Is it Legitimate and Beneficial for Judges to Use Comparative Law?

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‘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. [...] it 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’.

‘When interpreting the Bill of Rights, a court, tribunal or forum [...] (b) must consider international law; and (c) may consider foreign law’.

Abstract: In many European jurisdictions, the courts use the comparative method when applying domestic law. In some countries, they use this method occasionally; in others, the highest courts use comparative law in the field of private law in between 10 per cent and more than 30 per cent of all cases. However, it is sometimes still questioned whether it is legitimate for courts to use the comparative methodology, alongside the traditional methods of interpretation, when determining and interpreting domestic law. A very animated discussion among judges of the US Supreme Court has helped put this issue on the agenda of comparatists, lawyers, and judges. The following contribution analyses the arguments against and for the use of comparative law by the courts. On the basis of court decisions, the numerous benefits that judges and courts derive when using the comparative method are demonstrated.

Résumé: Dans de nombreux pays européens, les tribunaux utilisent aujourd’hui la méthode comparative. Dans certains États, les tribunaux y font recours occasionnellement; dans d’autres, les arrêts des tribunaux suprêmes comportent des références comparatives à d’autres ordres juridiques dans 10% à plus de 30% des cas.


** Dr. iur. (Goethe-Universität Frankfurt) habil. (Humboldt-Universität zu Berlin), LL.M. (Harv.), Professor at the Faculty of Law, University of Geneva, Switzerland, and Director of the Program on Transnational Law (CDT/CTL).


2 Constitution of the Republic of South Africa (1996), Art. 39(1). Interpretation of Bill of Rights. 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’.
In the early twenty-first century, it might seem surprising to still ask the question of whether it is legitimate for the judge to use the comparative method. However, judges in some countries still question the legitimacy of the use of comparative methodology by the courts. The experience of teaching comparative law shows that students, despite the intellectual pleasure that they might derive from comparing laws, also often doubt whether it is legitimate for courts to use the comparative methodology. They also have doubts concerning the benefits they might be able to derive of the comparative method in their future practical life as lawyers or judges.\(^3\) 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.

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\(^3\) See A. BULLIER, ‘Le droit comparé dans l’enseignement – Le droit comparé est-il un passe-temps inutile?’, *RDIC* 2008, p. 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’.
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 being 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, 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 would have 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 that 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 civil law.4

In such a case, is it legitimate for the court to take inspiration from foreign 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 put this issue on the agenda of comparatists, lawyers, and judges.

This contribution first analyses the arguments against and for the legitimacy of the comparative method when it comes to applying domestic law (sec. 2). 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 (sec. 3).

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2. Comparative Law: A Method at the Disposal of the Courts?

2.1. 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.\(^5\)

2.1.1. 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 would fail 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 law.\(^6\)

2.1.2. 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 the national legal systems.

2.1.3. 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 weighing of interests necessarily takes place within the national context, taking into account the specifics of the situation in the concerned country 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

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\(^6\) A. SCALIA, ‘Commentary’, 40. St. Louis U. L.J. 2006, p. 1119 at 1122: ‘[w]e 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’.

\(^7\) In this sense, A. SCALIA, supra n. 5, ibid.
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 fashions on Americans’. 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’.

2.1.4. Legal Science: A Largely National Science

During 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’, the law remains a largely national science. The Federal Supreme Administrative Court of Germany accordingly declared in a 1993 judgment that *die Rechtswissenschaft ist eine national geprägte Wissenschaft* (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

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8 In *Lawrence et al. v. Texas*, 539 US 558 [2003], 598 (on the constitutionality of a statute of the State of Texas prohibiting sexual relations 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. *Id.*, 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’.


11 Bundesverwaltungsgericht (BVerwG) (Federal Administrative Court) 30.06.1992 (on the recognition of a Polish Master of Laws degree), *NJW* 1993, 276.
legal fees calculated according to the final result, Erfolgshonorare or contingency fees, valid in US law but prohibited and hitherto deemed contrary to moral and legal standards by German law.

2.1.5. Lack of Knowledge of Foreign Law

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 do not know or, at best, only know a little foreign law, use of the comparative method would open the route to error, danger of an incorrect understanding, and a false interpretation of foreign law. Added to which, there are often also linguistic barriers that make understanding foreign law particularly difficult and multiply the risks of error. Furthermore, the judge would simply not have the time and the resources that would be necessary to systematically carry out comparative research.


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 Schweizer, vol. 1, Stämpfli, Bern 2011, p. 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'.

14 See J. STAPLETON, 'Benefits of Comparative Tort Reasoning: Lost in Translation', 1. J. Tort L. 2007, p. 6 at 33, introducing the notion of ‘comparative foreign-language law’ that should be left aside when comparing: 'The 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; article published also in Liber Amicorum Tom Bingham, OUP, Oxford 2009, p. 773. See, on this issue, also J. BELL, 'Le droit comparé au Royaume-Uni', in X. Blanc-Jouvan et al. (eds), L’avenir du droit comparé, un défi pour les juristes du nouveau millénaire, Société de Législation comparée, Paris 2000, p. 283; B. MARKESINIS & J. FEDTKE, 'The Judge as Comparatist', 80. Tul. L. Rev. 2005–2006, p. 11 at 167.

15 See the example given by HONDIUS, supra n. 13, p. 759 at 773.
2.1.6. 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 would rely on the comparative argument, whereas they reject 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 frequently by critics of the comparative approach in recent discussion in the United States and notably by judge Antonin Scalia.\(^{16}\)

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

2.2. 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.

2.2.1. 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.\(^{17}\) 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 do not hesitate to cite foreign law in situations where the solution under foreign law differs from that preferred by the court.\(^{18}\)

\(^{16}\) A. Scalia, 98. Am. Soc’y Int’l L. Proc., p. 305 at 308: ‘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’.


\(^{18}\) See infra sec. 3.2.4.
2.2.2. Information on Foreign Law Is 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.¹⁹

For numerous points of law, this information is now available. Indeed, 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 Society of European Contract Law (SECOLA), the European Group of Tort Law, the European Centre of Tort and Insurance Law (ECTIL), the Commission on European Family Law, 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.²⁰ 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 laws, 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.²¹ In a case brought before the court, it is also possible

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¹⁹ See also T. BINGHAM, Widening Horizons, supra n. 1, pp. 4 et seq., who reminds us incidentally that ‘few human activities are free from the risk of error and judicial decision-making is no exception’.

²⁰ 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.

²¹ 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
for this comparative research to be carried out on an ad hoc basis by comparative law institutions and lawyers trained in comparative law.

Due 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.

2.2.3. Access to Foreign Law: The Private International Law Argument

In cross-border cases that present closer links with a foreign legal system than 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.

2.2.4. 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.

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 court would be able to build on this knowledge and to use the comparative arguments when interpreting domestic law.

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’.


23 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?’, supra n. 4.

24 In some jurisdictions, such as Switzerland, the judge establishes the content of foreign law ex officio; see Art. 16 sec. 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, Sweet & Maxwell, London 2006, vol. 1, secs 9-001 et seq.; see also ORUCÜ, ‘Comparative Law in Practice: The Courts and the Legislator’, in E. Örücü, D. Nelken (eds), Comparative Law – A Handbook, Hart, Oxford 2007, p. 411 at 414, 418.
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.

2.2.5. 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 twentieth century, in countries such as France and Germany, legal science was effectively a widely national science. However, in other countries, notably the United Kingdom 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. To the contrary, the doctrine in these jurisdictions, and in some of them also the court practice, has a long history of using the comparative approach. In the second half of the twentieth century, more and more legal scientists have been arguing in favour of an internationalization (or more accurately, a re-internationalisation) of legal science. 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.

2.2.6. 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 that would necessarily

25 References in infra sec. 3. See also E. HONDHUS, supra 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’.


27 For references, see, e.g., TH. KADNER GRAZIANO, European Contract Law, Palgrave Macmillan, Basingstoke 2009, pp. 7 et seq.
have to take place within each country’s own cultural context. 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 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 and has introduced, for example, a general part in the new Code of Obligations. 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. The new Lithuanian Civil Code of 2000 takes inspiration, among others, from the codifications and statutes of the Netherlands, Quebec, Germany, France, Italy, Switzerland, Sweden, Latvia, Japan, and Russia, as well as from the CISG and the UNIDROIT Principles. Polish law has recently taken inspiration from German and Dutch laws, 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”.

In 2002, the German Civil Code experienced the most important reform since it came into force in 1900. Initiated by a European Directive, the drafting process of this reform took inspiration from a wide range of European jurisdictions.

In China, important law reforms have taken place during the last 15 years, in particular with the adoption of the Chinese Contract Act of 1999 and the Law of Property Act of 2007. 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

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28 See supra sec. 2.1.3 with references.
Commercial Contracts, and the Principles of European Contract Law.\footnote{34} The new Law of Property Act drew inspiration from the laws of Germany, France, Japan, and Taiwan and from some aspects of English and US laws.\footnote{35} In 2002, the project of a Chinese Civil Code was presented. The structure of the Code was inspired by the example of the Pandects and by Dutch law.\footnote{36}

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.\footnote{37} 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.\footnote{38} 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.\footnote{39} In the same spirit, the

\begin{footnotes}
\footnote{35} Ibid., p. XX.
\footnote{36} Ibid., p. XXII.
\footnote{38} Article 1, sec. 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, Libr. général de droit et de jurisprudence, Paris 1919, pp. 326 et seq., No. 204; see also TH. HENNINGER, Europäisches Privatrecht und Methode, Mohr Siebeck, Tübingen 2009, p. 80, with further references.
\end{footnotes}
highest court in Germany, the Federal Constitutional Court, expressly recognized, in 1953 already, the use of the comparative method by courts to fill gaps in domestic law and to interpret it.40

In other jurisdictions, 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.41

The courts consequently benefit from a substantial freedom in their choice of methods to determine the law and 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.42

2.2.7. 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. This aim can be achieved through systematic interpretation that is one of the principal methods of interpretation of law. Indeed, like every other method of interpretation, the comparative method must allow an interpretation and development of the law so that, out of the many possible solutions, the most convincing is chosen while preserving coherence within the domestic system of law.43

40 18 Dec. 1953, BVerfE 3, p. 225 at 244: ‘Im übrigen haben die Gerichte sich der erprobten Hilfsmittel, nämlich der Interpretation und Lückenfüllung, unter Verwertung auch der rechtsvergleichenden Methode bedient’.

41 See, e.g., Arts 6 et seq. of the Austrian Civil Code (ABGB), Arts 1 et seq. of the Spanish Civil Code (Código civil), Arts 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, Arts 1.3 et seq. of the Lithuanian Civil Code, and Arts 4 et seq. of the Latvian Civil Code; see also TH. HENNINGER, supra n. 38, e.g., pp. 437 et seq. with further references.

42 For references, see infra sec. 3.

The Authority of Foreign Law: A Persuasive Authority

It is clear that the judge is bound by domestic law as well as 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.

First, 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.\(^{44}\) In such a case, it is, in principle,\(^ {45}\) the role of the legislator (national or international) to solve the problem (if there is a problem). However, situations in which interpretation of domestic law does not leave space for doubt or a margin of appreciation for the judge are very rare. 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 large.

Second, foreign legislation and case law can never bind the national judge. The authority of foreign law can only be a persuasive authority. 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. The more a certain issue is politically sensitive, the less willing will some judges be to draw inspiration from foreign law and experience. This is possibly the reason why the use of comparative law in 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 United States.\(^ {46}\)

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44 See Bell v. Peter Browne & Co. [1990] 2 Q.B. 495 (MUSTILL L.J.) 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 law is clear and we must apply it’.

45 For this rule and its limits, see, e.g., TF 28 Nov. 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 sei verfassungswidrig oder 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’.

46 See, supra 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, supra n. 5,
2.2.9. **Soft Harmonization of the Law within the Context of Regional Integration**

Finally, the use of the comparative method is justified nowadays, in Member States of the European Union (EU), by the membership of these countries in the Union. According to Article 3, section 3 of the Treaty of the 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 that constitutes, at least for some matters, an alternative to harmonization through enacting legislation. In relation to this, Walter Odersky, the former President of the German Federal Court, has written:

> [...] The national judge has not only the right to rely on interpretations from other legal systems and courts in his judgement, 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 harmonisation 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. [...] 

2.3. **Intermediate Conclusions**

In the search for a fair solution, when interpreting his domestic law and determining its content, 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 many national courts draw inspiration from foreign solutions when interpreting domestic law. Indeed, important innovations notably in English, German, Austrian, and Swiss judicial law have taken inspiration from comparison with solutions that are in force abroad.

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48 See the references in infra sec. 3.
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, Premier Président of the French Cour de Cassation at the time, 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'.

According to Guy Canivet, ‘the use of comparative law is essential to the fulfilment of a Supreme Court’s role in a modern democracy’. Andenas and Fairgrieve come to the conclusion that ‘Courts make use of comparative law, and make open reference to it, to an unprecedented extent. […] Comparative law has become a source of law’. Tom Bingham concludes that ‘Judicial horizons have widened and are widening’.

3. Comparative Law in Court Practice

3.1. 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. 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. In other countries on the continent, the courts occasionally resort to the comparative method.

49 In G. CANIVET, M. ANDENAS & D. FAIRGRIEVE (eds), supra n. 10, p. v at vii.
50 Ibid., p. 181.
51 Ibid., p. xxvii.
52 T. BINGHAM, supra n. 1, p. 3.
55 For France, see R. LEGEAIS, ‘L’utilisation du droit comparé par les tribunaux’, 46. Revue Internationale de Droit Comparé 1994, p. 347; G. CANIVET, supra n. 43, p. 181, in particular pp. 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 plénière. For Spain,

recent study, for the period of 1996 to 2005, between 25 per cent and 33 per cent of House of Lords decisions have included comparative references to other legal systems.\textsuperscript{57} Some of the judgments that have benefitted from looking beyond borders are among the most prominent private law cases in English legal history, such as \textit{Hadley v. Baxendale}\textsuperscript{58} that 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 \textit{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’.\textsuperscript{59}

Comparison is no longer limited to private law.\textsuperscript{60} An increasing number of public or constitutional law courts have also resorted to the comparative method. In the United States, Judge Scalia, despite being opposed to the comparative approach, has observed that:

\begin{quote}
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.\textsuperscript{61}
\end{quote}


\textsuperscript{57} M. NOUNCKELE, supra n. 56.
\textsuperscript{58} [1854] 9 ExCh 341.
\textsuperscript{59} T. BINGHAM, supra n. 1, p. 5.
\textsuperscript{61} A. SCALIA, supra n. 5, pp. 307–309.
Article 39, section 1 of the Constitution of the Republic of South Africa of 1996 (concerning the interpretation of the Bill of Rights) expressly invites courts to use the comparative method in matters concerning fundamental rights.\(^\text{62}\)

### 3.2. 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.\(^\text{63}\)

#### 3.2.1. 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 the central or eastern European countries that have recently reformed and recodified 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.\(^\text{64}\)

#### 3.2.2. 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 that complements the historical method of interpretation of domestic law.\(^\text{65}\)

In two decisions of 2010 and 2011, the Supreme Court of Lithuania has stated that the provisions of the Lithuanian Civil Code that were adopted under the influence of the UNIDROIT Principles shall be interpreted in the light of the Principles.\(^\text{66}\)

\(^{62}\) Supra n. 2.

\(^{63}\) See A. GEBER, supra n. 53, pp. 150 et seq. (‘Gründe für das Heranziehen ausländischen Rechts’).

\(^{64}\) 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. SELELYONYTE-DRUKTEINIE, V. JURKEVICIUS & TH. KADNER GRAZIANO, supra n. 30, with references.

\(^{65}\) A. GEBER, supra n. 53, p. 151. See, e.g., the Swiss cases TF 3.4.1914, ATF 40 II 249 at 256; TF 5.4.1938, ATF 64 II 121 at 129, or the German cases BGHZ 21, 112 at 119, and BGHZ 24, 214 at 218 et seq.

\(^{66}\) See S. SELELYONYTE-DRUKTEINIE, V. JURKEVICIUS & TH. KADNER GRAZIANO, supra n. 30, with references.
To cite another example: in a landmark case of 2006, the Federal Court of Switzerland (TF) 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 consequently suffered a loss of around 2 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 Swiss Code of Obligations was being prepared. The most well-known English case concerning the scope of damages for breach of contract, Hadley v. Baxendale, 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.

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.

3.2.3. Discovering the Diversity of Solutions from Which the Court Can Choose

Courts often 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.

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

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67 TF 28 Nov. 2006, ATF 133 III 257. For the opposite situation, see the Swiss case TF 22 May 2008, ATF 134, 497 c. 4.2.3, 4.3, 4.4.2: Swiss law, notably Art. 418 of the Swiss CO, served as 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.

68 Supra n. 58.

69 Primrose v. Western Union Tel. Co., 154 US 1 [1894].

70 See also A. SCALIA, supra 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’.

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

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.

### 3.2.4. Illustrating the Aims and Particularities of the National Solution

In some judgments, courts cite foreign solutions in order to confront them with the solution that they have found for their own domestic law. They therefore illustrate the aims and particularities of the national law.

By way of example, it is 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 laws 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 press. 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.\(^{78}\)

In *Kuddus v. Chief Constable of Leicestershire Constabulary*, the English House of Lords notes that exemplary or punitive damages do neither exist in continental Civil Law systems, such as German and French laws, nor in mixed legal systems that are influenced by both Civil and Common Laws, such as Scots and South African laws. The court therefore observes that, for the matter in question, it is 'unhelpful to look at the position in other jurisdictions'.\(^{79}\)

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 Court of Justice could be materially distinguished from English law.\(^{80}\)

The question of pre-contractual liability was addressed in the case of *Chartbrook v. Persimmons Houses*. 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.\(^{81}\)

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 Art. 931 of the German Civil Code, the Bürgerliches Gesetzbuch or BGB), in Swiss law the ownership of movables cannot be passed on by the assignment of an action for recovery of the object.\(^{82}\) The TF 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 TF explicitly abandoned a solution formerly taken from German law according to which the transfer of ownership is

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\(^{81}\) *Chartbrook Ltd v. Persimmons Homes Ltd* [2009] AC 1101, [2009] UKHL 38, No. 39 (per Lord HOFFMANN). See also 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 laws, on the other hand.

separate from the validity of the contract of sale. The TF thus discarded the abstraction principle, a pillar of German property law.\footnote{29.11.1929 (Grimm c. Masse en faillite Näf-Ackermann), ATF 55 II 302.}

In a case concerning a legal action brought by an environmental protection foundation, the TF came to the conclusion that French legislation and case law, which was cited by the Court of First Instance, \textit{ne se concilient pas avec l'état actuel de notre législation} (cannot be reconciled with the current state of our legislation).\footnote{TF, Decision No. 4C.317/2002/ech 20.2.2004 (La Fondation X. c. La Masse en faillite de feu A, ou 'Gypaète barbu République V').}

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. To the contrary, when the court’s preferred solution differs from that of another country, 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.

3.2.5. \textit{Countering the Argument that a Certain Solution Will Lead to Harmful Results}

The experiences of other legal systems 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 laws. 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 \textit{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.\footnote{[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 [...]’.} In the English case \textit{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.\footnote{Arthur JS Hall & Co v. Simons [2002] 1 AC 615 (see the opinions of Lord BINGHAM and Lord HOPE).}
This use of the comparative method has furthermore been considered legitimate even by those who are, in general, opposed to its use 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’. 87

3.2.6. Legal Support for Value Judgments of the Court

Often courts refer to foreign legislation, case law, and doctrine, when interpreting a provision or filling a gap in domestic legislation or case law. 88 Here, comparative law serves as a source of inspiration when searching for a solution and for supporting the solution found by the court. 89 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. In the English case Alfred McAlpine Construction Ltd v. Panatown Ltd, Lord Goff of Chievely 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’. 90

87 A. SCALIA, supra 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’.
88 E. HONDIUS, supra n. 13, p. 767: ‘Comparative law may fill in the gaps’.
90 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] Q.B. 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, BK 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 (Nos. 113 and 114, Lord RODGER), dissenting opinion by Lord RINGHAM who refers to French and German laws (No. 49): ‘no flood of claims in these countries’. See on this use of the comparative method, and criticizing it, A. SCALIA, supra 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, supra n. 55, p. 157.
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.\(^{91}\) 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 that is traditionally required. While searching for a solution that was favourable to the claim, the House of Lords found support in numerous foreign jurisdictions.\(^{92}\) In relation to this litigation, Lord Bingham observed that:

‘[d]evelopment 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.’\(^{93}\)

This use of the comparative method can also be found in a recent judgment of the Swiss TF that concerned the capacity of beneficiaries of a will. The TF found confirmation for its solution in three out of four of its bordering countries’ legal systems (German, Austrian, and Italian laws, in contrast with French law).\(^{94}\)

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91 [2003] 1 AC 32. On this and the following cases, T. BINGHAM, supra n. 1, pp. 9 et seq.
93 Ibid.
3.2.7. Legal Support 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 confront new problems, to introduce new institutions or remedies, or justify changes to domestic case law.

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.\(^{95}\)

More commonly, the judge himself 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 (Art. 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\(^ {96}\) as well as the German Constitutional Court\(^ {97}\) found support in foreign laws when introducing a protection of personality rights and of privacy (Allgemeines Persönlichkeitsrecht).\(^ {98}\)

In an English case of 1991, it was still stated that ‘[i]t is well known that in English law there is no right to privacy’.\(^ {99}\) If the judgments of the Court of Appeal and the House of Lords, notably in Douglas and Others v. Hello! Ltd\(^ {100}\) and Naomi Campbell v. Mirror Group Newspapers Ltd,\(^ {101}\) were to change the law, it would be largely due to comparative law and case law of the European Court of Human Rights.\(^ {102}\)

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).\(^ {103}\) The court cited, as sources of inspiration and to support overruling previous case law, Swiss, French, Italian, Spanish, Scots, Greek, Yugoslavian, Belgian, and Turkish laws. The court found information on these laws in the writings of comparatists. It

\(^{95}\) See A. GERBER, supra n. 53, p. 152 and, e.g., the cases TF 10.5.1932, ATTF 58 II 151 at 156 (company law); 20.1.1981, ATTF 107 II 57 at 66 (copyright); 21.12.1982, ATTF 108 II 475 at 484 s.


\(^{97}\) BVerfG 14.2.1973, BVerfGE 34, 269 at 289, 291.


\(^{100}\) 18.5.2005, [2005] EWCA Civ 595.

\(^{101}\) [2002] EWCA Civ 1373.

\(^{102}\) Starting with the case Von Hannover c. l’Allemagne, No. 59320/00, CEDH 2004-VI.

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.

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. The Swiss TF took inspiration from German and Dutch case laws, distinguishing itself from case law of the English House of Lords and the Supreme Court of Austria. In another landmark decision, the Supreme Court of Austria in turn took inspiration from French, Italian, Scots, and Danish laws, while distinguishing German, Dutch, Belgian, and Spanish laws. Dutch case law took German law into consideration and, in turn, exerted an influence on Scots law. 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. In truth, judgments relating to this issue that have not referred to foreign case law are very rare.

It is possible to mention many other 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 in which the House of Lords abandoned the Common Law rule that it is 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

106 14.9.2006, 6 Ob 101/06f; see also OGH 25.5.1999, 1Ob 91/99k (comparison with German law).
107 E. HONDIUS, supra n. 13, p. 764.
cited German, French, Dutch, Canadian, US, Australian, and New Zealand laws), 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.

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.

3.2.8. 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, 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. In situations where this discussion leads to shared beliefs and solutions, comparison contributes to ‘soft harmonization’ of the law on a supranational scale.

4. 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, in principle, 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

110 White v. Jones [1995], 2 AC 207, 1 All ER 691; see the opinion of Lord GOFF OF CHIEVELEY.
112 See also C. WITZ, ‘Plaidoyer pour un code européen des obligations’, in Recueil Dalloz 2000, Chroniques, p. 79 at 81.
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 some countries including Switzerland) 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.

(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 and to benefit from experiences abroad;
- 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 confront new problems, introduce new institutions and remedies, or justify changes to domestic case law.

(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. In specific cases, this comparative research could also be undertaken, and information provided, on an ad hoc basis by comparative law institutions or by lawyers trained in comparative law.

(8) With the progressive programme of European integration, and notably in matters effecting economic relationships, the judge could use the
comparative interpretation while pursuing the aim of soft harmonization that 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.