greatly influenced by international treaties. If national law is based upon such a treaty, a proper 'uniform' interpretation should take into account the way in which other countries implement its provisions. Many treaties¹⁴ therefore state that the international character of the treaty is to be taken into account in interpreting its provisions. The same is true for the interpretation of European law: even though it is the European Court of Justice that is to supervise the proper interpretation of EC law, the contribution by national courts in interpreting provisions of national law based on European legislation in a European spirit is vital. Finally, there is an extra reason to look at foreign law if a statute has a foreign origin. The idea behind the American 'borrowed statute' doctrine, which allows a court to interpret the statute in accordance with the foreign source, is also accepted in many other countries. Thus, Australia adopted a constitution after the American model and Australian courts are therefore keen to look at American law when interpreting it.

2. Voluntary Recourse to Foreign Law in Domestic Disputes

When the influence of comparative law on national courts is discussed, it is often the *voluntary* use of foreign law in purely *domestic* disputes that forms the centre of attention. There are now examples of such influence in almost every legal system, even though important differences between various countries are to be appreciated. Concerning this voluntary recourse to foreign law, it should always be kept in mind that it is a ‘luxurious’ form of legal analysis¹⁵ that cannot be expected from every judge. One may even wonder whether it is permitted. Some countries (particularly in South America) explicitly prohibit the application of foreign law, while in other (mostly European) countries it is not formally forbidden but not done very often. The truth is that recourse to foreign law is not so much the application of a foreign legal regime in a national context, but usually only the taking over of a foreign *argument* if it fits in with the national legal system and if this is found necessary. It is thus of persuasive rather than formal authority.¹⁶

When is there a need in a domestic dispute to find persuasive authority elsewhere? The reasons already mentioned – national law has a *lacuna* or is unclear – are not completely convincing as these problems have always existed and can also be solved within the purely national context by using techniques which courts have used time and again. The increasing use of comparative arguments has more to do with the growing feeling among many (in particular supreme) courts that it may be counter-productive *not* to benefit from foreign experience. This is all the more so if similar problems arise in different countries. Koopmans¹⁷ points out that many countries face identical legal problems caused by the pollution of air, water and soil, new (bio-)technology, an emerging claim culture, migration, urban decay, etc. For a variety of reasons, political institutions often do not enact legislation to deal with these problems, thus leaving a large burden on the courts.

It is therefore no surprise that most cases in which a court looks at foreign law¹⁸ concern controversial new issues for which no solution can be found in the existing national law (be it statute or precedent). Thus, the question whether ‘immaterial damages’ should be awarded in cases of infringement of privacy (which at the time was denied by the German Civil Code) was answered affirmatively by the highest German civil and constitutional courts, and by both of them with reference to foreign law.¹⁹ In the Netherlands it was debated whether damages for pain and suffering may be allowed at all, a question on which the civil code was silent at the time. The Dutch Supreme Court awarded damages, also drawing upon the law of

neighbouring countries.²⁰ Likewise, the question whether actions for wrongful birth or wrongful life should be allowed was answered in the 1980s and 1990s by highest courts throughout the world, most of them making use of the decisions of their foreign colleagues.²¹ Furthermore, in deciding whether land rights should be given to aboriginals the Australian High Court relied heavily on arguments taken from other legal systems, citing fourteen cases in favour of its decision, only three of which were Australian.²² The same is true for the Supreme Court of Canada, which made extensive use of American case law in deciding which rights aboriginals should have.²³ In South Africa and in the United States foreign material has been used to analyse arguments for and against the death sentence.²⁴

One should not derive from these examples the conclusion that voluntary recourse to foreign law is now common in controversial cases. It is far from that. There are many cases that do not refer to foreign law at all, even though this would have been fruitful and legal counsel explicitly referred to it. In this respect, it may be useful to look at four countries in more detail. France, Germany, England and the United States differ considerably in the extent to which their courts take foreign law into account when deciding purely domestic cases.

In Germany it is not uncommon for the highest court to refer to foreign law in order to support its arguments, but the number of cases in which this actually happens is limited. Not surprisingly, most of the references are to other countries within the Germanic legal family, such as Switzerland and Austria, and there are only a few cases in which English, American or French law is cited. Some examples in the field of private law were already given above. In criminal law, the German Supreme Court decided that statements made by a defendant during a police interview were not admissible as evidence if the defendant had not been informed of his right to remain silent and of his right to legal representation. In doing so, the Court referred to the famous American case of *Miranda v. Arizona* of 1966 and to French, English and Dutch law.²⁵

The situation in France is very different. In French case law there are hardly any references to foreign law. This is not surprising as the decisions of the French *Cour de Cassation* in particular are not extensively reasoned and usually do not even contain references to French case law or legal doctrine. The same is true for the Netherlands and Belgium, where the sparse references to foreign law are only in the most general terms (for example that the outcome is in accordance with legislation and case law in neighbouring countries). One should however be careful not to draw the general conclusion that foreign law has no

influence at all on the court's reasoning in these countries. In civil law countries which have a system of Advocates-General who advise the Supreme Court, it is in the opinion (*conclusion*) of the Advocate-General that one often finds elaborate comparative considerations. In many cases the decision of the court can be related to parts of the Advocate-General's opinion, although it is, of course, difficult to accept a clear relationship between foreign law and the court's decision if the court does not make an explicit reference to the corresponding part of the Advocate-General's opinion.²⁶ But sometimes the influence cannot be coincidental: in a decision of 1991, the French *Cour de Cassation*²⁷ held that Art. 1384 of the Code Civil entailed a general liability for other people's acts. In 1920, the Privy Council had applied the same reasoning in a Québec decision on the similar provision of the Québec Civil Code. This decision probably influenced part of French legal doctrine, which in turn influenced the Advocate-General in the *Cour de Cassation* case. This led, in the end, to the court's following its Advocate-General and thus, indirectly, the law of Québec.

The most spectacular development has taken place in England in this respect. It was, and still is, common for an English court to refer to other common law jurisdictions: thus, even after the abolition of appeals to the Privy Council, English law influenced Australian and Canadian law (and vice versa). This is quite logical in view of the shared legal heritage in these countries, which makes it even difficult to say whether a specific rule is 'foreign'. Although during the nineteenth century, and particularly in the field of contract law, civil law exerted quite a strong influence on the common law, during the twentieth century it became almost unheard of to derive arguments from civil law countries. Even in 1978 Lord Diplock stated that it would not be consistent with English law 'to attempt to incorporate holus-bolus from some other system of law, even so close as that of Scotland, doctrines or legal concepts that have hitherto been unrecognized in English common law'.²⁸ At best, civil law was mentioned in passing when brought to the attention of the court and certainly did not guide the court's decision.²⁹ But this changed in the 1990s, a period described by Lord Bingham as 'the time when England ... ceased to be a legal island.'³⁰ The turning point was the decision of the House of Lords in *White v. Jones*.³¹ A testator had asked his solicitor to change his will to the benefit of some of his descendants. The solicitor failed to execute these instructions before the testator died. The intended beneficiaries were successful in claiming their loss from the solicitor. In his leading speech, Lord Goff relied heavily on comparative law arguments from civil law systems (in particular German law), even though these arguments were not directly influential for the outcome.³² The case was followed by several others in which comparative

reasoning played an even larger role, such as in *Greatorex v. Greatorex*³³, in which the High Court allowed a claim for psychiatric damage on the basis of arguments derived from a similar German case, and *Fairchild v. Glenhaven Funeral Services*,³⁴ in which the normal rules of causation were not applied in a case where a person suffering from a disease caused by exposure to asbestos dust would otherwise not have been able to show which of several employers had caused his illness. Alongside common law authority, the House of Lords quoted civil law sources from Germany, Norway, France and the Netherlands. Sometimes the House of Lords also refers to a lack of international consensus, as in the *Pretty* case³⁵ where the right to assisted suicide was denied.

It is clear that references to civil law cases by the House of Lords are usually based on legal literature and not so much on a reading of the foreign cases themselves: it is through the ‘filter’ of comparative literature³⁶ that foreign law enters a decision. In the wrongful birth case of *McFarlane v. Tayside Health Board*, the House of Lords referred to precedents from civil law systems, basing itself on the *Ius Commune* casebook on tort law³⁷ and other literature. It is quite likely that the growing interest in foreign law among English courts would not have originated without such comparative legal literature.

In the United States foreign law does not play an important role in court decisions. Although in the past there have been considerable civil law influences on American law, in particular in the early nineteenth and mid-twentieth centuries as a result of émigré lawyers who influenced legal practice through their writings,³⁸ the present situation can be characterised as parochial. On the whole, the conclusion which Levasseur drew in 1999 still stands: with the exception of Louisiana, ‘the relevance of foreign ... comparative law in American courts is almost nil.’³⁹

This is not to say that there are no examples of state courts or of the United States Supreme Court referring to foreign law; in the field of constitutional law there are even signs indicating a significant change. A famous old example is *Muller v. Oregon*,⁴⁰ in which the Supreme Court had to decide the constitutionality of Oregon’s ‘maximum hours for women’ law. Counsel for the state of Oregon was the later Supreme Court Justice Louis D. Brandeis; he referred to a whole range of foreign statutes (including those of France, Germany, Austria, Italy and the Netherlands) that restricted the working hours of women. Justice Brewer did not consider these to be authorities in a technical sense, but did consider them to be ‘significant of a widespread belief that woman’s physical structure, and the functions she performs in

consequence thereof, justify special legislation ...'. In *Roe v. Wade*⁴¹ Justice Blackmun also referred to historical and comparative materials on abortion.

As to the interpretation of the Eighth Amendment to the Constitution of the United States, comparative reasoning is on the rise. The Amendment prohibits 'cruel and unusual punishments'. There are now several cases in which the Supreme Court refers to international opinion to find out what is a cruel and unusual punishment in view of 'the evolving standards of decency that mark the progress of a maturing society'. In the 2005 case of *Roper v. Simmons*⁴², for example, the Court held that the execution of offenders who were under the age of eighteen when they committed their crimes was a violation of the Eighth Amendment. The majority of the Court found confirmation for its view in the fact that executing juveniles violated several international treaties and that 'the overwhelming weight of international opinion [was] against the juvenile death penalty'. This reliance on foreign materials provoked fierce reactions that may be typical of the American attitude *vis-à-vis* foreign law. I will come back to this in section IV., *infra*.

This short survey reveals that the exact role of the reference to foreign law in a purely domestic case is often not very clear. The above evidence merely suggests that courts (like legislatures) do sometimes refer to foreign law, but we are in need of an analytical structure to categorise these cases and to explain why these references, by both courts and legislatures, are justified. These questions are addressed in the next section.

IV. The Legitimacy of Comparative Law Influence: Why Comparative Inspiration?

1. A Categorization of Types of Comparative Influence

Legislatures and courts can make use of comparative law for a variety of reasons. It seems useful to distinguish these into three different groups, whilst recognising that this is not the only possible categorization. In the American literature in particular one can find a whole range of possible categorizations, ranging from the very practical to the very sophisticated. Thus, Tushnett makes a distinction between functionalism, expressivism and bricolage,⁴³ and Choudry distinguishes between universalist, dialogical and genealogical comparative interpretation.⁴⁴ The distinction adopted here is a more practical one, based on the criterion of whether or not the legislature or the court uses foreign law as a normative argument.

Firstly, legislatures and courts can make use of comparative law as a source of fresh ideas and, particularly, in order to find a solution to a given problem. It is this type of reasoning that comes closest to the idea of comparative inspiration, of comparative law as a means for the legislature or the court to inform itself about other countries' solutions and to gather ideas from this 'fund'. Thus, the legislature may want to know which new topics to address; or if it does already know the topics to be placed on the legislative agenda, it may want know how to draft rules to address the issues which they raise; or, if it does already know how to draft such rules, it may want to know how they will operate in practice. In all these cases foreign law may offer inspiration. Similarly a court that does not know how to solve a case, how to interpret a national rule, or how to deal with a certain argument, may look for inspiration elsewhere. There is no need for the legislature or court to give any justification for looking at foreign law at this stage. Often the use of foreign law will be 'hidden'⁴⁵ in the sense that it does not show in the explanatory memorandum or in the court decision. In other cases the fact that foreign law has been consulted will be mentioned 'in passing'. But this is not important because no normative weight is attached to the foreign law.

Secondly, legislatures and courts may refer to foreign law as a normative argument. This means that foreign law plays a role in justifying a court decision or a statute: it is at least one factor which favours a particular result. It is of course not the only such factor: its importance is still to be decided and it may well be that the comparative argument is overridden by others, with the result that the foreign example is not followed.

There are two types of such 'normative' use of foreign law. It may be that foreign experience is looked to as an illustration of how a certain rule is applied in practice, turning foreign experience into an empirical argument for the legislature or court. When the American Supreme Court decided against the legality of assisted suicide,⁴⁶ it took the Dutch experience into account and considered the (albeit contested) evidence that the Dutch guidelines had in practice failed to protect patients from involuntary euthanasia. Annus rightly observes that foreign countries may thus serve as a laboratory:⁴⁷ their experiences may help legislatures and courts to avoid mistakes made elsewhere, and possibly also to convince a national audience of the utility of a foreign institution. In this respect, it was helpful that countries wanting to introduce the ombudsman could point to the success of the Swedish example.

But it may also be that the content of foreign law itself is a normative argument to adopt a certain solution. In such cases, foreign law contributes directly to the court decision or

legislation and thus possesses authority for the court or the legislature: it is *because* a particular solution has been adopted elsewhere that the court or legislature wants to do the same. This argument may still have to be balanced against others, but it *does* have normative weight as an authority-based argument. The best examples of such ‘hard’ use⁴⁸ of foreign law are cases in which a certain international consensus, or a foreign solution, is explicitly used as an argument for adopting the same solution at the national level. The argument then is simply that the mere fact that the world community, or a foreign state, adopted a particular solution is (co-)decisive for the outcome in one’s own country. The American cases on the proper interpretation of the Eighth Amendment are – highly criticized – examples of this approach. Another example is the case law of the various courts within the Commonwealth in which a solution is sometimes adopted *because* it is in line with the law of other jurisdictions. This type of argument functions at the same level as the argument that a certain outcome is in line with legal history and should *therefore* be adopted.

It is not always easy to establish whether a legislature or a court uses foreign law as a normative argument. Often, the method of reasoning is far more subtle because it is not the foreign decision or statute as such that is used as the basis for the reasoning, but rather the *argument* used in it which is taken over by the national court or legislature. Adopting the underlying reasoning may, however, be characterised as falling under the first category of the use of foreign material, i.e. its use as a source of inspiration. In most of the examples discussed above under the heading of voluntary recourse to foreign law by courts, this is what has happened. But as soon as legislatures or courts use foreign law to *control* an outcome on the basis of ‘national’ arguments, they do use foreign law in the normative sense.⁴⁹ And this is in fact how foreign law is used in many cases. In the *Fairchild* case⁵⁰, for example, Lord Bingham stated that:

if ... a decision is given in this country which offends one’s basic sense of justice, and if consideration of international sources suggests that a different and more acceptable decision would be given in most other jurisdictions, whatever their legal tradition, this must prompt anxious review of the decision in question.

Thirdly, foreign law can be used for ‘ornamental purposes’.⁵¹ If references to foreign law are used in explanatory memoranda or court decisions without any visible connection with the statute or court decision, such references are obviously superfluous. They demonstrate the learning of civil servants or judges, but do no more than that. The drafters of the new Dutch Civil Code of 1992, and in particular its original draftsman, Eduard M. Meijers, took pride in

citing the (black letter) law of more than forty countries (including the civil codes of Brazil, Egypt and Chile), but the exact relationship of these citations with the adoption of a particular rule often remained unclear. The normative weight of such ornamental references is nil, but there can be other reasons why they are used. Thus, they may contribute to the draftsmans's prestige: by demonstrating his learning in the field of comparative law, the draftsman can try to convince others (like Parliament) of the high quality of his work in general.

2. The Legitimacy of Comparative Reasoning

The question whether it is legitimate for a national legislature or court to undertake voluntary comparative reasoning only arises when foreign law is used as a normative argument (the second type of use of foreign law described in the previous subsection). It has not been discussed very often in the European literature. The obvious answer is that the use of foreign law is permissible as it would be counter-productive to deal with a (new) problem without taking into account the experiences elsewhere. This answer presupposes that law is not national in nature, but that there is an international common 'fund' of solutions from which anyone may draw. Both Portalis and von Savigny knew this: they were convinced that a national code needed to be based on a legal scholarship which was not limited to national materials; and that while interpreting such a code it would be important to benefit from a European legal scholarship.⁵² In their times, the international stock of solutions was made up largely of Roman law, but that does not matter. What does matter is finding a good solution, which does not depend on the nationality of the respective legal system. If this argument is taken to its extreme, it leads to Konrad Zweigert's far-reaching idea of comparative law as a 'universal method of interpretation': even in cases where clear national rules are available, these rules should be interpreted in line with foreign law.⁵³

We should be aware that, underlying this view, there must be some more fundamental reason why it is legitimate to regard foreign authority as important. In fact, there are two such reasons. Firstly, one may find an argument in the promotion of uniformity. If one sees the attainment of uniform law as a desirable goal, the justification of the use of comparative reasoning by legislatures and courts is that it may help to achieve this aim. The former president of the German Federal Supreme Court, Walter Odersky, wrote that 'the national court is entitled to take note of the fact that a particular solution is conducive to the harmonization of European law. ... It is an argument that he should use with increasing frequency as the integration of Europe proceeds.'⁵⁴ This is a strong argument: it fits in with

the idea that competition of legal systems is one of the best ways to promote uniformity without, at the same time, sacrificing national legal culture, and that of the protagonists of legal development the courts are best able to perform this job.⁵⁵

There is a second reason that may explain the legitimacy of using foreign law in a national context.⁵⁶ It is that all legal systems share the common goal of finding and applying the best and most just legal rules. All legal systems try to approximate this goal, and it is likely that some of them will have succeeded earlier or more convincingly than others. This means that it is useful to compare the solutions reached elsewhere with domestic solutions in order to develop one's own law in accordance with that of other legal systems. Essentially this justification is based on the theory of Natural law. Legal rules are treated as if they are all cut from a universal cloth and each court is trying to identify the same set of norms.⁵⁷ The argument is particularly strong in the context of human rights, but it may also be extended to private law. In the debate on European harmonization of private law there is an important line of thought taking this view as a (sometimes implicit) starting point: legal diversity is merely coincidental and the main task of European legal scholarship is to unveil the principles that European legal systems have in common.

It is important to note that both theories are based on the idea that national laws are not something unique. This view is as contested in the United States as it is popular in Europe. The argument against the value of comparative reasoning is best presented by the United States Supreme Court Justice Antonin Scalia, who wrote extrajudicially:⁵⁸

We judges of the American democracies are servants of our peoples, sworn to apply ... the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own.

In other words: courts have to apply *national* law. In particular the national constitution is an expression of a uniquely national character and courts should help to constitute the nation by respecting this character.⁵⁹ When the United States' Supreme Court had to decide about the constitutionality of the death penalty for juvenile delinquents in *Roper v. Simmons* (see section III., *supra*), the reference to international opinion by a majority of the court ('The United States now stands alone in a world that has turned its face against the juvenile death penalty') as a confirmation of a national consensus was fiercely attacked by Scalia. In a dissenting opinion he rejected the use of international or foreign law with the following words:

I do not believe that the meaning of ... our Constitution should be determined by the subjective views of five Members of this Court and like-minded foreigners 'Acknowledgement' of foreign approval has no place in the legal opinion of this Court

The decision of the Court even led to a proposal by some Republican congressmen for a 'Constitution Restoration Act', prohibiting an American court from relying upon any foreign law in interpreting and applying the Constitution.⁶⁰ It should be added that, on this view, drawing inspiration from foreign material is less problematic for the legislature. In *Printz v. United States*, Justice Scalia said that 'comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.'⁶¹ This is quite logical as in a democratic society the legislature is permitted to do what a court cannot do: to implement whatever legal rule it chooses, and on whatever basis.

It is clear that there is a fundamental difference between Europe and the United States in valuing the role of foreign law. It is too easy simply to refer to American 'parochialism' and to the European belief in 'universality' in order to explain this difference. There must be underlying reasons why some countries invoke foreign law more readily than others. These reasons are discussed in the next section.

V. Motives, Strategies and Differences among Countries in Valuing Foreign Law

1. Introduction

There are still two questions which need to be answered. The first is why a legislature or a court voluntarily refers to foreign law. Obviously in most of the well-known examples of voluntary use of foreign law, the court or the legislature would have reached the same result had it not referred to foreign law. Lord Goff's speech in *White v. Jones* is usually considered to be one of the highlights of comparative reasoning in English law, but it has been sceptically remarked that the decision was, in the end, purely based on English law.⁶² It is a truism that gaps or unclear rules in national law can always be, and in the past often were, remedied other than by reference to foreign solutions. This suggests that the use of comparative law arguments often has not so much to do with substance as with other motives. It seems useful to pay attention to these motives.

The second, related, question is how to explain the differing extents to which various countries are open to foreign influence. Why is it that some legislatures and courts engage more readily in comparative reasoning than others? It was made clear above that American

courts are less open to foreign influence than English or German courts. Countries like Turkey and Japan were once willing to import foreign civil codes, but are now far less receptive. How can this be explained?

2. Motives and Strategies in Comparative Reasoning

There is a large literature which attempts to explain legal transplants in general. Most of this literature is about why national *legislatures* take over foreign law. Without going into details,⁶³ there seems to be a consensus that the legislature often borrows law for reasons other than mere inspiration or the mere *quality* of a foreign rule.

One reason is that it simply saves time and money to use a solution which is already in operation abroad. A frequent example of such a ‘cost-saving transplant’ is the adoption by developing countries of Western environmental or health and safety legislation. In the end it is simply efficiency and not the search for the ‘best’ rule that is decisive: it saves (information) costs to adopt something which has been proved to work elsewhere. Another reason for a country’s legislature to take over foreign law can be that it adds to the ‘prestige’ of that country in the rest of the world. That is why developing countries often introduce human rights charters into their constitutions, even if these are not complied with in practice.

The most important reason for a country to take over foreign law, however, is that it is often more or less compelled to do so: the adoption of a foreign model can be made a condition for giving loans (as is the case with the International Monetary Fund) or for granting political autonomy. Western countries often make their financial aid to the Third World dependent on the respect for human rights. After the Second World War General Douglas MacArthur imposed a Western-based constitution on Japan; Eastern European countries, on the other hand, faced a ‘Sovietization’ of law. In both cases this was part of a policy to ‘assist’ these countries to adapt to a prevailing ideology. In the 1990s Russia abolished the (execution of the) death penalty so as to be able to join the Council of Europe. Such ‘dictation’ can also be far more subtle. Many European countries have adopted legislation for new types of contracts such as franchising, leasing and factoring. In doing so, they created legal certainty for contracting parties who wanted to base their dealings on these new contractual concepts developed in American law. There was thus an economic interest to borrow from a foreign system. When China adopted its new Contract Code in 1999, it did so to enhance the market economy by attracting foreign investment. In today’s world, political and economic pressure

and commercial dominance are far more important explanations for legal transplants than the mandatory adoption of foreign institutions.

Unlike legislatures, courts are not primarily driven by political or economic considerations. It may be that courts look elsewhere for inspiration in cases, where there is either no domestic rule or the domestic rule is unclear, because they think that this will save time and money or will provide prestige, but it is probable that there is also a different mechanism at work. As was mentioned in section III., courts are particularly keen to refer to foreign law when they have to deal with a controversial new issue. It is likely that the more controversial or novel an issue is, the more the court feels obliged to convince its audience of the correctness of its decision. To convince outside observers that its decision is correct, the court can seek support in legal systems where a similar issue has been decided before. Thus, courts can use references to foreign law strategically to improve the acceptance of their decisions by the legal community of their own country.

This thesis was advanced by Walsh, and tested by Smithey, for Canadian and South African constitutional law.⁶⁴ Both Canada (in 1982) and South Africa (in 1996) adopted a new charter of fundamental rights and created a system of constitutional control by the courts. Both countries lacked any tradition in constitutional review, and yet the Supreme Court of Canada and the Constitutional Court of South Africa have had to decide very controversial cases, such as on the 'horizontal effect' of the new constitution in relationships among citizens, or the acceptability of the death penalty. Justice Beverly McLachlin of the Canada Supreme Court put it like this: 'Consider ... the sinking feeling that besets a common lawyer upon finding himself or herself confronted by a new document, an amalgam of unfamiliar American and European and who-knows-what-other ideas, without so much as a case to show the way.'⁶⁵ This is why Section 39 of the South African Constitution explicitly declares that courts 'may consider foreign law' when interpreting the Bill of Rights. In post-apartheid South Africa reference to foreign law also served the purpose of showing the world that the country was able to catch up with international human rights standards. Walsh's thesis was indeed supported by evidence: in the first 75 cases decided by the two courts, abundant reference was made to foreign law. The Canadian court cited foreign precedents in 64% of the cases and the South African court even in 68%.⁶⁶

The idea that legal uncertainty produces greater reliance on external sources also seems to be evidenced by most of the private law cases mentioned in the previous sections. When there is

no guidance in national law, the use of foreign law increases, but as soon as one knows how to deal with an issue, the need to find guidance abroad is less obvious and reliance upon foreign law decreases again. A study in which this thesis is empirically tested for countries other than Canada and South Africa is still lacking.

We should, however, not forget that this motive does not explain everything. Often, the influence of foreign law is a result of coincidence. The most famous example is probably the introduction of the Swiss Civil Code and the Code of Civil Procedure of the canton of Neuchâtel in Turkey in 1926. It is safe to say that this would not have happened if the then Turkish minister of justice had not studied law in Neuchâtel. In a similar vein, without the influence of German émigré lawyers like Friedrich Kessler, Albert Ehrenzweig and Stefan Riesenfeld, American contract law would have looked different. Likewise, if Andreas von Tuhr had not taught law at various German universities, his textbook on the Swiss law of obligations, and, indeed, Swiss law itself, would not have been as greatly influenced by German law as it is today.⁶⁷ As far as courts are concerned, much depends on legal counsel, or on the judges' linguistic knowledge, or on the availability of a good library.

3. Differences in the Extent to which Different Legal Systems are Open to Foreign Influence

How may the differences in the extent to which various legal systems are open to foreign influence be explained? As far as legislation is concerned, several factors have already been mentioned above: apart from political and economic considerations, the extent to which the legislature of a particular country has access to comparative materials plays an important role. If the drafting of legislation is left to a special branch of government or to a Law Commission, these bodies can make it a matter of course to refer to comparative law. This may partly explain why foreign materials play a less important role in American legislative practice: comparative resources are often not available at the state level, and at the federal level all energy is put into comparing the fifty three American jurisdictions. The differences in court practice are caused by similar factors. The aim of this section is to identify some of them.

A first factor is the amount of national materials available. We just saw that a court is more likely to refer to foreign law if the question before it does not receive a clear answer in national law. As a consequence, the more material that is available within the court's own jurisdiction, the less likely it is that the court will need to refer to foreign law. 'New'

questions are simply less frequent in large jurisdictions. This may explain why foreign law does not play a large role in deciding cases in the United States, with its enormous amount of case law. The theory is confirmed by the experience of small countries such as Luxemburg, where courts are obliged to refer to foreign law far more often.⁶⁸

It is important to note that the greater the sense of national lawyers that they are part of some larger legal tradition, the bigger the chance that they will refer to countries which are also part of that tradition. This is very obvious within the British Commonwealth. As noted above, the laws of the Commonwealth countries are widely seen to belong to one and the same tradition, which means that cases from other jurisdictions within the Commonwealth are frequently cited. In *R v. Kingston*, Lord Mustill said: 'In the absence of guidance from English authorities it is useful to inquire how other common law jurisdictions have addressed the same problem. ...'.⁶⁹ Typically, an English judge once apologized to his New Zealand friends for using the word 'foreign' when referring to New Zealand law.⁷⁰ This point is confirmed by statistical analyses. Between 1983 and 1994, 85% of the foreign cases referred to by Australian courts were English cases.⁷¹ In England, approximately 70% of the references to foreign law concerned common law jurisdictions.⁷² In a similar vein, though on a much smaller scale, Austrian and Greek courts often seem to be inspired by German law. If the Swiss *Bundesgericht* cites foreign law, in 90% of cases it is German law.⁷³

Frequent recourse to foreign law may be expected in mixed jurisdictions. Thus, Scottish and South African courts are able, in principle, to rely on materials from both the civil law and the common law traditions in finding the best solution to a problem. This is consistent with what, for example, the Scottish judge Lord Cooper of Culross said about drawing inspiration from abroad.⁷⁴ However, statistics show that the reality is different. Between 1920 and 1997, 25% of the case law cited in judgments of the Scottish Court of Session was English. Only 5% of the case law cited was of other origin, most of it probably coming from common law jurisdictions. The only change since 1997 seems to be that the case law of the European Court of Human Rights is increasingly cited.⁷⁵

A second factor which explains differences between courts has to do with the political constellation of a country. As mentioned above, courts in countries undergoing political transition seek to legitimize their decisions by reference to case law of more experienced courts. This is what happened in South Africa and Canada. It is likely that the general lesson to be learnt from this is that young constitutional courts engage more readily in comparative

reasoning than more established ones. This can be part of a strategy to convince the legal community that a legal system is distancing itself from the past. This need not be a past of human rights violations, as was the case in South Africa. When Australia finally abolished appeal to the Privy Council in 1986, this was part of a desire to develop an autonomous Australian law. It was obvious that ‘autonomy’ in this context meant first and foremost autonomy from England. As a result, Australian courts began to cite other foreign sources more often than before. A similar development can be expected in Scotland, where, as a result of devolution, the civil law aspect of its legal system may be emphasized more strongly than in the past, simply to demonstrate its independence from England.

As a third factor, it should be mentioned that the receptiveness in Europe towards comparative law arguments increased because of the process of Europeanization.⁷⁶ It is not only the influence of the European Convention on Human Rights, and EC law, or of the ‘transnational law explosion’ as such, that has led to a Europeanization of national law. Perhaps even more important is the fact that the process of European integration provoked a profound interest in the law of other countries generally. The European Court of Justice itself shows the way as it often bases its judgments on comparative research. This may explain why within Europe legal borrowing takes place on a larger scale than in other parts of the world. Of course, a common legal history is very helpful in this respect, and the role of academia should not be ignored either: the development of a European legal scholarship that we have witnessed since the beginning of the 1990s, has proven to be immensely useful for the courts. It has already been mentioned that it is often through legal literature that judges get to know about foreign solutions.

There is also a fourth factor. Receptiveness towards foreign law may also have to do with the way in which the law in a country is formed. If this is on a case by case basis, as in common law countries, it is easier to refer to similar foreign case law than in countries where the law is primarily formed by statute. The reason for this is simply that it is easier for a judge to compare similar situations decided in foreign cases than to compare abstract statutes. Basil Markesinis puts it like this:⁷⁷

The full benefit of comparing systems comes ... when one compares factually equivalent litigated circumstances. The immediately obvious similarities encountered when one is comparing similar litigated situations makes the ‘foreign’ reader feel reassured by what he is discovering rather than put off.

This may indeed explain the influence of one common law country on another and also why civil law courts seem to refer more readily to foreign case law than to foreign legislation. It does not explain, however, the minor role of foreign case law in the American discussion.

If Markesinis is right, this also casts doubts on the practical usefulness for courts of 'restatements' such as the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts. These cannot take the place of reference to foreign case law. It is more likely that such principles can offer important guidance in the drafting of national legislation. Both in the recent modernization of the German law of obligations and in the drafting of the new Chinese Contract Code, the UNIDROIT Principles of International Commercial Contracts were cited.

Again, these factors do not explain everything. There are many other, often more practical, factors which may determine the use of foreign law in domestic disputes. Knowledge of foreign languages, the availability of foreign material, intellectual curiosity, the time available to decide a case, and mere coincidence also play a role. If Markesinis had not advised counsel in *White v. Jones* to refer the Court to comparative materials, Lord Goff's opinion would have looked different. More formal incentives play a role as well. Article 1 of the Swiss Civil Code was often interpreted by Swiss courts as an invitation to incorporate foreign law in their decisions. Section 39 of the South African Constitution is even more explicit.

VI. Finally: The Influence of Comparative Reasoning on National Law

The title of this chapter suggests an influence of comparative law on national legal systems. In the end, it is clear that such influence does exist, but also that it is often difficult to measure. One reason why the causal link between foreign and national law cannot easily be established is that it is not so much foreign law as such that is taken over by a national lawmaker or court, but the *argument* expressed in foreign legislation, or in a foreign court decision. That argument itself, however, is not specifically 'foreign': it has persuasive authority because of its inherent quality, not because it is used in another country. Whether there should be liability in tort for pure economic loss does not depend on English or French law allowing this, but on the substantive arguments in favour and against such a claim, arguments that may, of course, have been discussed in an enlightening way in a foreign case or explanatory memorandum. But when it comes down to weighing these arguments, every legal system has to make its own choice. In the *McFarlane* case, Lord Steyn puts it like this:⁷⁸ 'The discipline of comparative

law does not aim at a poll of solutions adopted in different countries. It has the different and inestimable value of sharpening our focus on the weight of competing considerations.’ This means that the influence of comparative law in this type of case is, at most, one of finding inspiration in the process of weighing the arguments in favour or against a particular solution.

This is different if comparative law is used in a normative way. A certain international consensus, or a foreign solution, *as such* is then used as an argument for adopting the same solution at the national level. In this situation, foreign law influences national law more directly. If the legislature or court explicitly states that it has made use of comparative arguments there is little doubt that there *is* influence, but the problem then is that it is difficult to establish exactly what this influence has led to. It is banal to state that that the foreign solution may have a very different impact on the legal system of the importing country.⁷⁹ Present-day Turkish private law is very different from Swiss private law, even though Turkey took over the Swiss Civil Code. This also means that, if one’s goal is to promote uniformity among legal systems (see *supra*, section IV.2.), the mere adoption of foreign law will not achieve this aim. One need not agree with Montesquieu’s famous statement that the laws of each nation ‘should be closely tailored to the people for whom they are made, so that it would be pure coincidence if the laws of one nation would meet the needs of another’;⁸⁰ but it is clear that diverging legal cultures often do stand in the way of the unifying effect of legal borrowing.

Despite these doubts about the unifying effect of recourse to foreign law, it is certain that the continuing Europeanization and globalization will lead to a further increase of comparative reasoning in the years to come. As a result, the store of legal arguments to be considered in deciding hard cases, or in drafting new legislation, will become more and more similar across the world. This is likely to lead to a higher quality of legislation and court decisions: important arguments are less likely to be overlooked. This alone should make the drawing of comparative inspiration an indispensable part of present-day legal practice.

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- 63 For an overview, see Jonathan M. Miller, ‘Typology of Legal Transplants’, (2003) 51 *AJCL* 839.
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- ⁷⁶ On which, see Chapter XX of the present book.
- ⁷⁷ Basil Markesinis, 'Judicial Style and Judicial Reasoning in England and Germany', (2000) 59 *Cambridge LJ* 295. Also see 'Judge, Jurist and the Study and Use of Foreign Law', (1993) 109 *LQR* 622 ff.
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- ⁸⁰ *De l'Esprit des Lois* (1748).