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Legal Comparison by the Courts

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1. Judicial comparison

On July 2, 2009[1], the Delhi High Court ruled that consensual sexual acts between adults in private are not criminal, and therefore declared that Section 377 of the Indian Criminal Code violates Articles 21, 14 and 15 of the Constitution.

In decriminalizing homosexuality, the Delhi Court had considerable recourse to foreign law. It established that Article 21 of the Constitution of India includes the recognition of human dignity, by making reference to Canadian Supreme Court judgements. It concluded that the freedom of speech and expression protected by Article 19 of the Constitution extends to the "right to be let alone", making extensive reference to the US Supreme Court cases on privacy. It established that targeting the homosexuals as a class is contrary to the principle of equality under Article 14 of the Constitution, reasoning on the basis of Supreme Courts decisions and dissenting opinions from the US, Canada and South Africa. It argued that there is a global trend in the protection of the privacy and dignity of homosexuals by referring to the European Court of Human Rights and the Supreme Courts of South Africa, the US, New Zealand,

[1] Judgement WP(C), No. 7455/2001.

Hong Kong, and Australia. It held that public morality is not a valid basis for restricting the fundamental rights of homosexuals, quoting decisions of US, UK and South African courts. Lastly, it described the role of the judiciary as one of protecting the counter-majoritarian safeguards set out in the Constitution, citing the arguments of US Supreme Court Justice Robert Jackson in *West Virginia State Boards of Education v. Barnette* (1943).

On April 21 2010[2], The United Kingdom Supreme Court ruled that certain notification requirements for sexual offenders constituted a disproportionate interference with their right to privacy (Article 8 of the European Convention on Human Rights), because they made no provision for review of individual cases.

The Supreme Court relied on a number of reasons in reaching this conclusion. These included the fact that registration requirements for sexual offenders exist in France, Ireland, the seven Australian States, Canada, South Africa and the United States, and almost all of these contain provisions for individual review.

[2] *R (on application of F (by his litigation friend F)) and Thompson (FC) (Respondents) v Secretary of State for the Home Department (Appellant)* 2010 UKSC 17.

Not every court decision that makes use of comparison with foreign law does so to such an extent as the Indian court in developing constitutional standards. Not every court asked to review national law in the light of the European Convention on Human Rights makes reference, as did the British court, to European and non-European legal systems. But recourse to comparison is widespread, in spite of recurring arguments against the application of foreign law. A recent bibliography on the use of foreign precedents by constitutional courts lists more than five hundred examples. Assuming that such an extensive group of scholars did not decide to write about a figment of the imagination, it can be concluded that recourse to comparison by constitutional judges is far from limited.

It must be added that very often such comparison is not made explicit: constitutional courts prepare their decisions taking foreign law into account, but subsequently omit the comparative argument from their reasoning. For example, the Italian Constitutional Court was recently invited to verify the constitutionality of a statute that made illegal immigration a criminal offense, sanctioned with a fine and with expulsion from the State. The documents prepared prior to

making this decision included a thorough examination of foreign law: German, British, French, Spanish, Austrian, Dutch, Greek, Danish, Finnish, Portuguese, and American. The judgement, however, made no mention of this thorough investigation, in spite of the influence that it had on the decision[3].

2. Why is judicial comparison spreading?

Judicial comparison is becoming more widespread for many reasons:

a. Recourse to foreign law is increasingly provided for in national law. This is the case of Section 39 of the South African Constitution: "when interpreting the Bill of Rights, a court, tribunal or forum [….] may consider foreign law"; or the case in which national regulation of conflicts of law provide for the application of the most favourable rule (this requires an examination of foreign law, a comparison between that and local law, and an evaluation of which is more favourable).

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b. National legal orders face similar problems and it is, therefore, expedient to consider foreign law, to seek advice from others who have confronted the same problems, in order to find better solutions (e.g. by evaluating the advantages and disadvantages of different solutions to a common legal problem): for instance, courts everywhere are engaged in the review of statutes enacted to fight international terrorism, and it is useful for them to make reference to foreign judicial decisions.

c. National legal orders are increasingly bound together in supra-national and in global regulatory regimes, which facilitate the opening up of national legal systems towards each other. The rise of world constitutionalism renders constitutional borders permeable and acts as a bridge, encouraging local courts to look beyond national borders. For example, if a national court is called upon to define the notion of “refugee”, and if that court belongs to a country that has ratified the UN Convention relating to the Status of Refugees (July 28, 1951), it may be expedient for that court

to consider the interpretation given to that instrument, and to that term, by other courts of UN Member States.

d. Some principles are universal (for example, human rights) and command respect in every domestic legal order.

e. Comparison can assist constitutional courts in identifying changes in national standards, traditions and values (using foreign constitutional practices as a form of "rear-view mirror"). For example, Canada, Australia, and New Zealand have, since the 1970s, faced similar problems with their indigenous communities and have had to change their approach to the rights of these groups. In doing so, their supreme courts referred to each other's decisions (and to those of the the US Supreme Court) when adjudicating these rights[4].

3. What weight to attach to foreign law?

How much weight should be attached to foreign law? There are two answers to this question:

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a. Foreign law is binding as national law: an example is provided by the "*lex alius loci*", a principle followed by national courts in Europe throughout the 17th and 18th centuries: this area was ruled by a "*jus commune*" (a common law) and, when a provision in a domestic legal order was missing, courts were entitled to use foreign law to fill the "lacuna". This practice came to an end with the codifications of the 19th century. In this case, foreign law becomes a rule or norm in the "borrowing" legal order, just as it is in the "lending" legal order.

A similar case is that of the "common constitutional traditions" of European countries. The European Court of Justice has frequently referred to these traditions in order to establish some basic common principles (such as the right to a hearing or access to justice), thus helping to make the national legal systems in the European legal space more porous.

b. Foreign law is merely a means of interpretation: given that comparison is a universal method of interpretation, and judges are interpreters of law law, judges are of necessity comparatists.

Comparison for courts is not, therefore, simply erudition or "soft law"; and nor does it furnish mere influential or persuasive guidelines that require respectful consideration. Rather, it plays the same role as other methods of interpretation.

4. Are there rules of interpretation by comparison?

Having ascertained that comparison is a method of judicial interpretation, I want now to turn to the following questions: What makes one court more likely to use this method than another? And should there be at least some basic rules of interpretation by comparison? At the outset, let me make one basic distinction:

a. interpretation may be regulated by the legislator, as in the South African case;

b. or, as in the majority of countries, interpretation can be left free to the authorized interpreter. In this case, the interpreter is not obliged to have recourse to foreign law or to compare it with national law. It is important here to ascertain which variables are most important in influencing the recourse to foreign law by national courts.

- The use of a language that is common to many countries (English, Spanish) may facilitate comparison (and the widespread use of translating judgements of constitutional courts into English may enhance such comparison);
- Given that interpretation is based on legal culture, the greater the openness of the legal culture in question to comparison, the more willing the courts are to perform this function;
- Some countries are by tradition exporters of legal models and cultures (think, for example, of France, the United Kingdom, and the United States), whereas some are by tradition importers of legal models and cultures: in general, courts in the latter will be more open to comparison;
- The common law pays more attention to legal practices: as a consequence, common law courts have more frequent recourse to foreign judgements;

- Common legal traditions (e.g. in the Commonwealth, or in the European legal space) establish basic conditions for dialogue and comparison;
- Judicial networks are growing, and constructing step-by-step an epistemic community: most constitutional courts translate their judgments into English; many courts have regular, periodic exchanges with their foreign equivalents (for example, members of the Italian Constitutional Courts attend some 15 meetings per year with their colleagues from foreign countries); and many courts employ staff regularly charged with reading and summarising foreign decisions.
- Some countries belong to a region where trans-judicial communication is easier: for example, North America, in which US and Canadian law communicate frequently.

5. Towards a better judicial comparison

If the court as interpreter is free to choose foreign law, is it possible to formalize the basis upon which this is done, or this is a field in which cherry-picking must be the rule? To which limits should judicial discretion conform in choosing which foreign law to consider? From this point of view, a few issues are crucial:

a. Which country to choose for comparison? Should a court choose only foreign law of countries which share the same constitutional commitments? Or should comparison also take into account the foreign law of countries that take different approaches, and balance the various solutions?

The answer to this question is simple. A good comparison must not take into account only one or two foreign legal systems, chosen because they belong to the same area or region, or because they share the same values, or simply because they have a common language. A court – like any good comparatist – should consider the various legal "families" and weigh the differing solutions on offer, before arguing that one or more foreign legal systems provides a good example because

it is more effective, or because it ensures more benefits, or because it is more congenial to the borrower's legal order.

b. What forms of foreign law should be involved: legislation, judgments, scholarship? As comparison is, at least for our purposes here, the task of courts, should they pay attention only to foreign judge-made law?

Again, the answer is simple. Given that the law generated by legislatures, judges and, indeed, by scholars do not represent self-contained worlds, courts should have recourse to all: to foreign legislation, and to interpretations provided by both judges and law professors. One famous example of this approach is the Supreme Court of Canada's decision on the Quebec secession[5], in which a variety of statutes, regulations and international treaties, beginning with the "Magna Carta" were considered.

c. Should judicial comparison also take into account the different contexts in which laws apply?

Contrary to the prevailing opinion, national legal systems make use of a growing number of similar legal instruments

[5] Supreme Court of Canada, [1998] 2 S.C.R. 217.

(think of the "Ombudsman", the notice and comment procedure, the proportionality principle). These legal instruments are, however, applied in different contexts, as history, social values, and national constitutions differ from one country to another. These contexts render the legal institutions different: although structurally similar, they are functionally diverse. It is, therefore, crucial to take into account not only the legal institution to be compared, but also the legal environment in which it is applied.

d. How should foreign law be used?

It can be used as a source of solutions to common problems, or to strengthen or support a decision, or as a benchmark to evaluate national law.

6. The so-called "legitimacy problem" of judicial comparison

Finally, there is the problem of legitimacy. As democracy tends to "nationalize" the law, borrowing foreign law may appear as a non-democratic move to those who support "legal particularism" and resist the use of foreign ideas. This question has generated much discussion in the

US, where, in any event, many courts (including the Supreme Court) make reference to foreign law; and where those who oppose the use of foreign law by American courts do not, to my knowledge, also oppose the use of US law by foreign courts.

This problem of legitimacy is wrong. Making reference to foreign law does not mean that national courts surrender State sovereignty. A court acting as comparatist does not renounce its decision-making responsibility. It simply enlarges the "discussion" that precedes and informs the decision, by admitting to that "conversation" also actors that are foreign to the legal order in question.

This conclusion has been supported quite recently by the US Supreme Court in *Graham v. Florida*[6], on the question of imposing sentences of life without parole on juveniles who did not commit homicide: "The Court has looked beyond our Nation's borders for support for its conclusions that a particular punishment is cruel and unusual", and that "the Court has treated the law and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgement of the world's nations that a particular sentencing practice is inconsistent with

[6] US Supreme Court, No. 08-7412, May 17, 2010.

basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it".

7. Conclusions

Much of the literature on judicial comparison examines both the use of supra-national (and global) law and of foreign law, and focuses on the "to do or not to do" question.

This paper has approached the question from a different point of view. It has established a clear dividing line between supra-national and global law on one hand, and foreign domestic law on the other. The first cannot be considered as foreign, as it stems from obligations undertaken by national governments. Supra-national and global law can, however, facilitate the use of foreign domestic law.

Secondly, if judges interpret the (local) law, and if comparison is one of the methods of interpretation, then the right question to ask is not *whether* judges are entitled to make such comparisons, but rather *how* they should do so.

If national courts were not entitled to make comparison, doctrinal comparison would remain something of a solipsistic exercise, and there would be no dialogue between scholars and judges.

Foreign law is not binding on local law, but is one of the many means of interpretation. This implies that, through the comparative method, foreign law is "nationalized", and thus becomes part of the national discourse on local law.

Let me conclude by mentioning the two most important tasks of comparative lawyers with regard to judicial comparison:

a. The first is to examine judgements, not in order to establish *whether* judges have used foreign law (a question that has been the object of many enquiries), but rather to evaluate *how* courts use foreign law: by which techniques is foreign law chosen, and what weight is accorded to it;
b. The second is a prescriptive task: to develop methods and procedures of comparison. Given that interpretation can be regulated (recall the provision of the South Africa Constitution quoted above), recourse to foreign law can be channelled by developing rules and standards of comparison.