COURTS AND COMPARATIVE LAW

Edited by Mads Andenas and Duncan Fairgrieve

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List of Abbreviations

ACA-Europe	Association of the Councils of State and the Supreme Administrative Jurisdictions of the Member States of the European Union
Acquis Group	Research Group on existing Community law in the area of general contract law
ACVSB	UK Advisory Committee on Virological Safety of Blood
AG	Attorney General
AIHJA	International Association of Supreme Administrative Jurisdictions (*Association Internationale des Hautes Juridictions Administratives*)
ALI	American Law Institute
AMLA of 2009 (Singapore)	Administration of Muslim Law Act, cap. 3 (No. 27) of 1966, rev. ed., 2009 (Singapore)
ASIL	American Society of International Law
ATS	Alien Tort Statute
BGB	German civil code (*Bürgerliches Gesetzbuch*)
BGBl	Bundesgesetzblatt
BGH	Federal Court of Justice, Germany (*Bundesgerichtshof*)
BNAA	British North America Act of 1867
BVerfGK	Chamber Decisions of the Federal Constitutional Court
CBoR	Canadian Bill of Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEEP	European Centre of Enterprises with Public Participation
CEOS	Conditions of Employment of Other Servants
CEPEJ	European Commission for the Efficiency of Justice
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESL	Common European Sales Law
CFR	Common Frame of Reference
CFREU	Charter of Fundamental Rights of the European Union
Charter	Charter of Fundamental Rights of the European Union
CHRA	Canadian Human Rights Act
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
CMR	Convention on the Contract for the International Carriage of Goods
CPA	Consumer Protection Act 1987
CPR	Constitution of the Portuguese Republic
CRC	Civil Rights Congress
CRDJ	*Centre de recherches et de diffusion juridiques*
CST	EU Civil Service Tribunal
DCFR	Draft Common Frame of Reference

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECTIL	European Centre of Tort and Insurance Law
EGC	General Court
EIB	European Investment Bank
ELI	European Law Institute
ERPL	European Review of Private Law
ETL	European Tort Law
ETUC	European Trade Union Confederation
EU	European Union
EuGRZ	Europäische Grundrechte-Zeitschrift
FDA	US Food and Drugs Administration
GAAP	generally accepted auditing principles
GG	Grundgesetz, Basic Law
GTC	general terms and conditions
HHL	HIV Haemophiliac Litigation
HRC	UN Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Law Office
ILOAT	Administrative Tribunal of the International Labour Organization
IULA	International Union of Local Authorities
JCPC	Judicial Committee of the Privy Council
Lando Commission	Commission on European Contract Law
LDIP	Swiss Code on Private International Law
LEC	Spanish Code of Civil Procedure (*Ley de enjuiciamiento civil* 2000)
LGBT	lesbian, gay, bisexual, and transgender
MIB	Brunei Malay Muslim Monarchy (Melayu Islam Beraja)
MTC	OECD Model Tax Convention
NAACP	National Association for the Advancement of Colored People
NANBH	NonA NonB Hepatitis
New York Convention	UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NGO	non-governmental organization
NJW	Neue Juristische Wochenschrift

NNC	National Negro Congress
NWO	Netherlands Organisation for Scientific Research
OCR	Office of the Chief Rabbi of the United Hebrew Congregation of the Commonwealth
OECD	Organisation for Economic Co-operation and Development
Oviedo Convention	Convention on Human Rights and Biomedicine
PAP	People's Action Party (Singapore)
PC	Judicial Committee of the Privy Council
PECL	Principles of European Contract Law
PETL	Principles of European Tort Law
PIL	private international law
PLRA	Prison Litigation Reform Act
Rapport	*Rapport de la Cour de cassation*
Rome Statute	Rome Statute of the International Criminal Court
SANE	Society of Americans for National Existence
SCC	Supreme Court of Canada
SECA	Supreme and Exchequer Courts Act
StGB	German Criminal Code
Study Group	Study Group on a European Civil Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ThUG	Therapeutic Confinement Act
TOGAs	transnational organizations of government actors
UCLG	United Cities and Local Governments
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	General Conference of the UN Educational, Scientific and Cultural Organization
UNICE	Union of Industrial and Employers' Confederations of Europe
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
USCM	US Conference of Mayors
UTO	United Towns Organisation
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
ZEuP	Zeitschrift für Europäisches Privatrecht

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PART I

COURTS AND COMPARATIVE LAW

1

Courts and Comparative Law

In Search of a Common Language for Open Legal Systems

Mads Andenas and Duncan Fairgrieve***

I. Current challenges to comparative law and comparative law as a challenge

Comparative law challenges some traditionalists who regard legal method in a dualist paradigm, relying on the autonomy of their legal system. At the same time, the ever more extensive use of comparative law challenges comparative law as an academic discipline and as a method.

In 1965, Otto Kahn-Freund opened his inaugural lecture as Professor of Comparative Law with a paradox his Oxford audience much enjoyed: 'the Professor of Comparative Law suffers from the problem that the subject he professes has by common consent the somewhat unusual characteristic that it does not exist'. He went on to explain that comparative law is 'not a topic but a method', or rather 'the common name for a variety of methods of looking at law, and especially of looking at one's own law'.[1] One of his successors, Sir Basil Markesinis, never enjoyed the paradox, and characterized the great English comparatists of the 20th century as having eventually led their students and successors into an isolated and enclosed intellectual ghetto with little prospect of escape.[2]

In 2004, yet another Oxford professor, and a pupil of Kahn-Freund's, Mark Freedland, added the following: 'One of the main attributes of that heritage is the idea or perception that comparative law is not in any way a separate or ring-fenced area of legal studies; it has open borders, so that legal scholars can enter or leave the state of comparative law without elaborate identity papers.'[3]

Gently self-deprecating comparative law academics, and their academic and less academic opponents, may still query the existence of the academic discipline. At any academic comparative law stage there would be six professors in search of an author, with a focus on the variety more than any common method of looking at law, concluding that methodological problems make practical applications very difficult,

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[1] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, at 40.

[2] Basil Markesinis, *Comparative Law in the Courtroom and the Classroom* (Oxford: Hart Publishing, 2003), at 25–6.

[3] Mark Freedland, 'Introduction', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at xvi.

warning the audience 'Don't Try This at Home'. While some academic comparative lawyers still play in the ghetto (as Markesinis criticized), comparative law has got more than just a helping hand from the courts.

Courts have become the laboratories of comparative law, and try out different methods in their practical work. The forerunner to this book, *Comparative Law Before the Courts*, edited by Guy Canivet, the premier Président of the Cour de cassation of France, with the two of us, was published in 2004 when many courts were restrictive in, or completely excluded, the citation of foreign judgments or other external sources of law.

The seminars leading up to the 2004 book and the book itself were supported by the senior law lord, Lord Bingham, and a predecessor, Lord Goff, who wrote in the Foreword: 'It is heartening to see that comparative law is gaining in utility and relevance in the decisions of the courts.'[4] Canivet, Goff, and Bingham themselves were accomplished comparative law scholars. Their supreme courts were pioneers in their active use of comparative law as a source of law at a time when many courts would not make any reference to comparative law in their judgments, although most of these nonetheless would make use of comparative sources in their preparatory reports and opinions and also encourage parties to make submissions on comparative law points.

The ten years since the book have seen an increased use of comparative law by courts, and in a way which cannot be understood merely as 'a variety of methods of looking at law, and especially of looking at one's own law', in the reductionist manner some have interpreted Sir Otto Kahn-Freund's statement.

International courts have faced particular challenges. The new enforcement mechanisms and the multiplication of enforcement regimes put the international law system's coherence under pressure. Fear of fragmentation made some scholars emphasize the role of international courts in developing substantive law and procedure in a way that made up for the lack of institutional reforms that could remedy the problem. A strong reliance on international law as a system with a hierarchy of norms is provided by 'The Report of the study group on the fragmentation of international law', finalized by Martti Koskenniemi at the 58th session of the United Nation's International Law Commission in 2006. The International Law Commission's Special Rapporteur on the Formation of Custom, Sir Michael Wood, has observed that while:

> [t]he formation and evidence of rules of customary international law in different fields may raise particular issues and it may therefore be for consideration whether, and if so to what degree, different weight may be given to different materials depending on the field in question . . . at the same time it should be recalled that, in the words of Judge Greenwood, '[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law'.[5]

[4] Lord Goff of Chieveley, 'Foreword', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at vi.

[5] Special Rapporteur Sir Michael Wood, First Report on Formation and Evidence of Customary International Law ILC A/CN.4/663 p 8 [19], citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic*

For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of one another, and address possible conflicts, as well as those that cannot be resolved, and, in the course of doing so, contribute to the development of general principles and forms of hierarchies of norms and institutions. Such convergence may contribute to the stabilization and promotion of cohesion in the rapidly expanding international legal system.[6]

The International Court of Justice simply did not cite other courts, or national law, but has in recent judgments not only undertaken extensive surveys and analysis of national law and law from other international courts, but relied heavily on them.[7] The European Court of Human Rights has taken its long-standing use of comparative law further, and important judgments sometimes have longer sections under the heading 'Comparative Law'.[8] The European Court of Justice today makes open use of comparative law in the context of its extended tasks concerning fundamental rights and other general principles of EU law.[9]

Most national courts follow the same path of giving comparative law an ever more prominent place as a source of law, as the chapters to this book illustrate, and struggle with the methodological consequences. Comparative law as a source of law still has its opponents, including among judges, but is generally accepted in the different national jurisdictions. The argument today is about the method—how, and not if, courts should make use of the judgments and legal materials from other jurisdictions in reaching a decision. The United States is the exception.[10] The US Supreme Court has become the forum for one of the sharpest discussions on the utility and legitimacy of comparative law. Best known from the debate between Supreme Court Justices on the recourse to sources of foreign and international law that are 'external' to the domestic norms being interpreted, is Justice Scalia's criticism of the majority's use of comparative law as a modern fad and dangerous flirtation with 'alien law' in several opinions.[11] Although some form of comparative law has long been part of the judicial process, in the United States comparison was predominantly undertaken between the states and in the rest of the common law world between common law jurisdictions in different configurations. The inherent characteristics of the common law have perhaps served to mask the fact that it is indeed based on a series of comparative law exercises. Across the national borders dividing the Commonwealth, the seamless nature of the common law, from its origins in English law, through its permutations across to former colonies and beyond, provided a reason and justification for courts to look to each other's jurisprudence, exchange solutions, and thereby create a network of persuasive authority. But there is a long tradition of borrowing from beyond the common law, although often

Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea), Judgment, 19 June 2012, Declaration of Judge Greenwood [8].

[6] See Mads Andenas and Eirik Bjorge (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge: Cambridge University Press, 2015).

[7] As described by Eirik Bjorge in Chapter 12 in this book.

[8] See further Paul Mahoney and Rachael Kondak, Chapter 7 in this book.

[9] See further Koen Lenaerts and Kathleen Gutman, Chapter 8 in this book.

[10] See the lively discussion in the US, described by Judith Resnik in Chapter 23.

[11] In *Lawrence et al v Texas*, 539 US 558 (2003), and subsequent cases. See Judith Resnik, Chapter 23 in this book; Martha Minow, Chapter 27 in this book; and J Waldron, Chapter 28 in this book.

conveniently forgotten or at least pushed into the background. The late Lord Bingham, one of the greatest jurists of recent times, was a pioneer in the forensic use of comparative law and a tireless advocate of the idea of 'there is a world elsewhere'. Enjoying the controversy, Lord Bingham often referred to the judicial hero of English commercial lawyers, Lord Mansfield, and how he made good use of Pothier and other French sources in the creation of English commercial law.[12]

The Supreme Court of the United States is much cited internationally. It has had a notable impact on the constitutional law of most jurisdictions, in particular through its due process and freedom of press jurisprudence. Guido Calabresi, sitting as a judge of the Second Circuit of the US Court of Appeals in *US v Manuel Then*, cited the German and Italian constitutional courts, and added that:

> these countries are our 'constitutional offspring', and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.[13]

Justice Sandra Day O'Connor has also extra-judicially restated her support for the use of comparative law:

> I suspect that with time we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues. Doing so may not only enrich our own country's decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.[14]

Aharon Barak, then the Chief Justice of the Supreme Court of Israel, criticized in 2002 the position of US Supreme Court justices who did not cite foreign judgments: 'They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.' Partly as a consequence, the US Supreme Court 'is losing the central role it once had among courts in modern democracies'.[15]

The discussion in the US Supreme Court continues to give rise to interesting scholarship. The case against the use of international and foreign law is set out by, among others, Curtis Bradley and Jack Goldsmith, who challenge the positive foundation in US law for such use.[16]

[12] For instance in Sir Thomas Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 ICLQ 513, reprinted in Bingham, *The Business of Judging* (Oxford: Oxford University Press, 2000) 87. Lord Bingham wrote that 'in showing a new receptiveness to the experience and learning of others, the English courts are not, I think, establishing a new tradition, but reverting to an old and better one', at 527.

[13] *US v Manuel Then*, 2nd Circuit, 56 F.3d 464 (1995).

[14] Remarks by Sandra Day O'Connor, Southern Center for International Studies, Atlanta, Georgia, October 28, 2003, at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/SOUTHERN_CENTER_INTERNATIONAL_STUDIES_Justice_O'Connor.pdf>.

[15] Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 (2002) Harvard L Rev 16: 97–106.

[16] Curtis A Bradley and Jack L Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 Harvard L. Rev. 4: 815, at 822.

Judith Resnik in Chapter 23 of this book develops a powerful counter-narrative to the objections made to the use of non-US sources. Pointing out that America is a country of migrants, as is US law, Resnik questions the veracity of labelling law 'domestic' or 'foreign', given that borders are porous and various routes serve to domesticate as well as exile 'foreign' law. Resnik eloquently illustrates the inherent difficulties in avoiding foreign sources in the US system, built as it is on liberal principles. Within the context of legislation effecting prohibitions on the resort to non-domestic law, she analyses the constitutional issues raised by attempts to direct judges as to sources of law, and poses the question whether constitutional principles allow judges to be subject to, or immune from, directions on the sources to consult when rendering judgments. Resnik argues that legislatures cannot try to limit judicial thought-processes by banning consideration of a category of materials, labelled 'foreign.' She ultimately argues that the use of foreign sources is neither exotic nor less intrinsically disciplined than looking at other resources.

Jeremy Waldron provides strong support for the use of foreign law, but opens his chapter in the present book by observing that there is no theory or doctrine which provides a basis either for the use of foreign law or the rejection of such use.[17] He continues by arguing that we should not reject the idea of a theory of the citation of foreign law simply because we see foreign law being cited opportunistically. We should reject it only if we think inconsistent and unprincipled citation is inevitable under the auspices of the theory providing the foundations for such citations. He then goes on to develop a theory that the citation of foreign law can rest on the idea of the law of nations (*ius gentium*). He points to the fact that although the law of nations is often used as a synonym for international law, it once had a broader meaning, comprising something like the common law of mankind. It was not just law on issues between sovereigns but on legal issues generally—on contract, property, crime, and tort. It was a set of principles that had established itself as a sort of consensus among judges, jurists, and lawmakers around the world. Waldron argues for returning the phrase to this broader meaning. He demonstrates the utility of this from both positivist and natural law starting points. He uses an analogy between the law of nations and the established body of scientific findings. Existing science claims neither unanimity among scientists, nor infallibility. Individual scientists could not proceed with their own individual research without taking account of existing science. The law of nations is available to lawmakers and judges as an established body of legal insight, and has a similar function in that it reminds them that their particular problem has been confronted before and 'that they, like scientists, should try to think it through in the company of those who have already dealt with it'. The issues that follow from Waldron's argument are mainly in developing the methodology for establishing and making use of this body of legal insight.

Finally, and following from this argument, Waldron contrasts the positions of those who see law as will, and those who see law as reason. Those who approach the law as a

[17] Jeremy Waldron, Chapter 28 in this book, reprinted from (2005) 119 Harvard L. Rev. 129, and the analysis in John Bell, 'Researching Globalisation: Lessons From Judicial Citations' (2014) Cambridge Journal of International and Comparative Law 22.

matter of will do not, of course, see any reason why expressions of will elsewhere in the world (abroad) should affect expressions of will at home. Those who see law as a matter of reason may well be willing to approach it in 'a scientific spirit that relies not just on our own reasoning but on some rational relation between what we are wrestling with and what others have figured out'.

Martha Minow refers to 'the swirling debate over whether the United States courts should consult international or comparative law' which has puzzled her as a law professor as no one disagrees that US judges have long consulted and referred to materials from other countries as well as international sources. She points out how the evidence of the long-standing practice is undisputed and well forecast by one of the Federalist Papers.[18] Nonetheless, citing foreign and international sources has provoked intense controversy in the course of the last decade. There seems to be a fear of temptation or loss of control. If merely looking at what others are doing causes the worry, the concern seems to be about caving in to peer pressure or being an outlier—some kind of contagion effect.

Minow takes the position that, while not minimizing concerns about peer pressure or influence, one should instead emphasize that 'confidence in who we are, what our values and traditions are, and how we interpret them over time stems from a source deeper than a refusal to look at what others do'.

In her conclusion, Minow points to soft law in the European Union and the complementarity of the International Criminal Court Statute as models for approaching the relationship between national and international legal systems. Her own scholarship on *Brown v Board of Education*[19] has shown the vast impact of US law on other systems from the early days after the *Brown* case to the current judgments of the European Court of Human Rights on discrimination against Roma in European countries.[20]

Our introduction to the 2004 *Comparative Law Before the Courts* had the title 'Finding a Common Language for Open Legal Systems'.[21] Legal systems will not give the same answers to legal questions; they will not even deal with one another in the same manner. The aim of the 2004 book was, as it is of the present book, to examine the use of comparative law by national and international courts, itself a fruitful subject of comparative law scholarship. Both books include authoritative contributions covering both common law and civil law jurisdictions from the viewpoint of practitioners and academic theorists. The starting point is that comparative law is increasingly recognized as an essential reference point for judicial decision-making. The challenge to judges and counsel is considerable. Legal scholarship has an important role in making comparative material available in a systematic manner. At the present stage there is perhaps even more of a need to discuss the role of comparative law in the judicial process. One extension of this discussion of legal method is how legal scholarship can assist. The discussion ranges from jurisprudential questions of the relevance and

[18] Marta Minow, Chapter 27 in this book.

[19] See M Minow, *In Brown's Wake: Legacies of America's Constitutional Landmark* (New York: Oxford University Press, 2010).

[20] Ibid., at 19–25.

[21] Mads Andenas and Duncan Fairgrieve, 'Finding a Common Language for Open Legal Systems', in G Canivet, M Andenas, and D Fairgrieve, *Comparative Law Before the Courts* (London: BIICL, 2004) at xxvii.

weight of comparative law arguments, to the practical aspects of how to present those arguments to a court or where and how to access the source material. Parallel developments in different jurisdictions justify a comparative approach to the use of comparative law. There may be lessons to learn from other jurisdictions.

II. Polycentricity and pluralism

Shedding traditional adherence to 20th-century positivist and national paradigms, domestic courts are deliberately and explicitly making use of comparative law to an unprecedented extent. International courts move freely across the boundaries of the different treaty regimes, searching for and applying the underlying unities, also in relation to domestic law. Many factors can of course be seen as having influenced this process.[22] First amongst these is the breakdown of the traditionally closed and hierarchical national legal systems. Another factor is the increasingly complex issues with which modern courts are required to engage, beyond what follows from the breakdown of the closed national legal systems, whether they be fundamental rights, constitutional review, international law, or emerging areas such as biomedical regulation, in which ethical and moral issues are increasingly prominent. The polycentric nature of these issues poses challenges to the traditional judicial approaches and explains changes in terms procedures, personnel, and outlook.

The complexity of decision-making has heightened the importance of knowing how other jurisdictions have dealt with similar problems. This has opened the door to the use of, and increases in, the utility of comparative law, through the development of formal and informal avenues for judicial dialogues, as well as an increasing engagement with doctrinal literature within the formal decision-making process.

As we will discuss from different perspectives below, and as several of the other contributors to the present book do, comparative law also offers assistance with many of the new issues of method that courts have to resolve in the more open legal systems. The first issue is: how does one deal with comparative law? When is it relevant, what weight should it have, how does one sort out the many practical problems that arise? Comparative law can also assist courts in dealing with other fundamental issues such as international law and European law, and their relationship with national law, or, for that matter, the relationship of courts with the legislatures as parliamentary supremacy (in the sense of the national legislature's supremacy) is eroded.

Comparative law is itself one of several new types of challenges that courts have to deal with. A situation with sources of law with competing claims to legitimacy leaves a whole set of issues to be determined by the courts.[23] The traditional form of a unitary

[22] See more general discussion in Mads Andenas and Duncan Fairgrieve, '"There is a World Elsewhere"—Lord Bingham and Comparative Law', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011), and John Bell, 'The Argumentative Status of Foreign Legal Arguments' (2012) 8 Utrecht L. Rev. 8, 17.

[23] What Hart termed the 'secondary rules', representing the constitutional arrangements of any particular society, are undergoing fundamental change. The 'primary rules' are also changing in a way that reflects the change of the secondary rules, developing rights of individuals, harmonizing the laws of European countries over a wide field, etc. See HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 51 about 'secondary rules'.

rule of recognition (if it ever applied fully anywhere)[24] kept the picture simple. The possible recourse to a clear hierarchy, resolving conflicts between norms, seemed to leave the major issues for determination by the legislature. The present, more complex constitutional systems of validity of norms and their hierarchy, leave courts with many new issues. There are certain constitutional issues that traditionally have been left to practice. On the macro or principles level, this applies to the relationship between legal orders. On the micro or rules level, it applies to remedies protecting private parties against the state. These are issues that have come to the fore in most jurisdictions, with courts rapidly developing the law. The macro level developments include, for instance, the role of international and European law in national law, or the role of the case law of one international court before another international court. At the micro level, examples are the intensity of judicial review of administrative action and of legislation, tort liability of administrative authorities, and injunctive remedies against the state.

This opens the way for, and increases the utility of, comparative law. It is not surprising that courts are, to an increasing degree, involved in dialogues with one another across the traditional jurisdictional divides. Our discussion of the cases and typology of current applications of comparative law will illustrate the methodological problems of the use of comparative law in the courts.

Several of the contributors to the present book look at the dialogues between different national and international courts. An international market place for judgments is emerging, where also the form and style of judgments may be influenced by the increased use of comparative law. Courts may wish to explain their judgments not only to parties and the national legal community, but so that they are understood in other jurisdictions. National supreme courts may also consider the review that European and international courts and similar bodies could undertake, and how to explain their position better. In national courts one talks about 'appeal proofing'. This now also applies to supreme courts who may find their judgments reviewed, and to international courts wanting to convince other international courts, or domestic courts, to adopt their views on the law. At a vertical level, the dialogues between the international and national courts are developing and are also formally recognized in a way they were not a few years ago.

One may talk about an international market place for judgments,[25] where the form of judgments may be influenced by the accessibility and increased use of comparative law.[26] In jurisdictions where the form of judgments allows it, judges make open reference to comparative law sources, and in particular to judgments by foreign

[24] See the brief setting out of the case against a universal rule of recognition, or Austin's illimitable and indivisible sovereign, or traditional statehood concepts, in Mads Andenas and John Gardner, 'Introduction: Can Europe have a Constitution' (2001) 12(1) Kings College Law Journal 1.

[25] See Lord Rodger, 'The Form and Language of Judicial Opinion' (2002) 118 Law Quarterly Review 226, 247; and Lord Goff of Chieveley, 'The Future of the Common Law' (1997) 46 International and Comparative Law Quarterly 745, 756–7, on the accessible form of common law judgments, and also Maurice Adams, Jacco Bomhoff, and Nick Huls (eds.), *The Legitimacy of Highest Courts' Rulings* (The Hague: Asser Press, 2008) provides important contributions to this analysis.

[26] There is an increasing access to foreign court judgments and other legal sources in the citations made by courts and in legal scholarship. The court websites that provide translations of important judgments are increasing in number and quality.

courts.[27] We have pointed to the variation between national systems (and sometimes even within them). Where the form of judgments is not open for the citation of foreign law sources, there may be an advocate-general or *rapporteur* who makes direct references, or the use of comparative law sources may be acknowledged in less formal ways.

Comparative law plays a role in resolving fundamental issues such as the relationship between national and international law, in implementing international and European human rights law, in developing constitutional review, in review of administrative action, and in developing effective remedies. Comparative law also plays a role in developing the substantive law in different areas, including in finding normative solutions to questions of a more technical kind. One can hardly expect always to find the ideal solutions to problems of globalization within one's own jurisdiction. Nonetheless, there is still disagreement on when comparative law can be invoked, where it is convenient to do so, and how it should be done.

Similar questions are posed to courts in jurisdictions across the world, but there is much variation in the solutions found. For instance, some courts still find that the autonomy of their legal system prevents them from expressly acknowledging the use of foreign judgments. This is one of the issues where there has been a rapid development in the practice of courts, including the French courts,[28] the Italian *Corte di cassazione*, the International Court of Justice, and the European Court of Justice, which in different ways have relaxed their self-imposed restrictions on citing judgments by courts from other jurisdictions.

Our discussion of the cases and typology of current applications of comparative law will illustrate the methodological problems of the use of comparative law in the courts. There are cases which reflect a general recognition of comparative law as a persuasive authority or source of law, which apply normative models from other jurisdictions where national law is undetermined, and which use comparative law in reviewing factual assumptions about the consequences of legal rules, or assumptions about the universal applicability of rules or principles.

Comparative law has been seen to provide courts with persuasive and non-binding arguments. At the current stage, there is an argument about the consequences of a call for more consistency. One question is whether courts are ever bound to make use of comparative law sources, for instance in certain situations when an authority is based on comparative law sources.

In the new more open legal systems, it is left to courts to weigh and balance ever more complex sources of law. The courts will also have competing claims to legitimacy.

[27] Basil Markesinis and Jorg Fedtke, *Engaging in Foreign Law* (Oxford: Hart Publishing, 2009) is a leading treatise on comparative law method, and deals extensively with comparative law in the courts. See also generally Matthias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), especially the chapter by Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', at 869–98.

[28] See Guy Canivet, 'Variations sur la politique jurisprudentielle: les juges ont-ils un âme?', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 17, and Bernard Stirn, 'Le Conseil d'Etat, so British', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 81.

The sources of law may still be supported on a unitary, nationally based, rule of recognition. But the way in which courts deal with the more complex issues of validity of norms and their hierarchy, has one outcome. That is an opening up of the legal system, mainly through the recognition of sources of law from outside the traditionally closed national system.

III. A typology

Courts function within systems of sources of legal authority. The domestic law paradigm remains strong, and the methodological problems in the use of comparative law add to the challenge. The role of comparative law remains open, although ever less controversial (with the prominent exception of the United States). It may be interesting to analyse some of the cases with a view to formulating a typology of the use of comparative law by courts. There are some clear situations that stand out in the recent case law.

The tentative typology is grouped into seven categories, building on our 2012 study included in Pier Giuseppe Monateri's *Methods of Comparative Law*.[29] Comparative law can be used in the following cases:

(1) to provide support for a rule or an outcome;
(2) for normative models in comparative law where national law is undetermined;
(3) to review factual assumptions about the consequences of legal rules;
(4) to review assumptions about the universal applicability of a particular rule;
(5) to overturn authority in domestic law;
(6) to develop principles of domestic law; and
(7) to resolve problems of the application of European and international law, including European Human Rights law.

1. Support for a rule or an outcome

The existence of a solution in other jurisdictions may under certain circumstances provide persuasive arguments for that solution in one's own jurisdictions, if one agrees with Lord Bingham's views on the 'virtue in uniformity of outcome' in *Fairchild*,[30] as set out below, and that '[p]rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake' in *Dresser*.[31] See also his statement that 'it should be no easier to succeed here than in France or Germany', in *JD v East Berkshire*.[32] But where domestic sources support another rule or outcome, this kind of argument does not seem to have much weight. In practice, comparative law arguments

[29] Mads Andenas, and Duncan Fairgrieve, 'Intent on Making Mischief: Seven Ways of Using Comparative Law', in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (London: Edward Elgar Publishing, 2012), Chapter 2, 17–79. See also Martin Bobek, 'Comparative Reasoning in European Supreme Courts' (2013) 245.

[30] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

[31] *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.

[32] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC)* [2005] UKHL 23, which is quoted more extensively in the text by n 41.

will not often be used where domestic law is clear. There are certain particular situations where comparative law carries more weight.

In *Fairchild*,[33] Lord Bingham states his basic conviction that 'in a shrinking world (in which the employees of asbestos companies may work for those companies in any one or more of several countries) there must be some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome'.[34] In the same paragraph of the judgment, he also sets out his view on the use of comparative law in the development of the common law:

> Development of the law in this country cannot of course depend on a head-count of decisions and codes adopted in other countries around the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice. If, however, 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.

In the Supreme Court of the United States, Justice Kennedy addressed similar issues in *Roper v Simmons*.[35] The case concerned a very different matter and area of law. But the criteria were not that different. Justice Kennedy states that international and comparative law provides 'respected and significant confirmation' for the majority's view while not controlling the outcome:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. See Brief for Human Rights Committee of the Bar of England and Wales et al. as *Amici Curiae* 10–11. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

In both cases, the courts considered overturning a previous decision. Both courts had good reasons of legal principle and policy for doing so. In *Roper*, Justice Kennedy finds that comparative law provides 'confirmation for our own conclusions'. Lord Bingham reasons along the same lines in *Fairchild*. 'Anxious review' is called for when (1) a national decision offends one's basic sense of justice, and (2) there is a more acceptable decision in most other jurisdictions.

Both courts decided to overturn the previous decision, and the judgments fit into category 5. But the general statements about the role of comparative law also have a bearing on the current category. *Fairchild* was a unanimous decision, whereas the US

[33] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.
[34] At para 31. [35] *Roper v Simmons* 543 US 551 (2005).

Supreme Court had only a narrow majority for setting aside its previous decision. The *Roper* minority provided arguments against the use of comparative law in US courts in general (with one justice strengthening the argument for comparative law in general but disagreeing with the majority's conclusions in the particular case). The other view in the House of Lords was first expressed in the subsequent decision of *Barker*[36] where an activist panel invented a new concept of 'proportionate liability' to limit the effect of *Fairchild*. These cases will be discussed further in the paragraphs that follow, but what is of particular interest here is the parallel approach that Lord Bingham and Justice Kennedy took in *Fairchild* and *Roper*. In spite of the many differences between the cases, the method used was similar.

Lord Bingham and Justice Kennedy also address the question of whether the use of comparative law is disloyal to the national legal system. Each of them answer no to this, and provide both a principled and practical argument. In *Fairchild*, the issues appear legal and technical, although the outcome would have social implications. Lord Justice Bingham stated in the early 1990s that '[p]rocedural idiosyncracy is not (like national costume or regional cuisine) to be nurtured for its own sake'.[37] In *Fairchild*, Lord Bingham sets out the social and economic issues. Comparative law is of assistance in dealing with both the social and economic issues, but even more so when it comes to the more technical legal solutions. In *Roper*, the question was whether it was unconstitutional to impose capital punishment for crimes committed while under the age of 18. The case went to the core of the question of the extension of constitutional rights protection. On another level, both cases concerned the arguments a court can take into account when it is considering whether to set aside the authority of a previous decision. The question in *Roper* and *Fairchild* is about how comparative law fits into the system of sources of law as the closed and hierarchical national system of legal authority associated with Kelsian (or Hartian) positivist traditions is breaking down.

The discussion in the US Supreme Court has brought out into the open a disagreement about the validity of the general assumption about the virtue of uniformity of outcome. The majority in the line of cases we have already discussed, have based their argument on there being some current connexion between US law and international and foreign law. We have also referred to Justice Scalia's arguments about 'foreign moods, fads or fashions'. The 'US exceptionalism' has counterparts in all countries, where some judges and academics will more or less openly base resistance to comparative law on assumptions about the superiority of their own system. Justice Scalia has counterparts arguing for English, French, German, Norwegian, Icelandic, or Lichtenstein superiority or exceptionalism. Norwegian or Lichtenstein claims are made with no less self-assuredness than Scalia's. Empirically, claims to national superiority are difficult to assess, as are other claims to the autonomy or 'separateness' of legal systems.

[36] *Barker v Corus (UK) plc* [2006] UKHL 20.
[37] *Dresser UK Ltd v Falcongate Ltd* [1992] QB 502, 522.

2. Normative models in comparative law where national law is undetermined

The least complicated situation could be the one where national law does not determine any particular outcome. The judge may be looking for ways of resolving a problem, and finding no solution based on the traditional sources of law, she seeks solutions in rules or normative arguments from other jurisdictions. Here the use of comparative law takes place in a process of developing or interpreting the law without any conflict with domestic law sources. The judge is operating in a field of open discretion or 'policy'.[38] A slight variation is found where national law leaves more than one solution, and foreign law may assist in choosing between them.

Assistance in finding normative solutions to situations where one's own system has none may be found to be useful and is not often controversial. There should not be any strong, or any at all, limitations in the national legal system where it does not proscribe any solution.

3. Comparative law to review factual assumptions about the consequences of legal rules

In the development of the law in different fields, one encounters the 'floodgates' argument. A new rule is considered, for instance giving access to information held by the administration, requiring that some authority has to give reasons for their decisions, giving procedural rights or standing to groups, or giving rights to compensation for breach of rights. The financial, administrative, or behavioural consequences are considered. Some courts will reject the new rule with an assertion that the rule will open the floodgates for claims, with disproportionate consequences of different kinds. The assertions are often made in a seemingly authoritative way. However, judgments in such cases often contain speculations about risks without much foundation.[39] There is practically always a state financial or other interest on the one side, and a particularly weak individual (dyslexic pupil, victim of sexual abuse as a minor) or public interest (environment, human rights) on the other. The acceptance of risks and the different

[38] See the parallel here in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Judgment of 26 February 2007, where the Court of Justice of the European Union (ECJ) cites the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) on the requirement of 'substantiality' in establishing intent, and also the European Court of Human Rights (ECtHR) in the context of accounting for the parties' submissions (but does not rely on or make any further use of the ECtHR references).

[39] Jane Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009), argues that there can be reasons for basing conclusions on risk assessments, and for not requiring too much for establishing them. She also points out that the possibility for misunderstandings when courts and scholars are dealing with judgments from other common law jurisdictions is considerable. When the other jurisdiction belongs to the civil law and judgments are in another language, her view on comparative law is that it is a rather hopeless enterprise, and in particular for courts.

related assertions are more based on values, giving more weight to the interests of the state in balancing these with other interests, than openly admitted to.

Sir Basil Markesinis has compared the arguments of Lord Bingham and Lord Hoffmann, who were two of the most active comparativists in the House of Lords, in a number of cases.[40] In a number of cases Lord Hoffmann had asserted that granting rights or remedies to disadvantaged groups would lead to the opening up of the floodgates and would also have unwanted consequences of other kinds.

Lord Bingham had long rejected this kind of broad assertion. In *JD v East Berkshire*,[41] he sought recourse to comparative law in dealing with similar assertions. If a rule has been applied in another jurisdiction, and has not opened the floodgates there, the court cannot base its conclusions on assertions to the contrary. Lord Bingham dealt with the matter in paragraph 49 of the judgment in *JD*. This passage is interesting also in the extensive way that academic scholarship is used and relied upon.

In the case of *Smith*,[42] Sir Thomas Bingham MR looked at changes in the laws of other European countries, but here he argued that they were too recent for their effect to be evaluated. The case concerned the blanket ban on homosexuals in the armed forces. Sir Thomas Bingham considered different parliamentary materials, and observed that they did consider a less absolute rule, even though since 1991 neither homosexual orientation, nor private homosexual activity, precluded appointments as a civil servant, diplomat, or judge, and very few NATO countries barred homosexuals from their armed forces. This is the case where Sir Thomas Bingham established that the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable. He nonetheless concluded that the army policy could not be deemed legally irrational, because it was supported by both Houses of Parliament, there was no evidence which plainly invalidated that advice, and because changes elsewhere had been adopted too recently for their effect to be evaluated.[43]

4. Review assumptions about the universal applicability of a particular rule

In *Lawrence*,[44] the use of foreign law in part refuted the claims to universality in *Bowers*[45] (which the *Lawrence* majority used in support of overturning *Bowers*). In *Bowers*, Chief Justice Burger had made 'sweeping references' to the history of Western civilization and to Judeo-Christian moral and ethical standards. He did not take

[40] See in particular Basil Markesinis and Jorg Fedtke, 'Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective' (2007) 18 EBLR 1: 5–75, at 66–7, and also Mads Andenas, 'Introduction' (2007) 18 EBLR 1: at 2.

[41] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC)* [2005] UKHL 23.

[42] *R v Ministry of Defence, ex p Smith* [1996] QB 517.

[43] See the extensive discussion in Paul Craig, 'Substance and Procedure in Judicial Review', in Mads Andenas and Duncan Fairgrieve (eds.), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009 and 2011) 73.

[44] 539 US 558 (2003). [45] 478 US 186 (1986).

account of sources pointing in other directions. Legal developments in other countries could then be used to undermine the claims in *Bowers* and to overturn it.

Claims to universality may be challenged by variations in a temporal dimension (for instance in interpreting an old constitutional text), or in a jurisdictional dimension (the case law of another country or international tribunal contradicts the claim). Comparative law may have a role to play in different ways in this context, and may provide powerful arguments against the universality claims made in an authority.

Another feature of *Lawrence* is the way in which Justice Kennedy makes use of the judgment of the European Court of Human Rights in *Dudgeon v United Kingdom*.[46] Justice Kennedy points out how the European Court of Human Rights followed not *Bowers* but its own previous decision in *Dudgeon* in a number of cases after *Bowers*, and that this applies to other countries. This has consequences for the value of the fundamental freedom involved, and for the possible governmental interests in its limitation.

There is a parallel in the European Court of Human Rights in the *Smith* case (the English Court of Appeal decision is discussed in section III.2).[47] The Court placed much weight on the evidence from other countries. The UK government argued that no worthwhile lessons could be gleaned from recent legal changes in those foreign armed forces that now admitted homosexuals. The Court noted that few European countries operated a blanket legal ban on homosexuals in their armed forces. Also, the UK government had to show convincing and weighty reasons to justify their policy in the proportionality review, and had not done so.[48]

5. Additional support to overturn authority in domestic law

Fairchild[49] and *Roper*[50] may be instances of this category. Both cases are based on there being 'some virtue in uniformity of outcome whatever the diversity of approach in reaching that outcome'.[51] They may express a general principle that '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'.[52]

However, in *Fairchild*, the anxious review was also prompted by the fact that the existing authority offended 'one's basic sense of justice'. In *Roper and Simmons*, Justice Kennedy makes it very clear that he had sufficient support in US constitutional law for overturning the previous authority. The dissenting judges disagree between themselves on the use of international and comparative law, but Justice Scalia is highly critical of this way of claiming support for a result which the majority says is also fully supported in domestic law. We have discussed the use of this argument earlier (see text near n 11).

[46] (1983) 5 EHRR. [47] *Smith and Grady v UK* [2000] 29 EHRR 493.

[48] The difference between the Strasbourg Court and the UK courts in *Smith* is better understood when account is taken of the fact that the Convention was not at that time incorporated into UK law. Convention rights were relevant by way of background to the determination of rationality. See Paul Craig, 'Substance and Procedure in Judicial Review', n 43.

[49] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

[50] *Roper v Simmons* 543 US 551 (2005). [51] *Fairchild*, n. 49, at para 31. [52] Ibid.

The other view in the House of Lords, as expressed in the subsequent decision of *Barker*,[53] is interesting in that the panel's invention of a new concept of 'proportionate liability' to limit the effect of *Fairchild* did not make use of comparative law. It was clearly policy based, in spite of the references to authority and legal principle. It protected a strong economic interest, industrial employers over traditionally weaker applicants, dead or sick workers and their families. *Barker* was overturned by legislation. *Barker* was an 'activist' decision in the sense that it had an outcome based on the kind of reasoning and solution that judicatures typically will concede to legislatures. *Barker* satisfied many of the criteria that English courts have developed for limiting judicial decision-making, in that it concerned allocative and financial matters, social priorities, and a balancing with typical political factors. In the event, it was not unsurprising that it was regarded as an exercise of political discretion that the legislature overturned. Sir Basil Markesinis' criticism that comparative law arguments here deserved consideration, particularly in light of the role that comparative law arguments had played in *Fairchild*, which *Barker* limited, seem well supported.

As mentioned, in *Lawrence*,[54] the use of foreign law in part refuted the claims to universality in *Bowers*[55] which the majority overturned. Comparative law may provide powerful arguments against universality claims of an authority, and support for the overturning of the authority.

The *Lawrence* and *Roper* line of cases has seen the use of comparative law providing support for overturning precedents to strengthen the protection of individual rights. *Fairchild* appears as a technical causation case but has a more complicated background against a case law favouring employers over employees by limiting liability in different ways, and creating a clear tension with fairness and effective remedies. It is not surprising that the disagreement about the role of precedent and comparative law, and the discussion about an American exceptionalism, have to some extent been coloured by the views on the outcome of the cases.

6. Develop principles of domestic law

Comparative law can support the development of principles of domestic law. The minority opinion in *JD v East Berkshire*,[56] as discussed earlier, falls into this category. In this case, Lord Bingham argues for an evolution of tort law, 'analogically and incrementally, so as to fashion appropriate remedies to contemporary problems'. The European Human Rights Convention, as incorporated by the Human Rights Act 1999, provides the assistance in doing so here. The alternative outcome is to leave tort law 'essentially static, making only such changes as are forced upon it, leaving difficult and, in human terms, very important problems to be swept up by the Convention'.[57]

[53] *Barker v Corus (UK) plc* [2006] UKHL 20. [54] 539 US 558 (2003). [55] 478 US 186 (1986).

[56] *JD (FC) (Appellant) v East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC)* [2005] UKHL 23. See the quotation from para 49 from this judgment, in text by n 41.

[57] Unfortunately, the majority, not following Lord Bingham, fell into an error which it will take more than a decade to work English law out of.

We discuss *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[58] in section III.7. This judgment also fits in under the present heading in that the Privy Council here used South African, Canadian, United States, Zimbabwean, and German authority to develop the constitutional principles of freedom of expression and proportionality in the constitutional law of Antigua and Barbuda.

7. Resolve problems of applying European and international law, including European human rights law

In *de Freitas*, the Privy Council, drawing on South African, Canadian, and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate.[59] This formulation was built on by the parties in *Huang v Secretary of State for the Home Department*,[60] and the applicants argued in favour of an overriding requirement which featured in a judgment of the Supreme Court of Canada. Dickson CJ in *R v Oakes* had included the need to balance the interests of society with those of individuals and groups.[61] In *Huang,* the House of Lords accepts the argument,[62] and refers to having recognized as much in its previous decision of *R (Razgar) v Secretary of State for the Home Department* (in Lord Bingham's speech).[63]

This is one of a long line of decisions where the House of Lords have made use of Commonwealth authorities in the application of European human rights law. In particular, Canada offers a relevant experience of applying constitutional protection of individual rights in a common law tradition. This may be a surprise in other European jurisdictions, but both counsel and judges have felt comfortable with these judgments. Decisions from other European national courts have been less easily applied.

We also have an opportunity to refer to *Bulmer v Bullinger*,[64] where Lord Denning cites judgments of German and Dutch courts on the application of Article 234 EC on references from national courts to the ECJ.[65]

[58] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

[59] Ibid., at 80. They asked whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

[60] *Huang (FC) (Respondent) v Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* [2007] UKHL 11.

[61] *R v Oakes* [1986] 1 SCR 103, at 139.

[62] In para 19, where it also refers to *de Freitas.* The judgment had the form of an 'Opinion of the Committee', and was not reported as individual 'speeches', as is the tradition. This form, and the general form and content of the opinion, clearly owes much to Lord Bingham.

[63] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17–20, 26, 27, 60, 77.

[64] [1974] Ch 401.

[65] See also Lord Goff of Chieveley, 'The Future of the Common Law' (1997) ICLQ 46: 745, 757 on the use of a French judgment to determine whether a question was *acte claire* under the procedure for references to the European Court of Justice.

Another example is provided by *Techna SA*.[66] As noted by Olivier Dutheillet de la Motte in Chapter 13 of this book, the French *Conseil d'Etat* made reference to a decision by the English High Court concerning labelling requirements under EU law, explicitly citing an English case in support of suspending a directive.[67]

IV. Some conclusions and consequences for scholarship

We have looked at some situations where courts make use of comparative law. They illustrate how comparative law is used in a context where domestic law paradigms remain strong. The cases and the typology illustrate some of the many methodological problems in the use of comparative law in the courts. There are cases which reflect a general recognition of comparative law as a persuasive authority or source of law. There are more and perhaps clearer cases of applying normative models from comparative law where national law is undetermined. There are clear cases where comparative law has been given weight, reviewing factual assumptions about the consequences of legal rules, or assumptions about the universal applicability of rules or principles. Arguments based in this kind of analysis have been used to overturn authority in domestic law in a number of cases. Comparative law has also had a further role in developing principles of domestic law. It has a particular role in the application of European and international law, including European human rights law.

We have illustrated how the use and acknowledgement of comparative law sources is on the increase. In some of the cases its use has been criticized as opportunistic. This argument can be turned against the use of comparative law in general, or in favour of the development of a method for the use of comparative law. We have discussed the positions of Justice Scalia[68] and Sir Basil Markesinis, who have used the consistency arguments in these different ways.[69] We pointed out the more general feature that judges make use of the same authorities or sources of law, and legal and factual arguments, and then reach different conclusions. In many cases this will be done without making clear why, for instance, the appellate court disagrees with the first instance court, or one judge with another in the same court. Judgments may also include or exclude sources or arguments, and this discretion may be perceived to be particularly wide when one is dealing with merely persuasive and non-binding authorities or arguments. This may lead to inconsistencies which are unsatisfactory in many instances. At a stage where comparative law provides mostly persuasive authorities or arguments that do not bind, this has often meant that the courts or judges who do not find support for their preferred outcome in comparative law will disregard comparative law arguments in the reasons they give. We find it difficult to disagree with Sir Basil's call for more consistency here. In particular, the call for consistency is powerful in cases

[66] No 260768 *Techna SA* 29 Oct 2003.

[67] Roger Errera, 'The Use of Comparative Law Before the French Administrative Law Courts', in Guy Canivet, Mads Andenas, and Duncan Fairgrieve (eds.), *Comparative Law before the Courts* (London: BIICL, 2004) 153.

[68] For instance, in *Roper v Simmons* 543 US 551 (2005).

[69] Basil Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law' (2006) Tulane Law Review 80: 1325, at 1361–2 and 1371.

where one judge mentions foreign law. We agree with Sir Basil that reasonable consistency requires that other judges who come to a different conclusion from that which the first judge supported by comparative law, address and counter in a specific manner the first judge's arguments.

Comparative law is no longer an impractical academic discipline. We have discussed how comparative law is more actively used, and its use more openly acknowledged, by courts, and this is also the case in teaching, scholarship, and in statute law reform. This new awakening puts the academic discipline under some pressure. One response is in the growing scholarship on the purposes and methods of comparative law.

A generation ago, there were some disagreements about purpose and method in academic comparative law circles. Looking back, the prevailing impression is nonetheless of an established academic discipline with a high degree of cohesion. There were parallel discourses across jurisdictions, mostly dominated by private lawyers, but with important contributions made by public and criminal lawyers.

Comparative law has lost whatever common language it had as an academic discipline. This is one consequence of the expansion of the discipline: it does not have the coherence of the small academic community that it had a generation ago. It is a current and rather pressing challenge to engage comparative law scholars in a discourse on what can be agreed upon as the core issues. The growing scholarship on the purposes and methods of comparative law is a good beginning,[70] although the present phase demonstrates a wide range of views, some rather fundamentally opposed to one another.[71] There is much to be done before the academic discipline can emerge

[70] Two magisterial volumes provide extensive overviews of the rapidly expanding scholarship, see Matthias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), and Jan M Smits, (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006). See also William Twining, Ward Farnsworth, Stefan Vogenauer, and Fernando Téson, 'The Role of Academics in the Legal System', in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 920.

[71] See the following authors representing some of the divergence in the current comparative private law scholarship: Pierre Legrand, 'European Systems are not Converging' (1996) 45 ICLQ 52; Mauro Bussani, and Ugo Mattei, 'The Common Core Approach to European Private Law' (1997/98) 3 Columbia Journal of Comparative Law 339; Walter Van Gerven et al, *Tort Law* (Oxford: Oxford University Press, 2000); Basil Markesinis, *Foreign Law and Comparative Methodology: a Subject and a Thesis* (Oxford: Hart Publishing, 1997); Basil Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* (Oxford: Hart Publishing, 2001); Basil Markesinis, *Comparative Law in the Courtroom and Classroom* (Oxford: Hart Publishing, 2003); Basil Markesinis, and Jörg Fedtke, 'Authority or Reason? The Economic Consequences of Liability for Breach of Statutory Duty in a Comparative Perspective' (2007) 18 EBLR 5; Basil Markesinis, 'Judicial Mentality: Mental Disposition or Outlook as a Factor Impeding Recourse to Foreign Law' (2006) 80 Tulane Law Review 1325, 1361–2; Anne Peters and Heine Schwenke, 'Comparative Law beyond Post-Modernism' (2000) 49 ICLQ 800; Horatia Muir Watt, 'La Fonction Subversive du Droit Comparé' (2000) 52 RIDC 503; Alan Rodger, 'Savigny in the Strand' *The Irish Jurist* 28–30 (1995): 1; Rodolfo Sacco, 'Legal Formants: a Dynamic Approach to Comparative Law (I)' (1991) 39 American Journal of Comparative Law and (II) (1991) 39 American Journal of Comparative Law 343; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, London: University of Georgia Press, 1993); Reinhard Zimmerman, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science' (1996) 112 LQR 576; Konrad Zweigert and Helmut Kotz, *An Introduction to Comparative Law*, 3rd edn (Oxford: Clarendon Press, 1998); Guido Alpa and Vincenzo Zeno-Zencovich, *Italian Private Law* (London: Taylor and Francis (Routledge-Cavendish), 2007); Guido Alpa, et al., *Diritto privato comparato. Istituti e problem* (Rome, Bari: Laterza, 2004); Guido Alpa and Mads Andenas, *Fondamenti del diritto privato europeo* (Milan: Giuffrè, 2005); Mads Andenas et al., *Liber Amicorum Guido Alpa: Private Law Beyond the National Systems* (London: BIICL, 2007); Duncan Fairgrieve, Mads

from this phase with any degree of agreement on what are the fundamental issues in the field, as is required for a critical academic discourse to be meaningful. The active comparative law discourse needs to rediscover at least the core of a common language.[72] It requires this common language for scholarship and comparative law to have full impact on legal scholarship, law making, and legal practice. It needs a mainstream academic discipline to emerge, the academic world now having received more than a helping hand from the courts and their use of comparative law.

Andenas, and John Bell (eds.), *Tort Liability of Public Authorities in Comparative Perspective* (London: BIICL, 2002); Duncan Fairgrieve and Horatia Muir Watt, *Common law et tradition civiliste* (Paris: Presses Universitaires de France, 2006); Martin Siems, *Comparative Law* (2014).

[72] Basil Markesinis and Jorg Fedtke, *Engaging in Foreign Law* (Oxford: Hart Publishing, 2009), makes an important contribution in this respect.

PART II

CONFLICTS AND COMPARISONS

2

Is it Legitimate and Beneficial for Judges to Compare?

*Thomas Kadner Graziano**

I. Introduction

In the early 21st century, it might seem surprising to still ask the question whether it is legitimate for judges to use the comparative method in their reasoning. The experience of teaching comparative law shows, however, that students, i.e. the judges and lawyers of tomorrow, despite the insights and the intellectual pleasure they derive from comparing laws, often doubt whether it is legitimate for courts to use comparative methodology. They also have doubts concerning the benefits they might be able to derive from the comparative method in their future practical life as lawyers.[1] In contrast, they quickly recognize the use of comparative law with regard to legislation, whether on a national or international level, given that national and international legislators regularly rely on comparative studies when preparing legislation. Judges and lawyers[2] in some countries also still question the legitimacy of the use of comparative methodology by the courts.

The following reflections address the question of whether it is *legitimate* for the judge to resort to the comparative method in addition to the classic methods of determining and interpreting domestic law. If it is legitimate, is it *beneficial* for the courts to use the comparative method? And if so, do the benefits of the comparative method justify the sometimes considerable effort that the comparative approach demands?

A practical example serves to illustrate that these questions are far from purely theoretical. The economy of a central European state undertakes privatization. A foreign investor buys one of the largest companies in that country. The company,

* Professor of Law at the University of Geneva, Faculty of Law, <http://www.unige.ch/droit/transnational/professeurs/kadner.html>. This is an extended version of an article first published in European Review of Private Law (ERPL) 2013, 687–716 and reprinted with permission of Kluwer Law International. On this topic by the same author in French: 'Est-il légitime et utile pour le juge de comparer?', *in* M. Faure-Abbad/M. Boudot (eds.), *Obligations, procès et droit savant—Mélanges en l'honneur de Jean Beauchard* (Paris: LGDJ, 2013), 77–101.

[1] Comp. A. Bullier, 'Le droit comparé dans l'enseignement—Le droit comparé est-il un passe-temps inutile?', RDIC [2008] 163 at 164: '*cette matière souffre d'un déficit d'image . . . . . Les juristes sont avant tout des internistes. Ils veulent donner des solutions immédiates et tangibles à leurs étudiants ou clients. La spéculation intellectuelle, si elle est appréciée, ne correspond plus à un monde où l'efficacité et le rendement sont considérés comme essentiels et aller voir ailleurs relève de la curiosité intellectuelle comme pour les digressions élégantes et stimulantes de la philosophie ou de la théorie générale du droit.*'

[2] When teaching comparative law to lawyers, it is a frequent experience that their scepticism regarding the use of comparative law usually vanishes only when studying cases in which the courts used this method in their reasoning.

which is of national importance (and too big to fail), risks bankruptcy but is saved by state investment in the region of several billion dollars. The state accuses the foreign investor of not having taken necessary measures to save the company, measures that the investor had been obliged to take under the privatization contract. The state therefore claims damages in the region of several billion dollars for the investments made to save the company.

The case is to be decided on the application of provisions of the civil code of the state concerned. There is little doctrine and no case law interpreting the applicable articles (provisions concerning contractual and tortious liability). That said, in neighbouring countries' codes, there are similar provisions which have been widely commented on and often applied by their courts. These codes served as an inspiration to the state's legislator at the time of codification of its domestic civil law.[3]

In such a case, is it legitimate for the court to take inspiration from foreign statutory law, case law, and legal doctrine when dealing with the issue under the applicable domestic law? Would lawyers be able to use, in the interest of their clients, other legal systems as a source of inspiration and support when proposing a certain interpretation of the law to the judges?

These questions are not limited to Europe. A very animated discussion among judges of the Supreme Court of the United States has helped in putting this issue on the agenda of judges, comparatists, and lawyers.[4]

This contribution firstly analyses the arguments against and for the *legitimacy* of the comparative method when it comes to applying domestic law (section II). Then, the *benefits* that may be derived from comparison by the judge are demonstrated. Numerous decisions of courts in Europe illustrate the *reasons* that lead to the use of comparative methodology and the multiple *aims* that the courts pursue by using this method (section III).

II. Comparative law—a method at the disposal of the courts?

1. Is it legitimate to use comparative law?—Arguments against the use of comparative methodology by courts

Some arguments seem to speak against the use of the comparative method by the courts when interpreting national law.[5]

[3] For more case scenarios, see T. Kadner Graziano, 'Comment enseigner et étudier le droit comparé?—Une proposition', 43 RDUS [2013] 61–87; German language version: 'Rechtsvergleichung lehren und lernen—ein Vorschlag aus Genf', *ZEuP* 2014, 204–23.

[4] The discussion in the USA focuses on the comparative method in constitutional law. In Europe, the legitimacy of judicial comparison has hardly been discussed so far, comp. e.g. C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', 20 Oxford J. Leg. Stud. [2000] 499 at 503: a topic 'relatively ignored in the theoretical literature'; R. Reed, 'Foreign Precedents and Judicial Reasoning: the American Debate and British Practice', 124 LQR [2008] 253 at 259: the current discussion in the USA 'has no parallel in the United Kingdom or elsewhere in the common law world'. In the USA, the topic is also regarded as 'under-theorized', R. Hirschl, 'The Question of Case Selection in Comparative Constitutional Law', 53 American J. Comp. L. [2005] 125.

[5] For an emphatic statement against the use of comparative law by US Federal courts, see A. Scalia, 'Keynote Address: Foreign Legal Authority in the Federal courts', in American Society of International Law,

a) A lack of democratic legitimacy

According to a first argument, the judge is bound by the law, but only his domestic law as well as international law in force in his country. Only the national legislator and, where required, an international legislator, would have the necessary democratic legitimacy to guide the judge in his decision. Foreign law failed to respect this democratic legitimacy and would not, in light of this fact, be capable of neither binding, nor convincing, nor even serving as an inspiration to the national judge in the interpretation of his own domestic law.[6]

b) The legal system—a national system

According to a second argument, every domestic legal provision or precedent should be interpreted within its own context, that of a national system.[7] In many continental legal systems, civil law is codified in a coherent system, the system of the national code, whereas in common law countries, case law constitutes a body of jurisprudence with its own coherence. It is claimed that an interpretation that takes inspiration from foreign sources is potentially harmful to national legal systems.

c) Specifics of the national situation

According to another argument, each legal provision as well as each judgment interpreting a provision and applying the law in a specific case is always the result of a weighing of interests. It is argued that this weighting of interests necessarily takes place within the national context, taking into account the specifics of the situation in the country concerned and the cultural context in which the decision will take effect. In this sense, Antonin Scalia, judge of the Supreme Court of the United States, in a judgment concerning US constitutional law, expressed the opinion that looking at foreign law is, at best, of no importance, and, at worst, dangerous. According to him, the Supreme Court of the United States 'should not impose foreign moods, fads or

Proceedings of the 101st Annual Meeting (American Society of International Law), Vol 98 (2004), 305; available also at <http://www.jstor.org/pss/25659941> (last accessed 10.02.2015).

[6] A. Scalia, 'Commentary', 40 *St. Louis U. L. J.* [1996] 1119 at 1122: '[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 citizen supra-national values that contradict their own.' In the USA, some critics have argued that an 'unchecked comparative practice' was 'subversive of the whole concept of sovereignty', see: Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 2d Sess. 77 (2004) at 72 (testimony of Prof. Jeremy Rabkin, Cornell Univ.); see also E. Young, 'Foreign Law and the Denominator Problem', 119 Harv. L. Rev. [2005] 148 at 163: '[I]mporting foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanism by which the political branches ordinarily control the interaction between the domestic and the foreign'; D. Pfeffer, 'Depriving America of Evolving Its Own Standards of Decency? An Analysis of The Use of Foreign Law In Eighth Amendment Jurisprudence and Its Effect On Democracy', 51 Saint Louis U. L. J. [2007] 855 ff., e.g. at 879; Z. Larsen, 'Discounting Foreign Imports: Foreign Authority in Constitutional Interpretation & the Curb of Popular Sovereignty', 45 Willamette L. Rev. [2009] 767, e.g. at 784.

[7] In this sense see A. Scalia, ibid.

fashions on Americans'.[8] In the majority opinion of the Court, Justice Kennedy, who frequently uses the comparative method, had referred to English law and the case law of the European Court of Human Rights. According to Scalia, in his dissenting opinion, such considerations of foreign law would be 'meaningless *dicta*'.[9]

d) Legal science—a largely national science

Over the last few years, certain courts have once again emphasized the fact that, although *comparativa est omnis investigatio* and 'all forms of higher knowledge consist of comparison',[10] the law remains a largely national science. The Federal Supreme Administrative Court of Germany accordingly declared in a 1993 judgment that '*[d]ie Rechtswissenschaft ist eine national geprägte Wissenschaft*'[11] (legal science is a nationally characterized science). A German court of appeal expressly supported this view in a judgment in 2004. This case related to the legitimacy of an agreement reached between a lawyer and his client concerning legal fees calculated according to the final result, *Erfolgshonorare* or contingency fees,[12] valid in US law but prohibited and hitherto deemed contrary to moral and legal standards by German law.

[8] In *Lawrence et al. v Texas* 539 US 558 [2003] 598 (on the constitutionality of a statute of the State of Texas prohibiting certain sexual acts between persons of the same sex; held that this law violates the 'Due Process Clause' of the US Constitution), p. 598: 'The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."' With reference to *Foster v Florida*, 537 US 990, note (2002) (J. Thomas): 'Justice Breyer has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court. Ibid., at 990. While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans'.

[9] Ibid., p. 573; see also L. Blum, 'Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication', 39 San Diego L. Rev. [2002] 157 ff., e.g. at 163; B. Lucas, 'Structural Exceptionalism and Comparative Constitutional Law', 96 Virginia L. Rev. [2010] 1965 ff.; E. Young, n. 6, 148 ff. The US Supreme Court has, however, a long tradition when it comes to using the comparative method, see e.g. M. Minow, 'The Controversial Status of International and Comparative Law in the United States', 52 Harv. Int. L. J. Online, 27.08.2010, I.: '[N]o one disagrees that United States judges have long consulted and referred materials from other countries as well as international sources; yet for the past nine or so years, citing foreign and international sources provoked intense controversy'; V. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', 119 Harv. L. Rev. [2005] 110 ff.; G. Calabresi/S. Dotson Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision', William & Mary L. Rev. [2005] 743. See on the debate in the US also A. Barak, 'Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia', *The Fulbright Convention*, 29 January 2006; M. Rosenfeld, 'Le constitutionnalisme comparé en mouvement: d'une controverse américaine sur les références jurisprudentielles au droit étranger', *in* P. Legrand (ed.), *Comparer les droits, résolument* (Paris: PUF, 2009), 561; I. Eisenberger, 'Wer fürchtet sich vor einem Verfassungsrechtsvergleich? Gedanken zur Rechtsvergleichung in der Judikatur des US Supreme Court', *JRP* [2010] 216 at 217: '*Rechtsvergleichung am SC ist beinahe so alt wie die Institution selbst. Ebenso alt wie die Rechtsvergleichungspraxis ist die Kritik daran*'.

[10] M. Freeland, 'Introduction: Comparative and International Law in the Courts', *in* G. Canivet/M. Andenas/D. Fairgrieve (eds.), *Comparative Law before the Courts* (London: BIICL, 2005), p. xvii.

[11] Bundesverwaltungsgericht (BVerwG) (Federal administrative court) 30.06.1992 (on the recognition of a Polish Master of Laws degree), NJW 1993, 276.

[12] OLG Celle (Appellate court of Celle) 26.11.2004, NJW 2005, 2160 et seq.: '*Rechtsvergleichung kann Gemeinsamkeiten und Unterschiede der Rechtsordnungen deutlich machen. Sie kann auch dem Richter eine Auslegungshilfe im Sinne einer "fünften Auslegungsmethode" . . . sein. Die praktische Bedeutung einer solchen Vorgehensweise ist freilich bislang sehr gering geblieben. Außerhalb des durch Kollisionsnormen bestimmten*

e) Lack of knowledge of foreign law and linguistic barriers

According to yet another argument, it is evident that the national legislator would not expect courts to have knowledge of foreign law. This knowledge would, however, be necessary to correctly employ the comparative method. Given that judges did not know or, at best, only knew a little foreign law, use of the comparative method would open the route to error, to danger of an incorrect understanding and a false interpretation of foreign law.[13] Added to which, there were often also linguistic barriers that made understanding foreign law particularly difficult and multiplied the risks of error.[14] Because of language barriers one US-author (and comparatist) has made the proposal to leave aside 'foreign-language law' when comparing.[15] Last but not least, the judge would simply not have the time and resources necessary to systematically carry out comparative research.[16]

f) The danger of cherry picking

Some have voiced criticism of the courts over selective citing of foreign law. It would always be possible to find support in some countries for a solution that is favoured by the courts. In contrast, diverging solutions in other countries would not always be invoked. In certain cases, the courts relied on the comparative argument, whereas they rejected comparison when the solution found in foreign law differs from that which is preferred by the court. Here the argument in question is that of *cherry picking*. It is used

Bereichs können im Wege der Rechtsvergleichung gewonnene Erkenntnisse nur dort einfließen, wo das eigene Recht "offen" ist und damit Interpretationsspielräume lässt . . . Auch darf die Bindung des Richters an Recht und Gesetz (Art. 20 III GG) nicht in Frage gestellt werden und muss weiter bedacht werden, dass mit der Übertragung von Rechtsgrundsätzen einer fremden Rechtsordnung, und zwar besonders dann, wenn dieseeiner anderen Rechtsfamilie angehört, in die eigene Rechtsordnung vorsichtig umzugehen ist.'

[13] See on this argument E. Hondius, 'Comparative Law in the Court-Room: Europe and America Compared', in A. Büchler/M. Müller-Chen (eds.), *Festschrift für Schwenzer*, Vol. 1 (Bern: Stämpfli, 2011), 759 at 769: 'The high quality of the [foreign] expert opinions is apparent from the reports on Dutch law. And yet . . . when reading the expert opinion on Dutch law, I sometimes know almost for certain that a Dutch court would decide differently now'; C. McCrudden, n. 4, at 526; R. Reed, n. 4, at 264.

[14] R. Reed, n. 4, at 264: '[M]any British judges (and counsel) are effectively monolingual, so that decisions must either come from an English-speaking jurisdiction or be translated . . . [M]ost of the world's case law is in reality inaccessible to most British lawyers'; E. Young, n. 6 at 166: both decision costs and error costs 'seem likely to be high for American courts dealing with foreign materials, given language and cultural barriers and most American lawyers' lack of training in comparative analysis'. See on this issue also J. Bell, 'Le droit comparé au Royaume-Uni', *in* X. Blanc-Jouvan et al., *L'avenir du droit comparé, un défi pour les juristes du nouveau millénaire* (Paris: Société de Législation comparée, 2000), p. 283; B. Markesinis/J. Fedtke, 'The Judge as Comparatist', 80 Tulane Law Review [2005–06] 11 at 114.

[15] J. Stapleton, 'Benefits of Comparative Tort Reasoning: Lost in Translation', 1 *J. Tort L.* [2007] 6 at 33, introducing the notion of 'comparative foreign-language law': '[T]he general indifference of North American and Australasian courts and practitioners to the tort law of foreign-language jurisdictions seems a wise response from inescapable phenomena. For them there is no more to be reliably derived from foreign-language jurisdictions than from English-speaking ones . . . : moreover, there are added perils of misinterpretation'; published also *in Liber Amicorum Tom Bingham* (Oxford: Oxford University Press, 2009), p. 773.

[16] See the example given by Hondius, n. 13, p. 759 at 773.

frequently by critics of the comparative approach in recent discussion in the USA and notably by judge Antonin Scalia.[17]

All of these arguments therefore seem to speak against the use of the comparative method by the courts.

2. Widening horizons—Arguments in favour of the use of comparative methodology by the courts

The question thus is, on the one hand, whether, and to what extent these arguments are convincing; and on the other hand, whether there are arguments favouring the use of comparative law by the judge when interpreting and applying domestic law.

a) Cherry picking—an apprehension that has not been confirmed by court practice

The danger of *cherry picking* is not unique to the comparative argument. The risk exists just as well in relation to differing opinions in doctrine and case law that also can be used and cited very selectively by courts.[18] Therefore, provided that the comparative method is used as seriously and balanced as every other method of interpretation, the danger of *cherry picking* does not question the legitimacy of comparison. In fact, numerous examples show that courts choose the jurisdictions for comparison very carefully and do not hesitate to cite foreign law in situations where the solution under foreign law differs from that preferred by the court. In these cases, comparative law is used in order to highlight the specificities of one's own domestic law.[19]

[17] A. Scalia, n. 5, at 309: 'Adding foreign law . . . is much like legislative history, which ordinarily contains something for everybody and can be used or not used, used in one part or in another, deemed controlling or pronounced inconclusive, depending upon the result the court wishes to reach . . . The Court's reliance has also been selective as to when foreign law is consulted *at all*'; ibid.: 'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making but sophistry', dissenting opinion in *Roper v Simmons*, US S.Ct., 543 US 551 [2005] 627; see also Chief Justice of the US S.Ct. John Roberts: 'Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking over a crowd for support and picking out your friends . . . And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent . . . and use that to determine the meaning of the Constitution', *in* US Senate Judiciary Committee, Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court, Transcript, Day Two, Part III, 13.09.2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html> (last accessed: 10.02.2015); see also R. Posner, *Legal Affairs*, July/August 2004, at <http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp> (last accessed: 10.02.2015).

[18] See R. Glensy, 'Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority', 45 Virginia J. Int. L. [2005] 357 at 401 ff.; C. McCrudden, n. 4, at 517: '[T]here are also increasing numbers of judges in particular jurisdictions who appear to consider it important to distinguish judgments of foreign courts if they go against the conclusions that the judge intends to reach'; Stephen Breyer, Judge of the US Supreme Court, *in* 'U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions' (2005), Transcript by Federal News Service, Washington D.C., at <http://www.freerepublic.com/focus/f-news/1352357/posts> (last accessed: 10.02.2015).

[19] For examples and references see section III.2.d). For criteria for choosing the jurisdiction for comparison, see e.g. C. McCrudden, n. 4, at 517 ff.; R. Reed, n. 4, at 264, 271; R. Glensy, n. 18, at 401 ff.;

b) Information on foreign law increasingly accessible

In order to avoid error and misunderstanding as to the content of foreign law, and so that the court has a solid basis for the use of the comparative method, it is effectively essential that the judge is provided with trustworthy, sound, and reliable information on the substance of foreign law.[20]

For numerous points of law, this information is now available. First of all and most obviously, the Internet makes access to information on foreign law as well as access to foreign case law much easier. Moreover, several institutions and research groups and numerous comparatists substantially contribute to the circulation of knowledge on foreign law. To name just some of the particularly active institutions and groups, it is possible to mention the International Institute for the Unification of Private Law (UNIDROIT), the Commission on European Contract Law, the Study Group on a European Civil Code, the Research Group on Existing EC Private Law, the Academy of European Private Lawyers, the Trento Group working on a Common Core of European Private Law, the European Group of Tort Law, the European Centre of Tort and Insurance Law (ECTIL), as well as the Leuven and Maastricht group of researchers working under the leadership of Walter van Gerven on the 'Ius Commune Casebooks for the Common Law of Europe'. Some of these groups count among their members researchers from all European jurisdictions, others researchers from around the world. They seek to make available entire libraries containing reliable and up-to-date information on foreign laws. A large majority of this information is published in English, thus facilitating access.[21] It is also possible to mention the numerous comparative analyses that are published in European law journals, such as the European Review of Private Law (ERPL), the Maastricht Journal of European and Comparative Law, the Columbia Journal of European Law, the Zeitschrift für Europäisches Privatrecht (ZEuP), and the Rivista di diritto pubblico comparato ed europeo, published in English, German, and Italian respectively.

Providing reliable information on foreign and comparative law, in languages easily accessible, is therefore the responsibility of comparatists and researchers using a comparative approach in their publications. English judges have expressly noted that without these publications, comparison would not have been possible for the court.[22]

A. Friedman, 'Beyond Cherry-Picking: Selection Criteria For the Use of Foreign Law in Domestic Constitutional Jurisprudence', 44 Suffolk U. L. Rev. [2011] 873 ff.

[20] C. McCrudden, n. 4, at 527: '(in general) a judge or court in one jurisdiction will not use case law from another jurisdiction unless it is considered to be comparable, and unless the judge or court feels adequately informed about the other jurisdiction'; see also T. Bingham, *Widening Horizons—The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010), p. 5, who reminds us incidentally that 'few human activities are free from the risk of error and judicial decision-making is no exception'.

[21] A reading proficiency in English, French, and German gives access to the law of *nine* European jurisdictions in the original language, and beyond that to further common law jurisdictions as well as to further jurisdictions belonging to the French legal tradition.

[22] See e.g. Lord Goff of Chieveley *in White v Jones* [1995] 2 AC 207, 1 All ER 691 at 705 (House of Lords): '[I]n the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.'

In a case brought before the court, it is also possible for this comparative research to be carried out on an ad hoc basis by comparative law institutions and lawyers[23] (or their trainees) trained in comparative law.[24] Christopher McCrudden recalls that 'where lawyers appearing before the courts, or clerks assisting the judge, give the judge confidence, then the decisions of foreign systems are more likely to be cited.'[25]

Thanks to this information on foreign law, error and misunderstanding in the substance of foreign law can be avoided. Consequently, this argument does not question the legitimacy and practicability of comparison either.

Ruth Bader Ginsburg, judge at the US Supreme Court, has stated in this respect: '[W]e should approach foreign legal materials with sensitivity to our differences, deficiencies, and imperfect understanding, but imperfection, I believe, should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.'[26]

c) Access to foreign law—the private international law argument

In cross border cases which present closer links with a foreign legal system than with the law of the jurisdiction in which a legal action is brought, the forum's private international law sometimes obliges the court to resolve the case solely on the application of foreign law. The existence of private international law rules clearly shows that the legislators believe it is possible for the national judge to be informed about the substance of foreign law in a reliable and trustworthy way.[27]

d) The comparative methodology—a method of interpretation like the others

It is clear that the national legislator does not expect courts or lawyers to know foreign law as they know domestic law. It is equally clear that judges and lawyers cannot resort to the comparative method in *every* case.

[23] This was the case e.g. in *Tabet v Gett,* [2010] High Court of Australia 12, at <http://www.austlii.edu.au/au/cases/cth/HCA/2010/12.html>, or the English case *A and others v the National Blood Authority* [2001] 3 All ER 289. See also Hein Kötz, 'Alte und neue Aufgaben der Rechtsvergleichung', *JZ* [2002] 257 at 259: lawyers '*sind sich offenbar noch nicht genügend des Umstands bewusst, dass ein für ihre Mandanten günstiger Rechtsstandpunkt sich in vielen Fällen auf rechtsvergleichende Argumente stützen lässt*' (apparently lawyers are not yet sufficiently aware that they can use comparative law in order to further the interests of their clients); E. Hondius, n. 13, p. 759 at 777; for England e.g. Lord Steyn, *Public Law* 1999, 51 at 58: 'Law Lords expect a high standard of research and interpretation from barristers . . . For example, if the appeal involves a statutory offence we would expect counsel to be familiar with . . . comparative material from, say, Australia and New Zealand'.

[24] For a method of teaching comparative law that prepares the students for this task, see the author of this contribution, 'Comment enseigner le droit comparé?', n. 3.

[25] C. McCrudden, n. 4, at 526.

[26] R. Bader Ginsburg, 'A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication', 64 Cambridge L. J. [2005] 575 at 580.

[27] In some jurisdictions, such as Switzerland, the judge establishes the content of foreign law *ex officio*, see Art. 16 sect. 1 of the Swiss Code on Private International Law (LDIP); in other jurisdictions, he can require that the parties contribute to the establishment of the content of foreign law or, for certain areas of law, that they establish its content altogether, see *Dicey, Morris & Collins on The Conflict of Laws*, 14th edn. (London: Sweet & Maxwell, 2006), Vol. 1, §§ 9-001 et seq.; see also E. Örücü, 'Comparative Law in Practice: The Courts and the Legislator', *in* E. Örücü/D. Nelken (eds.), *Comparative Law—A Handbook* (Oxford: Hart, 2007) 411 at 414, 418.

In situations where such knowledge is not available or accessible, the court cannot be expected to use the comparative approach. However, in cases where content of foreign law is brought to the attention of the court, the judges are in a position to build on this knowledge and to use the comparative arguments when interpreting domestic law.[28]

The fact that the comparative method can be used in some cases and not in others is not unique to this method. While the literal rule and perhaps also the purposive approach are methods of interpretation that are always available to the court, this is not the case for other methods of statutory interpretation. This is true notably in relation to the historical interpretation, which draws inspiration from the legislative history of the law, and the systematic interpretation, both of which will assist the judge, much like the comparative method, in his search for a solution to specific problems in some cases and not in others.

e) Revival of a European legal science

The argument that legal science is a largely national science is another argument against the use of comparative law that barely convinces. Throughout a large part of the 20th century, in countries such as Germany and France, legal science was effectively a widely national science. However, in other countries, notably the UK as well as some countries in continental Europe, such as the Netherlands, Belgium, Austria, and Switzerland, legal science has never been limited to a single national law. On the contrary, the doctrine in these jurisdictions, and to some extent also the court practice, has a long history of using the comparative approach.[29] In the second half of the 20th century, more and more legal scientists have been arguing in favour of an internationalization (or more accurately, a *re-internationalization*[30]) of legal science.[31] These pleas were eventually successful and we observe today a renaissance of a truly international science of law in Europe. In law, ideas and solutions are circulating across borders again. From a US perspective, Matthias Reimann has observed in this respect: 'In Western Europe, comparative legal studies have . . . gained a momentum and a significance unprecedented in the last hundred years . . . From an American perspective, one may . . . look across the Atlantic with envy these days. Comparative law in Europe is a hot topic. It is practically relevant, self-confident, and enjoys a high profile.'[32]

[28] For the important role that lawyers might play in this respect, see section II.2.b).

[29] References in section III. See also E. Hondius, n. 13, p. 759 at 765: 'It has been suggested that, if one wishes to consider legal research a science, [focusing on domestic developments] is the wrong attitude. Science knows no borders, and legal science is no exception.'

[30] Before the period of the codification of the law started on the continent, legal discourse on the continent was truly European using the same language, Latin; see e.g. R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996); Zimmerman, 'Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit', *JZ* 1992, 8; H. Coing, 'Die ursprüngliche Einheit der europäischen Rechtswissenschaft', in Zimmerman, *Gesammelte Schriften*, Vol. II, p. 137; for the situation in private international law, see T. Kadner Graziano, *Gemeineuropäisches Internationales Privatrecht* (Tübingen: Mohr Siebeck, 2002), p. 46–59.

[31] For references see e.g. T. Kadner Graziano, *European Contract Law* (Basingstoke: Palgrave Macmillan, 2009), p. 7 et seq.

[32] M. Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', 50 Am. J. Comp. L. [2002] 671 at 691–2.

f) The judge's freedom to choose his methods of determining the law—revival of the idea of justice that transcends borders

Another argument against the use of the comparative method asserts that every law and judgment is the result of a weighing of interests which would necessarily have to take place within each country's own cultural context.[33] This argument overlooks the fact that these days, the national legislators themselves rely on extensive comparative research in practically every important legislative procedure and, at any rate, in matters of private law. To cite just a few recent examples: The recent codifications in the Baltic States have largely taken inspiration from comparative studies. The Estonian legislator has followed the example of the German civil code in his new codification of the law of obligations (and has introduced, for example, a general part in the new Law of Obligations and has, e.g. in torts, codified the essence of a century of German case law). The legislator has also widely taken inspiration from Swiss law, Dutch law, the laws of Quebec and Louisiana, the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law, and the UNIDROIT Principles of International Commercial Contracts.[34] The new Lithuanian Civil Code of 2000 takes inspiration, amongst others, from the codifications and statutes of the Netherlands, Québec, Germany, France, Italy, Switzerland, Sweden, Latvia, Japan, and Russia, as well as from the CISG and the UNIDROIT Principles.[35] Polish law has recently taken inspiration from German and Dutch law, as well as the CISG and the Principles of European Contract Law. In Central and Eastern European countries, the comparative method plays such an important role in modern legislation that it was affirmed that 'the main method used for private law in today's legislative drafting is the comparative method'.[36]

In 2002, the German civil code (the BGB) experienced the most important reform since it came into force in 1900.[37] Initiated by a European Directive, the drafting process of this reform took inspiration from a wide range of European jurisdictions.[38]

In China, important law reforms have taken place over the last 15 years, in particular with the adoption of the Chinese Contract Act of 1999, the Law of Property Act of 2007, and the Tort Law Act of 2010. Among the sources of inspiration for the Contract Act were the codifications of Germany, Japan, and Taiwan, the English Common Law, and US law, as well as the CISG, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law.[39] The new Law of Property Act drew inspiration from the laws of Germany, France, Japan, and Taiwan

[33] See section III.1.c) with references.

[34] P. Varul, 'Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia', Juridica International [2000] 104 et seq.

[35] S. Selelionyte-Drukteiniene/V. Jurkevicius/T. Kadner Graziano, 'The Impact of the Comparative Method on Lithuanian Private Law', *ERPL* [2013] 959–90.

[36] P. Varul, n. 34, at 107.

[37] Gesetz zur Modernisierung des Schuldrechts, Bundesgesetzblatt 2001, I, 3138.

[38] Compare U. Huber, 'Das geplante Recht der Leistungsstörungen', in W. Ernst/R. Zimmermann (eds.), *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen: Mohr Siebeck, 2001), p. 104–7; P. Schlechtriem, 'Das geplante Gewährleistungsrecht', *in* W. Ernst/R. Zimmermann (eds.), ibid., p. 205–24.

[39] L. Huixing, *The Draft Civil Code of the People's Republic of China*, English Translation (Leiden/Boston: Martinus Nijhoff, 2010), p. XIX with examples.

and from some aspects of English and US law.[40] Recently, a draft version of a Chinese Civil Code was presented. The structure of the draft code was inspired by the example of the Pandects and by Dutch law.[41]

These varied examples show that preparing legislation in the field of private law does not take place in a context that is purely specific to each state, but within the context of a European-wide discussion, or, in the case of Chinese law, the CISG and the UNIDROIT Principles, in a worldwide context.

The fact that the legislator himself uses the comparative method in the preparation of domestic law has an important implication for its interpretation: if the legislator takes inspiration from foreign law, because he is inspired by an *idea of justice existing beyond state borders*, the judge must be able to follow this approach when applying the law. In this sense, article 1 section 2 of the Swiss Civil Code expressly states that '*à défaut d'une disposition applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur*' (in the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator). This provision expresses a general idea according to which the judge is invited to resort to the same sources of inspiration and methods used by the legislator, notably including the comparative method.[42] This is true, as is explicitly stated in article 1 section 2 of the Swiss Civil Code, in the absence of a legal provision. In many jurisdictions, it is recognized today that this also applies in cases of uncertainty of the law and when interpreting it, since filling gaps in the law and interpreting it are merely two sides of the same coin.[43] The Swiss Federal Court has consequently stated that 'when interpreting the law, all traditional methods of interpretation are to be taken into consideration (systematic, purposive, and historic . . . as well as comparative), all of which are used by the Federal Court in a pragmatic way without giving priority or preference to one of these methods over the others'.[44]

In the same spirit, the highest court in Germany, the Federal Constitutional Court, has repeatedly confirmed that the judge is not bound when it comes to choosing his methods of determining the law. In the 1990s the Constitutional Court held: 'Artikel 20 III of the Fundamental Law [Grundgesetz, i.e. the German Constitution] requires that the judge decides "according to law and justice". The Constitution does not prescribe a particular method of interpretation (or even a purely literal inter-

[40] Ibid., p. XX. [41] Ibid., p. XXII.

[42] Article 1 sect. 2 of the Swiss Civil Code was inspired by the works of the French legal scientist François Gény and thus is itself the fruit of an influence across borders, see F. Gény, *Méthode d'interprétation et sources en droit privé positif*, Vol. 2, 2nd edn. (Paris: Libr. général de droit et de jurisprudence, 1919), p. 326 et seq. no. 204; see also T. Henninger, *Europäisches Privatrecht und Methode* (Tübingen: Mohr Siebeck, 2009), p. 80, with further references.

[43] Konrad Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode', *RabelsZ* [1949] 5 at 9.

[44] Swiss Federal Court 13.01.1998, ATF 124 III 266: '*4. . . . bei der Auslegung [sind] alle herkömmlichen Auslegungselemente zu berücksichtigen (systematische, teleologische und historische . . . ; auch rechtsvergleichende . . .), wobei das Bundesgericht einen pragmatischen Methodenpluralismus befolgt und es ablehnt, die einzelnen Auslegungselemente einer Prioritätsordnung zu unterstellen . . . ;*' French translation in *JdT* 1999 I 414.

pretation).'[45] The court further held that '[t]he courts are bound only by the law and they are not required to follow an opinion that is prevailing in legal doctrine, nor are they obliged to follow the precedents of higher courts; on the contrary, they can follow their own legal opinion and perception of the law… The judge is required to decide according to law and justice (Art. 20 III GG); with respect to the prohibition to render arbitrary decisions, the judge has to give reasons for his decision… In any case, the judge must show that the decision is based on an in depth legal analysis; his view also must not be deprived of objective reasons.'[46] In a 1953 ruling, the Federal Constitutional Court expressly recognized the use of the comparative method by the courts to fill gaps in domestic law and to interpret it.[47]

In other jurisdictions on the continent, legal provisions defining methods of statutory interpretation by the judge are limited to stating general principles, emphasizing the freedom of the judge to interpret and, if necessary, to develop the law.[48]

For common law and mixed jurisdictions, Robert Reed, judge at the Supreme Court of the United Kingdom, has noted with respect to the freedom of judges to choose their sources of inspiration:

> Scottish and English judges have for centuries drawn on ideas developed in other jurisdictions (both common law and civilian)… Judicial reasoning has been seen as a process of rational inquiry, in which there are not in principle any sources of ideas which are off-limit. Judicial reasoning in this country has not been thought of in national terms, with non-national sources of ideas being regarded as suspect: on the contrary, it has long been thought sensible to consider how others, from Ancient Rome onwards, have resolved similar problems. If judges are free to take account of the views of academic lawyers writing in law reviews, whether they are based in Cambridge, England, or Cambridge, Massachusetts, there would seem to be no reason why the opinions of foreign courts should be off-limits.[49]

The courts consequently benefit from a substantial freedom in their choice of the methods they apply to determine the law and they are free with respect to the choice of their sources of inspiration. Numerous examples cited in the third part of this contribution show that in many jurisdictions, judges use the comparative method to fill gaps in domestic law and when interpreting it, without questioning the legitimacy of comparison.[50]

[45] BVerfG 30.03.1993, BVerfGE 88, 145; NJW 1993, 2861 (2863).

[46] BVerfG 19.07.1995, NJW 1995, 2911.

[47] 18.12.1953, BVerfE 3, 225 at 244: '*Im übrigen haben die Gerichte sich der erprobten Hilfsmittel, nämlich der Interpretation und Lückenfüllung, unter Verwertung auch der rechtsvergleichenden Methode bedient.*'

[48] See e.g. §§ 6 et seq. of the Austrian Civil Code (ABGB), Art. 1 et seq. of the Spanish Civil Code (Código civil), Art. 1 et seq. of the Portuguese Civil Code (Código civil), Art. 1 of the introductory provisions of the Italian Civil Code (Codice civile), Art. 6 of the Russian Civil Code, Art. 1.3 et seq. of the Lithuanian Civil Code Art. 4 et seq. of the Latvian Civil Code; see also T. Henninger, n. 42, e.g. p. 437 et seq. with further references.

[49] R. Reed, n. 4, at 261–2; C. McCrudden, n. 4, at 527: 'the decision whether to use foreign judicial decisions seems largely in the realm of judicial discretion'.

[50] For references see section III.

g) Choice of the most convincing solution while respecting the national legal system

The argument that the use of the comparative method risks harming the national legal systems is also not convincing. It is true that, in every interpretation of domestic law, the system of the domestic law (be it a national codification or a case law system) must be respected as far as possible. This aim can be achieved through systematic interpretation which is one of the principal methods of interpretation of law. Indeed, like every other method of interpretation, the comparative interpretation must allow an interpretation and development of the law so that, out of the possible solutions, the most convincing is chosen while preserving coherence within the domestic system of law.[51]

h) The authority of foreign law—a persuasive authority

It is clear that the judge is bound by domestic law as well as by any provisions of international law in force in his country. Neither foreign statutory law nor foreign case law has democratic legitimacy in the judge's country. In relation to the use of the comparative method, two consequences follow from this:

Firstly, when the text of domestic law in force in the judge's country is clear and its interpretation does not leave any room for doubt, the judge is bound by his country's law. In principle, he cannot deviate from the result prescribed by the law in order to reach another result by using the comparative method; this is even true in cases where the judge finds this other result more adequate, appropriate, and fair, taking into account all the interests at stake.[52] In such a case, it is in principle[53] the role of the

[51] See e.g. G. Canivet, 'The Use of Comparative Law Before the French Courts', in G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. 181 at 183 et seq.; K. Zweigert, n. 43, at 16 et seq.; H. Unberath, 'Comparative Law in the German Courts', in G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. 307 at 316; see, however, A. Flessner, 'Juristische Methode und Europäisches Vertragsrecht', *JZ* [2002] 14: in a period of a renaissance of a common European legal science and of a European *ius commune*, the systematic interpretation of domestic law should lose its importance when it comes to determining the law.

[52] See e.g. *Bell v Peter Browne & Co.* [1990] 2 QB 495 (Mustill LJ) with respect to the concurrence of liability in contract and tort: 'Other legal systems seem to manage quite well by limiting attention to the contractual obligations which are, after all, the foundation of the relationship between the professional man and his client [citing French law] … Nevertheless the [English] law is clear and we must apply it'; see for the discussion in the USA, V. Jackson, n. 9, at 125: '[T]he legitimacy of looking to foreign experience will vary with the issue, depending on the specificity and history or our constitutional text, the degree to which the issue is genuinely unsettled, and the strength of other interpretative sources.'

[53] For this rule and its limits, see e.g. the Swiss Federal Court 28.11.2006, ATF 133 III 257 ('parrots' case), 265 cons. 2.4: '*Ergibt die Auslegung eines Bundesgesetzes auf eine Rechtsfrage eine eindeutige Antwort, so ist diese gemäss Art. 19 Bundesverfassung für das Bundesgericht und die anderen rechtsanwendenden Behörden massgebend. Diese dürfen daher nicht mit der Begründung von Bundesrecht abweichen, es … entspreche nicht dem (künftig) wünschbaren Recht … Eine Abweichung von einer Gesetzesnorm ist jedoch zulässig, wenn der Gesetzgeber sich offenkundig über gewisse Tatsachen geirrt hat oder sich die Verhältnisse seit Erlass des Gesetzes in einem solchen Masse gewandelt haben, dass die Anwendung einer Rechtsvorschrift rechtsmissbräuchlich wird*' (Translation: If the interpretation of a federal law leads to a clear result, then, according to Art. 19 of the Federal Constitution, the Federal courts and all other law-applying authorities are bound by it. They cannot deviate from federal law arguing that the result under this legal provision is … undesirable. It is however possible to deviate from a legal provision in cases where the legislator has obviously committed an

legislator (national or international) to solve the problem (if there is a problem). But aren't situations rare where interpretation of domestic law doesn't leave space for doubt or a margin of appreciation for the judge? Numerous uncertainties in domestic law, the demands of interpretation, as well as, in some cases, conflicts between traditional rules of civil law and constitutional values, make the scope of application of the comparative methodology very large.

Secondly, foreign legislation and case law can never *bind* the national judge. The authority of foreign law can only be a *persuasive authority*.[54] The more the values in one country and another are similar or shared, the more important is the persuasive authority of the other country's law.[55] The more a certain issue is politically sensitive, and the more particular circumstances in a given country led to the adoption of a specific rule or result, the less willing will judges be to draw inspiration from foreign law and experience. This is possibly the reason why the use of comparative law in certain constitutional issues before the US Supreme Court has been particularly controversial and disputed over the last years, whereas the use of this same method goes without saying in matters of private law in the USA.[56]

i) Soft harmonization of the law within the context of regional integration

Finally, the use of the comparative method is justified nowadays, in member countries of the European Union, by the membership of these countries in the Union. According to article 3, section 3 of the Treaty on European Union, the Union sets itself the objective, among others, of establishing an internal market and promoting economic cohesion among Member States. The convergence of provisions applicable to economic relations contributes notably to the achievement of this aim, in areas such as contract law, tort law, and, for certain questions, property law. In such matters, a comparative interpretation can result in 'soft harmonization' of the law which constitutes, at least for some matters, an interesting alternative to harmonization through enacting legislation. In relation to this, Walter Odersky, the former President of the German Federal Court, has written:

error or when the circumstances have changed since the enactment of the provision to the point that its application would constitute an abuse of right).

[54] See e.g. P. K. Tripathi, 'Foreign Precedents and Constitutional Law', 57 Columbia L. Rev. [1957] 319 at 346: 'When a judge looks to foreign legal systems for analogies that shed light on any of the new cases before him, he is looking to legal material which he is absolutely free to reject unless it appeals to his reason'; V. Jackson, n. 9, at 114: 'Transnational sources are seen as interlocutors, offering a way of testing and understanding one's own traditions and possibilities by examining them in the reflection of others'; A. Parrish, 'Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law', U. Illinois L. Rev. [2007] 637 at 674: 'Foreign law is persuasive authority: nothing more, nothing less'; and S. Yeazell, 'When and How U.S. Courts Should Cite Foreign Law', 26 Constitutional Commentary [2009] 59 at 69: '[I]ts persuasiveness has nothing to do with its origin.'

[55] For criteria for choosing the jurisdiction for comparison, see n. 19.

[56] See n. 9. The persuasive authority of the comparative argument loses weight if the fundamental values differ from one jurisdiction to the other, see e.g. A. Scalia, n. 5, p. 310: 'If there was any thought absolutely foreign to the founders of our country, surely it was the notion that we Americans should be governed the way Europeans are. And nothing has changed.'

> The national judge has not only the right to rely on interpretations from other legal systems and courts in his judgment, but also the right, when applying domestic law, and naturally when weighing up all interests and points of view to be taken into consideration in the interpretation and development of the law, to attach a certain importance to the fact that the solution in consideration contributes to the harmonization of European law. Following this reasoning, the judge may, if need be, follow the solution from another legal system as the result of a weighing of interests. With the progressive process of European integration, the judge should use this reasoning more and more often.[57]

According to Christopher McCrudden the impulse to use comparative law 'will be strongest . . . when the integration is set out explicitly as a political programme, with institutional characteristics, such as in Europe. Indeed, the comparative method is there explicitly built into the fabric of judicial decision-making'.[58]

3. Intermediate conclusions

In the search for a fair solution, the judge benefits from substantial freedom to choose his sources of legal knowledge and inspiration. In a large number of countries, judges are nowadays convinced that comparative law is one of the legitimate methods of interpretation of domestic law, and rightly so. The examples cited in the third section of this contribution will show that national courts draw inspiration from foreign solutions when interpreting domestic law. Indeed, important innovations notably in English, German, Austrian, Swiss, and US judicial law have taken inspiration from comparison with solutions that are in force abroad.[59]

In current US discussion, Ruth Bader Ginsburg, judge of the US Supreme Court, has written: 'The US judicial system will be poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own . . . [W]e are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality.'[60] Sonia Sotomayor, appointed in 2009 to the US Supreme Court, stated in the year of her appointment: '[T]o the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues of our legal system'.[61] Sandra Day O'Connor expressed the opinion that the judges on the court will 'find [them]selves looking more frequently to the decisions of

[57] W. Odersky, 'Harmonisierende Auslegung und europäische Rechtskultur', *ZEuP* [1994] 3 et seq. (translation from German).

[58] C. McCrudden, n. 4, at 521f (quote on p. 522).

[59] See the references in section III.

[60] R. Bader Ginsburg, n. 26, at 576. Available also at <http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-02-10> (last accessed: 10.02.2015).

[61] *In* Steven Groves, Questions for Justice Sotomayor on the Use of Foreign and International Law, The Heritage Foundation, July 6, 2009, at <http://www.heritage.org/research/reports/2009/07/questions-for-judge-sotomayor-on-the-use-of-foreign-and-international-law>, note 12 and accompanying text [Transcript of Judge Sotomayor's April 2009 Speech to the American Civil Liberties Union of Puerto Rico].

other constitutional courts . . . All of these courts have something to teach . . . about the civilizing functions of constitutional law.'[62]

Following an analysis of the use of the comparative method by courts in Europe, undertaken at the British Institute of International and Comparative Law, Mads Andenas, Duncan Fairgrieve, Guy Canivet (at that time *Premier Président* of the French *Cour de Cassation*), and the English judge of the House of Lords, Lord Goff of Chieveley, have summarized the analysis in relation to the current role of the comparative method before European courts: 'Comparative law is increasingly recognized as an essential reference point for judicial decision-making.'[63] According to Canivet, 'the use of comparative law is essential to the fulfilment of a supreme court's role in a modern democracy'.[64] Andenas and Fairgrieve come to the conclusion that, '[c]ourts make use of comparative law, and make open reference to it, to an unprecedented extent . . . Comparative law has become a source of law.'[65] Tom Bingham concludes that: 'Judicial horizons have widened and are widening.'[66]

III. Comparative law in court practice

1. Introduction

If it is legitimate to compare, is it beneficial and appropriate for the courts to resort to the comparative method? Do the benefits of the comparative method justify the sometimes considerable effort that the comparative approach demands?

In some countries, judges are nowadays convinced of the benefits of this method. An analysis of around 1500 judgments of the Swiss Federal Court has shown that in around 10 per cent of cases the court refers to one or more foreign legal systems for the purpose of comparison.[67] In matters concerning tort law, over the last few years, the percentage of the Federal Court's judgments that use the comparative approach has exceeded 20 per cent.[68] In other countries on the continent, the courts occasionally resort to the comparative method.[69]

[62] 'Broadening our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law', Int'l. Jud. Observer, June 1997, p. 2. The following judges of the US Supreme Court have favoured the use of the comparative method by the court in recent years: Justices Day O'Connor, Stevens, Souters, Kennedy, Bader Ginsburg, Breyer, and Sotomayor. Have spoken against the use of this method: Chief Justices Rehnquist and Roberts and Justices Scalia, Thomas, and Alito.

[63] In G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. v and vii.

[64] In G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. 181.

[65] In G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. xxvii.

[66] T. Bingham, n. 20, p. 3.

[67] See the excellent analysis by A. Gerber, 'Der Einfluß des ausländischen Rechts in der Rechtsprechung des Bundesgerichts', *in* Institut Suisse de Droit Comparé (ed.), *Perméabilité des ordres juridiques* (Zürich: Schulthess, 1992), p. 141–63.

[68] T. Kadner Graziano, 'Entwicklungstendenzen im schweizerischen ausservertraglichen Haftungs- und Schadensrecht', in P. Jung (ed.), *Aktuelle Entwicklungen im Haftungsrecht* (Zurich: Schulthess, 2007), p. 1 no. 3.

[69] For France see R. Legeais, 'L'utilisation du droit comparé par les tribunaux', 46 Revue Internationale de Droit Comparé [1994] 347; G. Canivet, n. 51, p. 181, in particular p. 190 et seq. Canivet reminds us, however, that the very particular style of reasoning of the French *Cour de cassation* does not allow the judge to reveal his sources of inspiration, p. 187; see also *Cour de cassation*, Bulletin d'information no. 648 du 15/10/2006, Jurisprudence—Arrêts publiés intégralement, Arrêt du 7 juillet 2006 rendu par l'Assemblée

In English law, judgments in which the judges not only cite decisions from other common law jurisdictions, but also the laws, judgments, and doctrine from continental Europe, have multiplied over the last few years.[70] According to a recent study, for the period of 1996 to 2005, between 25 and 33 per cent of House of Lords decisions have included comparative references to other legal systems.[71] Some of the judgments that have benefited from looking beyond borders are among the most prominent cases in English legal history, such as *Hadley v Baxendale*,[72] which concerned the scope of damages for breach of contract. Tom Bingham, former judge of the House of Lords, wrote in relation to this judgment that 'sometimes seen as a fine flowering of common law jurisprudence, the immediate source of the rule [in *Hadley v Baxendale*] were the French Code Civil, Pothier's Treatise on the Law of Civil Obligations, Kent's Commentaries, and Sedgwick's Treatise on Damages, none of them works of indigenous origin.'[73]

plénière. For Spain: J. Canivell, 'Comparative Law before the Spanish Courts', in G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10, p. 211 et seq. For Germany: H. Kötz, 'Der Bundesgerichtshof und die Rechtsvergleichung', in C.-W. Canaris et al. (eds.), *50 Jahre Bundesgerichtshof: Festgabe aus der Wissenschaft*, Vol. II (Munich: C.H. Beck, 2000), p. 825; U. Drobnig, 'The Use of Foreign Law by German Courts', in U. Drobnig/and S. van Erp (eds.), *The Use of Comparative Law by the Courts* (The Hague: Kluwer, 1999), p. 127, with references; for the period from 1950 to 1980, U. Drobnig, 'Rechtsvergleichung in der deutschen Rechtsprechung', 50 RabelsZ [1986], p. 610; H. Unberath, n. 51. For the influence of German law on English, Swiss, and Austrian law, see: K. Schiemann, 'Aktuelle Einflüsse des deutschen Rechts auf die richterliche Fortbildung des englischen Rechts', 1 Europarecht [2003] 17; H. Honsell, 'Rezeption der Rechtsprechung des Bundesgerichtshofs in der Schweiz', *in 50 Jahre Bundesgerichtshof*, Vol. II, p. 927; H. Koziol, 'Rezeption der Rechtsprechung des Bundesgerichtshofs in Österreich', in *50 Jahre Bundesgerichtshof*, Vol. II, p. 943; for Dutch law: E. Hondius, n. 13, p. 764. See also the contributions *in* G. Canivet/M. Andenas/D. Fairgrieve (eds.), n. 10; T. Koopmans, 'Comparative Law and the Courts', 45 ICLQ [1996], p. 545; B. Markesinis and J. Fedtke, n. 14, p. 11.

[70] See M. Nounckele, 'De la légitimité de la comparaison par les juges—Etude de la jurisprudence de la House of Lords de 1996 à 2005' (study prepared at the University of Louvain-la-Neuve, 2011); E. Örücü, 'Comparative Law in Practice: The Courts and the Legislator', in E. Örücü and D. Nelken (eds.), n. 27, p. 411; E. Örücü, 'Comparative Law in British Courts', in U. Drobnig and S. van Erp (eds.), n. 69, p. 253; K. Schiemann, 'Recent German and French Influences on the Development of English law', in R. Schulze and U. Seif (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* (Tübingen: Mohr Siebeck, 2003), p. 189. See e.g. the English cases: *Woolwich Building Society v Inland Revenue Commissioners (No. 2)* [1993] AC 70, [1992] 3 All ER 737 (HL): citing German law; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *White v Jones* [1995] 2 AC 207, 1 All ER 691, comparison with the laws of Germany, New Zealand, California, the USA, France, and the Netherlands; *Antwerp United Diamonds BVBA v Air Europe* [1996] QB 317, [1995] 3 All ER 424, comparison with Dutch and Belgian case law; *Hunter v Canary Wharf Ltd* [1997] AC 655; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349; *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, [2000] 3 All ER 673; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518: comparison with German law; *Greatorex v Greatorex* [2000] 4 All ER 769, [2000] 1 WLR 1970; *A v National Blood Authority* [2001] 3 All ER 289; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, [2002] UKHL 22, [2002] 3 All ER 305 (HL), damage following exposure to asbestos, comparison with the laws of Germany, Austria, Norway, Canada, Australia, Italy, South Africa, and Switzerland; *Campbell v Mirror Group Newspapers Ltd* [2004] AC 457, [2004] 2 All ER 995, liability for the invasion of personality rights and the violation of a person's privacy, comparison with German and French law; *The Starsin* [2004] 1 AC 715, [2003] 2 All ER 785; *Douglas and others v Hello! Ltd* [2005] [EWCA Civ] 595; *National Westminster Bank plc. v Spectrum Plus Ltd* [2005] UKHL 41, comparison with the laws of the USA, India, Ireland, Canada.

[71] M. Nounckele, n. 70.

[72] [1854] 9 Ex Ch 341.

[73] T. Bingham, n. 20, p. 5. See for the USA e.g. M. Minow, n. 9, III. (text following n. 135 and 136). She stresses that *Brown v Board of Education*, 347 US 483 (1954), one of the most famous decisions of the US Supreme Court, has benefited, among others, from foreign input; see also R. Glensy, n. 18, at 361: 'United States Courts have, from the founding of the nation to the present day, referenced foreign legal sources in a

Comparison is no longer limited to private law.[74] An increasing number of public or constitutional law courts have also resorted to the comparative method. In the USA, Justice Scalia, despite being opposed to the comparative approach, has stated:

> In many . . . cases, opinions for the Court have used foreign law for the purpose of interpreting the Constitution . . . I expect . . . that the Court's use of foreign law in the interpretation of the Constitution will continue at an accelerating pace . . . [U]se of comparative law in our constitutional decisions is the wave of the future.[75]

Based on an international survey Christopher McCrudden, constitutional lawyer at Queen's College, University of Belfast, found:

> It is now commonplace in many jurisdictions as well as for courts to refer extensively to the decisions of foreign jurisdictions when interpreting human rights guarantees.[76]

The Constitution of the Republic of South Africa of 1996 expressly invites courts to use the comparative method in matters concerning fundamental rights. The provision states: 'When interpreting the Bill of Rights, a court, tribunal or forum . . . (b) must consider international law; and (c) may consider foreign law.'[77] The Constitutional Court of South Africa is consequently today among the most active actors regarding a transnational judicial discourse.[78]

2. Benefits of using the comparative methodology

The reasons to resort to the comparative method, the aims pursued by the courts by comparing, and the assets of this method are plentiful.[79]

variety of different contexts . . . [E]xamples can be taken from almost every period of this nation's history', with numerous references.

[74] See e.g. C. McCrudden, 'Judicial Comparativism and Human Rights', in E. Örücü and D. Nelken (eds.), n. 27, p. 371: 'Courts are playing an impressive role in the creation of what some see as a "common law of human rights" or, in the context of Europe, "a ius commune of human rights" '; C. McCrudden, n. 4, at 499 ff.; A.-M. Slaughter, 'A Global Community of Courts', 44 Harv. Int. L. J. [2003] 191; P. Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat—Zugleich zur Rechtsvergleichung als "fünfter Auslegungsmethode" ', *JZ* [1989] 913; S. Baer, 'Verfassungsrechtsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [2004] 735; C. Fuchs, 'Verfassungsvergleichung durch den Verfassungsgerichtshof', JRP [2010] 183 (for Austria): '*Dass Verfassungsvergleichung auch für Verfassungsgerichte ein beachtliches Erkenntnispotential bergen kann, ist . . . heute weithin anerkannt. Der VerfGH zieht rechtsvergleichende Argumente in der—unausgesprochenen—Annahme ihrer grundsätzlichen Zulässigkeit und Leistungsfähigkeit zur Problemlösung heran*.'

[75] A. Scalia, n. 5, p. 307–9; see also Justice Ruth Bader Ginsburg, n. 26, at 591: 'Recognizing that forecasts are risky, I nonetheless believe we will continue to accord "a decent Respect to the Opinions of [Human] kind" as a matter of comity in a spirit of humility.'

[76] C. McCrudden, n. 4, at 506.

[77] Full text: 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.'

[78] See C. McCrudden, n. 4, at 506 with references in n. 26.

[79] See A. Gerber, n. 67, p. 150 et seq. ('*Gründe für das Heranziehen ausländischen Rechts*').

a) Positioning the national law in the international legal landscape

In some cases, courts cite foreign and international law in order to show that the national law is fully in line with modern solutions or international trends. This is frequently the case in Central or Eastern European countries that have recently reformed and re-codified their law. An example is the case law of the Lithuanian Supreme Court. The court has frequently referred to the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Principles of European Tort Law, and the Draft Common Frame of Reference, usually with the aim of showing that the new Lithuanian Civil Code is fully in line with these modern soft law principles.[80]

b) Complementary to the historical method of interpretation

Courts often cite foreign law or soft law principles that have served as an inspiration to the national legislator for their own legislation. In these cases the comparative method plays a support role which complements the historical method of interpretation of domestic law.[81]

In two decisions of 2010 and 2011, the Supreme Court of Lithuania has stated that the provisions of the Lithuanian Civil Code which were adopted under the influence of the UNIDROIT Principles shall be interpreted in the light of the Principles.[82]

To cite another example: in a landmark case of 2006, the Federal Court of Switzerland had to rule on the scope of damages for breach of contract. A parrot breeder had bought six parrots for his breeding farm. They were infected with a virus that was subsequently transmitted to the other birds in the breeding farm. As a result, all birds died and the breeder suffered a loss of around two million Swiss francs. He brought a claim for damages against the seller of the infected birds. The claim raised the issue of the scope and the limits of the seller's contractual liability.

The Swiss Federal Court awarded damages and, in defining the scope of contractual liability under article 208, sections 2 and 3 of the Swiss Code of Obligations, drew inspiration from the French author Pothier's Treatise on the Law of Obligations as well as from article 1150 of the French Civil Code, which were already known and had inspired the legislator when the Swiss Code of Obligations was being prepared.[83] The

[80] The Court has referred to the UNIDROIT Principles on International Commercial Contracts in 20 cases, to the Principles of European Contract Law in 11 cases, to the Draft Common Frame of Reference in one case, and to Principles of European Tort Law in three cases explicitly, in others implicitly, see S. Selelionyte-Drukteiniene/V. Jurkevicius/T. Kadner Graziano, n. 35, with references; C. McCrudden, n. 4, at 518, diagnoses a 'pedagogical impulse' in comparative constitutionalism; see also A.-M. Slaughter, 'A Typology of Transjudicial Communication', 29 U. Richmond L. Rev. [1994] 99 at 134: 'The court of a fledgling democracy, for instance, might look to the opinions of courts in older and more established democracies as a way of binding its country to this existing community of states.'

[81] A. Gerber, n. 67, p. 151. See e.g. the Swiss cases TF 03.04.1914, ATF 40 II 249 at 256; TF 05.04.1938, ATF 64 II 121 at 129, or the German cases BGHZ 21, 112 at 119, and BGHZ 24, 214 at 218 f.

[82] See S. Selelionyte-Drukteiniene/V. Jurkevicius/T. Kadner Graziano, n. 35, with references.

[83] TF 28.11.2006, ATF 133 III 257. For the opposite situation, see the Swiss case TF 22.5.2008, ATF 134, 497 c. 4.2.3, 4.3, 4.4.2: Swiss law, notably Art. 418 of the Swiss CO, served as a source of inspiration for Art. 89b of the German Commercial Code (HGB); the Swiss Federal Court then took inspiration from German legal doctrine and case law on Art. 89b HGB when interpreting Art. 418 of the Swiss CO.

most well-known English case concerning the scope of damages for breach of contract, *Hadley v Baxendale*,[84] dating back to 1854, equally takes inspiration from Pothier's Treatise on the Law of Obligations and article 1150 of the French Civil Code. In 1894, the Supreme Court of the United States in turn adopted the principles from *Hadley* for US law.[85]

Pothier's work, article 1150 of the French Civil Code, the English case of *Hadley v Baxendale*, American case law and notably that of the Supreme Court of the United States, and, last but not least, the Swiss Federal Court's judgment in 2006, are thus all based on the same idea of justice concerning the scope of contractual liability, an idea of justice existing well beyond national borders.

c) Discovering the diversity of solutions from which the court can choose

Courts use the comparative approach in order to discover and demonstrate the diversity of solutions in force in different jurisdictions and from which the court can choose when interpreting domestic law.[86]

Recent English case law has given, in some cases, an impressive comparative overview. For example, in *Fairchild v Glenhaven*, the House of Lords found inspiration in not only Californian, Canadian, Australian, and South African law, and in the US Restatement of the Law, but also cited German, Greek, Austrian, Dutch, Norwegian, French, Italian, and Swiss law.[87] In *Kleinwort Benson Ltd v Lincoln City Council*, the court referred to US law, and notably, the Restatement of the Law, as well as Canadian, Australian, South African, German, Italian, and French law.[88] In *Arthur Hall v Simons*, the House of Lords compared with US and Canadian law and other continental European legal systems, as well as Australian and New Zealand case law.[89] In *White v Jones*, the House of Lords referred to New Zealand, Australian, US, Canadian, German, French, and Dutch law.[90]

The Supreme Federal Court of Switzerland frequently analyses and cites the laws of countries that border Switzerland, namely, French, German, Austrian, and Italian law.[91]

Sometimes, the comparative overview is established by the court itself. More frequently the courts rely on comparative studies previously published by comparatists. Comparison thus widens the horizon and completes the picture of possible interpretations and solutions that are available to the courts to resolve a specific question. By using the comparative method, judges complete and improve the quality of their reasoning. Anne-Marie Slaughter observed in this respect:

[84] See n. 72. [85] *Primrose v Western Union Tel. Co.*, 154 US 1 [1894].

[86] See also A. Scalia, n. 5, p. 309: 'Adding foreign law to the box of available legal tools is enormously attractive to judges because it vastly increases the scope of their discretion.'

[87] [2003] 1 AC 32. [88] [2002] 2 AC 349.

[89] [2002] 1 AC 615. [90] [1995] 2 AC 207, 1 All ER 691.

[91] Out of numerous examples, see e.g. the cases TF 20.04.1972, ATF 98 II 73 (*Kienast c. Gubler*) (validity of a testament); TF 23.04.2009, ATF 135 III 433, c. 3.3 (contractual penal clauses): change of case law inspired by Italian and German law and legal doctrine.

> For . . . judges, looking abroad simply helps them to do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority . . . provides a broader range of ideas and experience that makes for better, more reflective opinions. This is the most frequent cited rationale advanced by judges regarding the virtues of looking abroad.[92]

d) Illustrating the aims and particularities of the domestic solution

In numerous judgments, courts cite foreign solutions in order to confront them with the solution that they have found for their own domestic law. They hereby illustrate the aims and particularities of their domestic law.[93]

By way of example, it's possible to mention a decision of the Federal Court of Germany (*BGH*) concerning the protection of personality rights and the right to privacy (*Caroline de Monaco*). Here the court compared German and French law, observing that the scope of the right to privacy is more limited in German law than in French law when opposed to the freedom of the press.[94] A German court of appeal provides another illustration in which the court cited US practice with respect to contingency fee agreements (i.e. agreements according to which the lawyer's fees depend on the outcome of the case). The court ultimately sets out that such agreements would be irreconcilable with the role of lawyers in German civil procedure.[95]

In *Kuddus v Chief Constable of Leicestershire Constabulary*, the English House of Lords notes that exemplary or punitive damages do not exist either in continental civil law systems, such as German and French law, nor in mixed legal systems which are influenced by both civil and common laws, such as Scots and South African law. The court therefore observes that, for the matter in question, it is 'unhelpful to look at the position in other jurisdictions'.[96]

In *Awoyomi v Radford*, the Queen's Bench Division of the English High Court refers to case law from the European Court of Justice (ECJ) concerning the immediate or future effects of a change in case law (the question of prospective overruling), before deciding that the case law of the ECJ could be materially distinguished from English law.[97]

[92] A.-M. Slaughter, n. 74, at 201.

[93] Compare A. Gerber, n. 67, p. 154; V. Jackson, n. 9, at 117: '[C]omparison can shed light on the distinctive functioning of one's own system . . . considering the questions other systems pose may sharpen understanding of how we are different', 128: 'engagement with foreign law . . . does not necessarily mean adoption, but thoughtful, well-informed consideration'; M. Minow, n. 9, text following n. 56: 'Looking at what others do may sharpen our sense of our differences rather than produce a sense of pressure to conform'; E. Young, n. 6, at 158: 'If American courts were to conclude that only domestic practice is relevant, then their judges might feel pressure to distinguish American mores . . . from the views they encounter on their European sabbaticals.'

[94] BGH 19.12.1995, BGHZ 131, 332 at 337 (taking inspiration from US law) and at 344 (opposing French law); for this use of the comparative method, see also the Swiss cases TF 04.06.1981, ATF 107 II 105 at 111; TF 18.05.1973, ATF 99 IV 75 at 76.

[95] OLG Celle 26.11.2004, NJW 2005, 2160. See, however, the German case: Constitutional Court 12.12.2006, 1 BvR 2576/04, BVerfGE 117, 163, NJW 2007, 979 (contingency fees admitted under specific circumstances).

[96] [2002] 2 AC 122, [2001] UKHL 29.

[97] [2007] EWHC 1671 (QB) no. 15 (per Lloyd Jones J).

The question of pre-contractual liability was addressed in the case of *Chartbrook v Persimmon Homes*. The House of Lords invoked the Principles of European Contract Law, the UNIDROIT Principles of International Commercial Contracts, and the CISG to highlight that the philosophy on which these regulations are founded differs from English contract law.[98]

It is also possible to mention judgments from the Swiss Federal Court concerning the conditions for the transfer of personal property. The court decided that, in contrast to German law (expressly indicating article 931 of the BGB), in Swiss law the ownership of movables cannot be passed on by the assignment of an action for recovery of the object.[99] The Federal Court therefore demonstrates that another outcome would be possible and practicable, but that there are reasons why it is not favoured by the court.

In another, nowadays classic, case, the Swiss Federal Court explicitly abandoned a solution formerly taken from German law according to which the transfer of ownership is separate from the validity of the contract of sale. The court thus discarded the abstraction principle, a pillar of German property law.[100]

In a case concerning a legal action brought by an environmental protection foundation, the Swiss Federal Court came to the conclusion that French legislation and case law, which was cited by the court of first instance, '*ne se concilient pas avec l'état actuel de notre législation*'[101] (cannot be reconciled with the current state of our legislation).

These examples show that the use of comparative law by courts is not at all limited to situations where the foreign solution is the one favoured by the courts. On the contrary, when the court's solution differs from another country's solution, the comparative approach can cause the court to expose national particularities and historical and cultural divergences that lead the court to favour one solution over another. In these cases, the comparative method contributes to a greater transparency and a better quality of reasoning. McCrudden concludes with respect to this purpose of judicial comparison:

> a use of foreign . . . law does not mean that the approach taken in the other jurisdiction will necessarily be *adopted*, just that it is *considered* . . . Even where the *result* of the foreign judicial approach has not been adopted, it has often been influential in sharpening the understanding of the court's view on domestic law.[102]

[98] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [2009] UKHL 38, no. 39 (per Lord Hoffmann). See also the case *Agnew v Länsförsäkringsbolagens* [2001] 1 AC 223 (House of Lords): Lord Millet states that with respect to pre-contractual liability there is a fundamental difference between English law on the one hand and French and German law on the other.

[99] TF 02.12.2005, ATF 132 III 155, c. 6.1.1 et 6.1.3: '*Das deutsche Recht . . . anerkennt die Abtretung des Herausgabeanspruchs als Ersatz für eine Übergabe. . . . [Für das schweizerische Recht ist] festzuhalten, dass durch eine Abtretung des Herausgabeanspruchs das Eigentum an einer Fahrnissache nicht übertragen werden kann, da dies mit dem Traditionsprinzip nicht zu vereinbaren ist.*'

[100] 29.11.1929 (*Grimm c. Masse en faillite Näf-Ackermann*), ATF 55 II 302.

[101] TF 20.02.2004, 4C.317/2002/ech (*La Fondation X. c. La Masse en faillite de feu A*, ou '*Gypaète barbu République V*').

[102] C. McCrudden, n. 4, at 512.

e) Countering the argument that a certain solution will lead to harmful results

The experiences in other jurisdictions are frequently cited by courts to counter the argument that a certain solution or interpretation of the law would have harmful or disastrous results.

Illustrations of this use of the comparative method are particularly common in English and US case law. For example, according to an old common law rule, someone who makes a payment following a mistake of law rather than a mistake of fact cannot seek restitution of the payment. In *Kleinwort Benson Ltd v Lincoln City Council*, the House of Lords abandoned this solution. The comparative approach was used to counter the argument that a right to restitution would result in a flood of litigation.[103]

In the English case *Arthur Hall v Simons*, the court considered the question of immunity of legal professionals for conduct during legal procedures. The court referred to the experiences of other countries in order to show that such immunity is not justified by practical needs, and the court subsequently abandoned the immunity.[104]

This use of the comparative method has furthermore been considered legitimate even by those who are in general opposed to the use of comparative law by the courts. In this respect, Justice Scalia has written:

> I suppose foreign statutory and judicial law can be consulted in assessing the argument that a particular construction of an ambiguous provision in a federal statute would be disastrous. If foreign courts have long been applying precisely the rule argued against, and disaster has not ensued, unless there is some countervailing factor at work, the argument can safely be rejected.[105]

f) Legal support for value judgments of the court

Often references to foreign law also play a role in highlighting that the solution favoured by the court is already recognized by other legal systems as being unbiased and fair, even if the legal approach to reaching this solution may differ from one country to another. This use of the comparative argument is particularly common and useful for the court when the decision is based on value judgments. In these situations, references to foreign legislation and case law provide *legal* support for the court's balancing of conflicting values.[106] In the English case *Alfred McAlpine Construction*

[103] [2002] 2 AC 349, 375 C (per Lord Goff): 'For the present purpose, however, the importance of this comparative material is to reveal that, in civil law systems, a blanket exclusion of recovery of money paid under a mistake of law is not regarded as necessary. In particular, the experience of these systems assists to dispel the fears expressed in the early English cases that a right of recovery on the ground of mistake of law may lead to a flood of litigation'.

[104] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 (see the opinions of Lord Bingham and Lord Hope).

[105] A. Scalia, n. 5, p. 306, see also p. 307: '[T]he argument is sometimes made that a particular holding will be disastrous. Here . . . I think it entirely proper to point out that other countries have long applied the same rule without disastrous consequences.'

[106] See e.g. A. Barak, 'Constitutional Human Rights and Private Law', 3 Review of Constitutional Studies [1996] 218 at 242: Comparative law 'grants comfort to the judge and gives him the feeling that he is treading on safe ground, and it also gives legitimacy to the chosen solution'; A.-M. Slaughter, n. 74, at 201: 'Evidence of like-minded foreign decisions could enhance the legitimacy of a particular opinion on the domestic constituency that a particular court seeks to persuade'; V. Jackson, n. 9, at 119.

Ltd v Panatown Ltd, Lord Goff of Chieveley stated in this sense: 'I find it comforting (though not surprising) to be told that in German law the same conclusion would be reached as I have myself reached on the facts of the present case.'[107]

Here it is possible to refer once again to the famous English case of *Fairchild v Glenhaven Funeral Services Ltd.* In this case, the court discussed liability of employers following the exposure of their employees to asbestos.[108] Inhaling asbestos fibres caused the employees to develop cancer. However, they had worked consecutively for several employers who had all exposed them to asbestos. This resulted in uncertainty as to where they had contracted the illness. According to traditional rules, the claim would have been rejected because the employees could not prove causation with the probability which is traditionally required. While searching for a solution that was favourable to the claim, the House of Lords found support in numerous foreign jurisdictions. In relation to this litigation, Lord Bingham observed:

> Development of the law . . . cannot of course depend on a head-count of decisions and codes adopted in other countries of the world, often against a background of different rules and traditions. The law must be developed coherently, in accordance with principles so as to serve, even-handedly, the ends of justice. If, however, a decision . . . 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. In a shrinking world . . . there must be some virtue of uniformity of outcome whatever the diversity of approach in reaching that outcome.[109]

This use of the comparative method can also be found in a recent judgment of the Swiss Federal Court which concerned the capacity of beneficiaries of a will. The court found confirmation for its solution in three out of four of its bordering countries' legal systems (German, Austrian, and Italian law, in contrast with French law).[110]

[107] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (per Lord Goff of Chieveley). For other recent examples of this use of the comparative method, see the English cases *Robinson v Jones (Contractors) Ltd* [2012] QB 44, [2011] EWCA Civ 9, nos. 49 and 78 (LJ Jackson); *D v East Berkshire Community Health NHS Trust MAK v Dewsbury Healthcare NHS Trust, RK v Oldham NHS Trust* [2005] 2 AC 373, [2005] UKHL 23: same outcome in Australian law (no. 89, Lord Nicholls) and the law of New Zealand (no. 113 and 114, Lord Rodger), dissenting opinion by Lord Bingham who refers to French and German law (no. 49): 'no flood of claims in these countries'. See, on this use of the comparative method, and criticizing it, A. Scalia, n. 5, p. 309: 'It will seem much more like a real legal opinion if one can cite authority to support the philosophic, moral, or religious conclusions pronounced. Foreign authority can serve that purpose'. See for Switzerland A. Gerber, n. 67, p. 157.

[108] [2003] 1 AC 32. On this and the following cases T. Bingham, n. 20, p. 9 et seq.

[109] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, [2002] UKHL 22, [2002] 3 All ER 305 at 334.

[110] 06.02.2006, ATF 132 III 305: '*Auch in ausländischen Rechtsordnungen wird . . . die rechtswidrige Beeinträchtigung des freien Erlasserwillens als Erbunwürdigkeit erfasst (z.B. in § 2339 des deutschen BGB, in § 542 des österreichischen ABGB und in Art. 463 des italienischen Codice civile, nicht hingegen in den Art. 727 ff. des französischen Code civil).*' For other examples of the use of the comparative method for the same purpose, see A. Gerber, n. 67, p. 155 et seq.

g) Legal support when changing an established case law or when confronting new problems

In some of the most famous examples of comparison in case law, courts have resorted to the comparative method in order to justify fundamental changes to domestic case law or to confront new problems and to introduce new institutions or remedies.

It is possible to mention many cases where courts have used the comparative method to justify changes to the law: we have already referred to the case *Kleinwort Benson Ltd v Lincoln City Council*,[111] in which the House of Lords abandoned the common law rule according to which it was only possible to claim restitution of money paid following a mistake in fact as opposed to a mistake of law. Here the court also found support in several foreign jurisdictions for overturning the precedent.

In *White v Jones*, the court considered the question of contractual or tortious liability of a solicitor in relation to pure economic losses suffered by the claimant following the solicitor's professional negligence. The House of Lords observed that despite the conceptual difficulties, in many jurisdictions (the court cited German, French, Dutch, Canadian, US, Australian, and New Zealand law), it is possible to find a favourable solution for the claimant in either the law of contract or the law of tort ('Many jurisdictions have found a remedy in the situation in which the present plaintiffs find themselves'). The court subsequently introduced liability for negligence of legal professionals in English tort law.[112]

In two landmark cases, the Supreme Court of Austria consecutively allowed, in Austrian law, liability for nervous shock and damages for immaterial harm following the loss of a close relation (damages for bereavement).[113] The court cited, as sources of inspiration and to support overruling previous case law, Swiss, French, Italian, Spanish, Scots, Greek, Yugoslavian, Belgian, and Turkish law. The court found information on these laws in the writings of comparatists. It seems that the desire to avoid isolation and to support majority trends in Europe was not the least of motivations for the Austrian Supreme Court.

In some decisions, foreign solutions are cited *obiter dictum* to draw attention to new problems that have not yet been dealt with by the national legislator or by domestic case law. In these situations, the aim is to encourage the legislator and doctrine to examine the problem and to work out a solution.[114]

More commonly, the court itself will introduce a new solution. A well-known illustration can be found in decisions in Germany that recognized personality rights and the right to privacy as an absolute right, protected by the means of tort liability (§ 823, section 1 of the BGB and article 2, section 1 of the Basic Law for the Federal Republic of Germany). The Federal Court of Germany[115] as well as the German

[111] [2002] 2 AC 349.

[112] *White v Jones* [1995] 2 AC 207, 1 All ER 691, see the opinion of Lord Goff of Chieveley.

[113] OGH, ZVR 1995/46 and OGH 16.05.2001, JBl. 2001, 660.

[114] See A. Gerber, n. 67, p. 152 and e.g. the cases TF 10.05.1932, ATF 58 II 151 at 156 (company law); 20.01.1981, ATF 107 II 57 at 66 (copyright); 21.12.1982, ATF 108 II 475 at 484 s.

[115] BGH 05.03.1963, BGHZ 39, 124 at 132; BGH 19.12.1995, BGHZ 131, 332 (*Caroline de Monaco*): protection of privacy, reference to US law. For further examples, see H. Kötz, n. 69, p. 832 et seq.

Constitutional Court[116] found support in foreign laws when introducing a protection of personality rights and of privacy ('*Allgemeines Persönlichkeitsrecht*').[117]

In an English case in 1991 the court still stated that '[i]t is well known that in English law there is no right to privacy'.[118] If the judgments of the Court of Appeal and the House of Lords, notably in *Douglas and others v Hello! Ltd*[119] and *Naomi Campbell v Mirror Group Newspapers Ltd*,[120] were to change the law, it would be largely thanks to the case law of the European Court of Human Rights and—last but not least—the influence of comparative law.[121]

Another example is provided by the decisions concerning claims brought by parents, and indeed children, against doctors for damages following an unwanted birth. The issue of medical malpractice for 'wrongful life', 'wrongful birth', or 'wrongful pregnancy' has been considered by the courts in many jurisdictions over the last few years.

In Germany, the landmark case in this matter, published in the official collection under the English title 'wrongful life', drew inspiration from the case law of the English Court of Appeal as well as US law.[122] The Swiss Federal Court took inspiration from German and Dutch case law, distinguishing itself from case law of the English House of Lords and the Supreme Court of Austria.[123] In another landmark decision, the Supreme Court of Austria in turn took inspiration from French, Italian, Scots, and Danish law, while distinguishing German, Dutch, Belgian, and Spanish law.[124] Dutch case law took German law into consideration, and in turn, exerted an influence on Scots law.[125] In France, on the initiative of the judges of the *Cour de Cassation*, the case '*Perruche*' was preceded by comparative studies on liability for wrongful life and wrongful birth, from which it drew inspiration.[126] In truth, judgments relating to this issue that have not referred to foreign case law are very rare.

In Germany, an important procedural innovation, namely the publication of dissenting opinions of judges in the Federal Constitutional Court's judgments, has drawn inspiration from Anglo-Saxon law.[127]

h) Legal discourse on an international scale and 'soft harmonization'

It is possible to identify an eighth and final effect (and perhaps also a final objective) of comparison by the courts. In the aforementioned decisions, as well as in many others,

[116] BVerfG 14.02.1973, BVerfGE 34, 269 at 289, 291.

[117] See H. Ehmann, 'Das Allgemeine Persönlichkeitsrecht—Zur Transformation unmoralischer in unerlaubte Handlungen', *in* C.-W. Canaris et al. (eds.), n. 69, p. 613 at 628 n. 81 and at 640.

[118] *Kaye v Robertson* [1991] FSR 62 (Glidewell, LJ).

[119] [2005] EWCA Civ 595.

[120] [2002] EWCA Civ 1373.

[121] Starting with the case *Von Hannover c l'Allemagne*, no. 59320/00, CEDH 2004-VI.

[122] 18.01.1983 ('wrongful life'), BGHZ 86, 240 at 249–51.

[123] 20.12.2005, ATF 132 III 359; case note: J. Essebier, '"Wrongful birth" in der Schweiz', *ZEuP* [2007] 888.

[124] 14.09.2006, 6 Ob 101/06f; see also OGH 25.05.1999, 1Ob 91/99k (comparison with German law).

[125] E. Hondius, n. 13, p. 764.

[126] Cour de Cassation 17.11.2000, D. 2001, 332: report of the 'avocat général' Pierre Sargos, JCP 2000 II No. 10438, p. 2302; conclusions de l'avocat général Jerry Sainte Rose, JCP 2000 II, No. 10438, 2308 et seq.; G. Canivet, *supra* n. 52, p. 190 et seq.; Cour de Cassation 19.11.2002 (*Epoux Brachot c. Banque Worms*), JCP 2002 II No. 10201, and avocat général Jerry Sainte Rose, JCP 2002 II No. 10201.

[127] P. Egbert, 'Für und Wider das Minderheitsvotum', *Die Öffentliche Verwaltung* [1968] 513.

courts draw inspiration from the laws of jurisdictions sharing the same values. In some cases, the courts adopt in their case law a truly European or even a global perspective. By demonstrating such open-mindedness, judges pave the way for discussion of legal problems on a European, or indeed a global, scale, thus creating a genuine European or even global community of lawyers who are able to comfortably discuss with each other.[128] In situations where this discussion leads to shared beliefs and solutions, comparison contributes to 'soft harmonization' of the law on a supranational scale.[129]

IV. Conclusions

From these reflections, a number of conclusions can be drawn:

1. If the applicable domestic law is clear and does not lend itself to interpretation, the judge is bound and can only with great difficulty and exceptionally deviate from the result prescribed by his domestic law by using the comparative approach.
2. None of the arguments against the legitimacy of the comparative approach are convincing. For the numerous cases in which domestic law has gaps or lends itself to interpretation, the comparative method is at the disposal of judges who may use it to find inspiration when interpreting domestic law.
3. Nowadays, it is possible that the comparative method constitutes (as it already does in a certain number of countries) a *fifth method of interpretation*, alongside the classical methods of interpretation, namely the literal, historical, systematic, and purposive approaches (or, depending on the country, alongside interpretation in conformity with principles of the national constitution or EU law also).
4. Neither foreign legislation nor foreign case law binds the judge when interpreting his country's law. Consequently, foreign law is only a *persuasive authority* and may only guide the judge as such.

[128] With regard to transnational judicial comparison in the field of human rights A.-M. Slaughter, n. 80, at 121 f.: 'courts around the world [are] in colloquy with each other'; Slaughter, n. 74, at 193: with respect to certain questions she observes a 'constitutional cross-fertilization' and an 'emerging global jurisprudence'; ibid. at 202: 'The practice of citing foreign decisions reflects a spirit of genuine transjudicial deliberation within a newly self-conscious transnational community'; see in Europe: C. Witz, 'Plaidoyer pour un code européen des obligations', in *Recueil Dalloz* 2000, Chroniques, p. 79 at 81.

[129] See e.g. *Cheah v Equiticorp Finance Group Ltd* [1992] 1 AC 472, [1991] 4 All ER 989 (Lord Browne-Wilkinson): 'It is manifestly desirable that the law on this subject should be the same in all common law jurisdictions'; *Attorney General v Sport Newspapers Ltd* [1992] 1 All ER 503 (High Court, QBD); *Smith v Bank of Scotland* [1997] SC 111 (120) (HL); E. Örücü, n. 27, pp. 415, 421, 425.

5. The aforementioned case law bears witness to the fact that courts, and notably supreme courts, pursue several objectives when using the comparative approach. Courts use the comparative approach:
   - in order to demonstrate that the domestic law is fully in line with modern international trends;
   - to complement the historical method of interpretation of domestic law;
   - to discover and demonstrate the diversity of solutions from which the courts may choose;
   - to benefit from experiences made abroad and to avoid reinventing the wheel again and again;
   - to sharpen one's own understanding of certain legal problems and to compare the national solution with differing foreign solutions in order to highlight the particularities of the domestic law;
   - to counter arguments that a given solution will lead to harmful or disastrous results;
   - to find legal support for a value judgment by the court; and finally,
   - to justify changes to domestic case law or to confront new problems, introduce new institutions or remedies.
6. Insofar as judges agree to take inspiration from foreign law or international principles derived from comparison, the comparative method will also become an important tool for lawyers who wish to use it in court in the interest of their clients.
7. So that the court has a solid base for use of the comparative method, it is essential to provide judges with reliable, solid, and trustworthy information as to the content of foreign law. This responsibility falls with the researchers and comparatists who use the comparative approach in their publications. Regarding a case before the court, this comparative research could also be undertaken, and information provided, on an ad hoc basis by comparative law institutions or by lawyers or their staff trained in comparative law.
8. With the progressive programme of European integration, and notably in matters affecting economic relationships, the judge could use the comparative interpretation while pursuing the aim of soft harmonization which provides an alternative to legislative harmonization ('bottom up' instead of 'top down' approach to harmonization).
9. By using the comparative method, courts contribute to the establishment of a legal discourse that transcends borders. They hereby contribute to the creation of a genuine European or even global community of lawyers who are able to comfortably communicate with each other about topical legal issues.

Thus, the widespread belief in the judiciary of the legitimacy and the multiple benefits of judicial comparison is well founded. With respect to this topic, Thomas Bingham has most aptly made the following point:

> In no other field of intellectual endeavour—be it science, medicine, philosophy, literature, architecture, art, music, engineering or sociology—would ideas or insights

> be rejected simply because they were of foreign origin . . . [I]t would be strange if [in the field of law] alone practitioners and academics were obliged to ignore developments elsewhere, or at least to regard them as of no practical consequence. Such an approach can only impoverish our law; it cannot enrich it.[130]

[130] T. Bingham, *Widening Horizons*, n. 20, p. 6; in the same sense e.g. Aharon Barak, judge of the Supreme Court of Israel, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', 116 Harv. L. Rev. [2002], 16 at 111: 'Indeed, the importance of comparative law lies in extending the judge's horizons'; Martha Minow, Dean of Harvard Law School, n. 9, III. Reclaiming the Chance to Learn: 'Neglecting development in international and comparative law could vitiate the vitality, nimbleness, and effectiveness of American law or simply leave us without the best tools and insights as we design and run institutions, pass legislation, and work to govern ourselves.'

3

Comparative Law and the Courts

What Counts as Comparative Law?

*Geoffrey Samuel**

Do common law judges make use of comparative law in their decision-making and judgments? The question is not such an easy one because much depends upon what one means by 'comparative law'. In the past the expression tended to be used in a somewhat loose sense without much thought as to its epistemological implications, but over the past couple of decades the literature devoted to comparative law theory has intensified to a considerable degree. This, in short, has provoked the question as to what actually counts as 'comparative law'.

I. Introduction: identifying the difficulties

The use of comparative law in national and international courts is a topic fraught with difficulties. These difficulties stem primarily from the notion of 'comparative law' itself—that is to say its definition, its scope, and its context—but they also stem from the relationship between any given legal system and the various historical, geographical, and intellectual contexts of the given system itself. Thus just because the judges in, say, an English or a French court, during a particular epoch, might never refer to, or seemingly interest themselves in, a foreign case, piece of legislation, or doctrinal work, it does not follow that comparative law, for the epoch in question, has no relevance or even role with regard to these courts. For comparative law is concerned with two fundamental questions. What is 'comparison'? And what is 'law'?

These questions immediately indicate that the mere citing of foreign material in a judgment, report, or argument does not amount in itself to the use of comparative law by a court. One might draw an analogy with the law school. To provide students with a definition of comparative law that is adequate enough to locate the precise boundaries between the subject of the definition and a range of associate subjects such as legal history, legal theory, sociology of law, Roman law, European Contract Law, and the like is probably impossible.[1] What can be done is to state what comparative law is not. Thus it is not, for example, an introduction to French law or to German law, since such subjects do not have at their heart knowledge obtained about law through comparison. Moreover, an introduction to a foreign legal system will not necessarily enlighten

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[1] See eg K Zweigert and H Kötz, *An Introduction to Comparative Law* (Oxford University Press, 3rd edn, 1998; trans T Weir), pp 2–12.

students about the epistemological issues that surround the 'law' question.[2] No doubt a study of a foreign system could broaden the student's mind about what amounts to legal knowledge. Yet there is the danger that it might also have the opposite effect, in as much as it could consolidate a view that legal knowledge is simply a matter of rules.[3] Of course, the citing of foreign material in a national court is not exactly analogous to the introduction of courses on foreign law in a law faculty, but it does go some way in stressing that great care must be taken when one talks of comparative law in the courts. Often one is not actually talking of comparative law. What is meant is that foreign material is being considered by the court which may, or may not, draw conclusions obtained through methods that can properly be described as comparative. And even if the comparative method is adopted, this will not necessarily in itself mean that comparative law is in play. A true comparatist needs continually to be reflecting on the nature of legal knowledge itself.[4]

II. What is 'law'?

When one turns to this 'law' question, a whole range of issues start to emerge out of the fuzzy image that comparative law as a title seemingly creates. The first concerns the relationship in general between a specific national legal system and what Professor Legrand calls 'the other'.[5] This relationship can be of a great many kinds depending on the systems in play. However, when the national system is the English common law and the 'other' is the civil law tradition, the relationship turns out, possibly, to be rather asymmetrical. Just as equity cannot be properly defined or understood without a thorough knowledge of the common law and its history (the reverse being perhaps not quite so true),[6] so English law cannot today be properly comprehended without a reasonable understanding of aspects of the civil law. In other words the relationship between English law and continental law is probably rather different from the relationship between a civil law system, as a national system, and the common law as 'other'. The reason for this is the common law's complex intellectual relationship with, above all, civilian doctrine which has functioned, particularly during the 19th century, at the level both of theory—one thinks of John Austin and, later, the whole analytical tradition[7]—and of practice.

At the practical level the relationship between the common law and the civil law is, for example, of importance in understanding a number of modern categories of law.[8] The law of contract was virtually an import,[9] citations to foreign material being particularly in evidence between 1850 and 1880, and the language of Roman law was

[2] This point is developed in more depth in G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart, 2014), pp 121–51.

[3] See eg R Perrot, *Institutions judiciaires* (Montchrestien, 14th edn, 2010), para 228.

[4] P Legrand, *Le droit comparé* (Presses Universitaires de France, 3rd edn, 2009), pp 34–49.

[5] Ibid., pp 27–9.

[6] Or at least the reverse being different.

[7] P Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980), p 70ff.

[8] J Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013), pp 21–7.

[9] AB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 Law Quarterly Review 247; Gordley, ibid., pp 251–4.