Comparisons in Legal Development

The Impact of Foreign and International Law on National Legal Systems
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1. The Normative Role of Comparison

Prevailing legal positivism conceives of legal systems as legal orders governed by a single legitimate and exclusive authority, the national law-giver.

On this view, national legal systems have the following features: first, they are closed and impermeable; second, as they are peculiar to each national society, they can only be studied in national terms (this feature makes the study of law so different from the study of sociology, or political science, or chemistry: a sociologist or a political scientist may study subjects that are either universal or national; a chemist does study subjects that are universal; a lawyer studies subjects that are intrinsically and necessarily national); consequently, legal systems can be compared; but comparison is only an intellectual exercise, that cannot have any impact on the real life of the law. Comparison is only knowledge-oriented; has no operative function. Foreign law emanates from another authority, that has no legitimacy as a law-giver in a different system. Therefore, there is no comparative law, as there is not a branch of law that can be called comparative, but only legal comparison.

This point of view must be reversed if we want to consider foreign law, transnational law (cross-border rules involving non-State actors, multinational corporations, epistemic communities, non-governmental organizations), supranational law (rules produced by regional organizations, like the European Union) and global law (rules established by international organizations, like the United Nations.

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Organizations or the World Trade Organizations) as active forces in national legal systems, and not just objects of an intellectual exercise. By “active force” I mean that foreign, transnational, supranational and global law may play a role that can be either persuasive or normative. Therefore, that legal systems are open or porous; treaties and agreements abolish barriers to money transfers and to trade; and money and trade are instrumental to the transplant of legal institutions. There are some characteristics, institutions, procedures, rules, practices, common to more than one national legal system. Legislators get “inspiration” from comparison, as the “world is flat” and, therefore, they have to adjust national legal systems to the prevailing institutions in the most developed nations. National courts, for their part, establish links with foreign legal orders via comparison. Legal scholarship is not bound to a nationalistic approach, and comparative law experts may not only study, but also suggest or advise, on the basis of comparison. Comparison is not a pure intellectual effort to know each other; it assumes a practical function; as a consequence, legal scholarship can proceed from legal comparison (“Rechtsvergleichung”) to true comparative law; comparative lawyers establish a transnational legal discourse and act as “merchants of law”. Finally, comparison becomes a “source of law”, with donor countries and receptor countries.

This is an entirely different paradigm, compared with the traditional one. According to this new paradigm, foreign, transnational, supranational, and global law are not only an object of scientific analysis by nationals scholars belonging to a different legal system, but also “goods” or “merchandises” imported from the outside into a different legal order, that have effect due to their normative or quasi-normative role both in the original system and in the importing country.

These conclusions are difficult to accept for those scholars who proclaim that legal orders are necessarily closed, isolated. The “isolationist” scholars want to establish fire walls around each national legal order, but not necessarily accept that finance and trade are limited to each nation. Consequently, the point of view that resist domestication of foreign and global law is mainly rhetorical, as national legal orders are bound by their own national interests to open their borders and accept foreign money, merchandise and law.

2. Primacy and Cross-Country Borrowing

I start by distinguishing transnational, supranational, and global from foreign law. All of the latter, however, are foreign, but in a different way and insofar as they are not domestic law.

Transnational, supranational and global law act on national legal orders vertically. National law can provide norms by which national systems are open to a higher law
("Völkerrechtsfreundlichkeit"): for example, Section 39 of the South African Constitution or Articles 10, 11 and 117 of the Italian Constitution. According to these provisions, national legal systems must adjust their own rules to foreign (higher) rules. The Swiss Parliament Act, Article 141, provides that the Federal Council, when submitting bills to the Federal Assembly, “shall explain the relationship with European law”. And Swiss courts interpret national law in accordance with European Union law (“Europarechtskonforme Auslegung”).

According to the Italian Constitutional Court, the European Convention on Human Rights provides rules that are superior to national law, although inferior to the national Constitution. Therefore, a necessary condition for the legality of national statutes is their conformity with the Convention.

On the other hand, international treaties, or international (or transnational) agreements provide that national legal orders should adapt themselves to a higher law: for example, the Treaty on European Union (TEU) or the European Convention on Human Rights (ECHR).

The higher law penetrates national legal orders in various ways because – to use the wording employed by the Spanish “Tribunal Constitucional” – it enjoys “primacy” (and not “supremacy”) over national law.

One example is Article 6 of the ECHR on access to justice. The right to a judge enshrined in this provision penetrates legal orders where this principle is unknown or less respected.

A higher law can interact with national legal orders also through the “dialogue of courts”. This dialogue can be informal (for example, meetings between groups of judges of the national courts), or formal, through judgements (when a court can make a preliminary reference to another court, or decline to follow a decision, giving reasons for adopting this course).

According to European law purists, supranational regulations have an impact on national legal orders that is limited to the areas in which powers are conferred to the supra-national bodies. But this point of view does not consider that national legal orders are unitary and that, once one introduces a principle, cannot establish “chinese walls” to avoid “diffusion by infection”. The combined effect, vertical and horizontal, of higher law is, therefore, underestimated: for example, the principle of proportionality, since it penetrated vertically into national legal orders from EU

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2 KUNZ, Einführung, pp. 37-54 and KUNZ, Instrumente, pp. 31-82.
3 BRAZDA, pp. 506-512 for leaps ahead and criticisms among courts and the Brighton Declaration on the Future of the European Court of Human Rights, 19-20 April 2012 for the proposal to introduce a request for advisory opinions on the interpretation of the Convention. See also B. Spölter, pp. 5-31.
law, has expanded horizontally in all areas, as it was impossible to confine it only to areas directly affected by EU law.

Europeanization and globalization give a new qualitative and quantitative dimension to comparison, as noted by Andreas Vosskuhle.\(^4\)

Foreign law too is external to other national legal systems: for example, French law is foreign in relation to German law. But it penetrates different legal orders horizontally. This can be described as cross-country borrowing, or migration, or transplant, or circulation.

The ways in which foreign law has impact overseas are different. One is simple imitation. The Council of State, the Ombudsman, the principle of proportionality, Public Private Partnerships, the Independent Regulatory Authorities, are all institutions which were created and developed in one country and subsequently adopted in others. This kind of "trade" is highly asymmetric, as there are few exporting countries and many importing countries.

Not only legislators, but also courts use foreign law, for different purposes, in most cases to persuade, in some cases as precedents. Judicial comparison is spreading and is raising a number of questions, like: what weight to attach to foreign law in deciding a case? Are there rules of interpretation by comparison? Is judicial comparison legitimate?\(^5\)

Imitation, however, can be not only voluntary, but also induced. It happens, for instance, through what has been called "comparative law by numbers":\(^6\) that is, the use of indicators to establish a ranking of attractiveness of different legal systems for doing business (as done, for example, in the "Doing Business" initiative by the World Bank). National legal orders pay a higher price if they achieve a low ranking and react by adjusting their internal legal orders to the better-performing systems. Legislators attempt to level the playing field, to make the national legal orders accessible.

Some "exporting countries" promote the application in foreign countries or in global institutions of their national law and practice. The United States President has issued in 2012 an Executive Order "Promoting International Regulatory Cooperation", in order to promote "good regulatory practices internationally, as well as [to] promote U.S. regulatory approaches, as appropriate".

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\(^4\) Vosskuhle, pp. 44-45.
\(^5\) A recent example of citation of foreign law is the decision n. 13/2012 of the Italian Constitutional Court. On this subject, Cassese, pp. 21 et seq.
\(^6\) Michaels, pp. 765-795.
The Internet Corporation for Assigned Names and Numbers (ICANN) bylaws have designed the administrative procedures of that global actor following the example of the 1946 United States Administrative Procedure Act. The reason is that ICANN was established on the basis of a decision of the U.S. government and has been linked to the U.S. Department of Commerce by an agreement.

There is a third and more subtle, or complex, manner in which one national legal order can have impact upon another legal system, that of imposed imitation. When the European Union establishes agencies that consist of networks of national regulatory bodies, it cannot accept too many differences among national systems, but, on the other hand, also cannot simply impose a single model. Therefore, national legal systems themselves must take care to self-harm. Certain participatory procedures before national regulatory agencies, which also belong to a European network of agencies, constitute such an example.

A fourth and more complex impact of foreign law is through the – already mentioned – combined, vertical and horizontal, effect of higher and foreign law. For example, the European Court of Human Rights, while ensuring observance for the rules of the European Convention, takes care to consider the direction taken by the majority of the European countries party to the Convention. For example, to interpret the scope of the right to a family life, the Strasbourg Court considers how many countries recognize such right to same sex couples.

3. **Adjustments and Change**

The import-export of law has become so dense that it has given rise to quite a few problems. Three of these are most important.

The first is the establishment of a *market for standardized legal items*, which plays the role of a global institutional reservoir, with international consultants ready to prepare the right “recipe” for every legal order, and national legal reformers acting as scholars of comparative law and agents of change. “[…] [T]ransnational human rights instruments have begun to shape the practice of formal constitutionalism at the national level.” One can rightly ask whether legal orders should not enjoy a right to self-government, and what the appropriate limits for such a new cosmopolitan legal super-market should be.

For example, the United Nations and the European Union programmes for the promotion of democracy and the rule of law assume a “Schumpeterian” conception of democracy and a “Diceyan” approach to the rule of law. Should these prevail or should each country be free to choose other concepts of democracy and the rule of law?

7. LAW & VERSTEEG, p. 769.
This problem displays two aspects: one is that of the democratic legitimacy of foreign law, the other that of legal unity and certainty.

Impermeability of legal orders is also instrumental to popular sovereignty. If foreign law can penetrate another legal system, the will of the people in the latter may be challenged by the foreign law. This is the argument of those opposing transplants.

This radical criticism of circulation of law does not take into account two points. One is that the "door opener" is always the national law. The other is that opening the doors is a way to reduce conflicts with foreign legal systems and to increase the dialogue and exchanges.

Penetration of foreign law can reduce the unity of the national legal systems and endanger the certainty of their provisions. This is true, but these risks are also opportunities for the civil societies. These are presented with a richer menu, and have a choice that is not otherwise available.

The second problem is connected with the necessary intermediation by comparative lawyers. Higher law and foreign law are both, but in different measures, flexible as compared to national law. They often require selection, interpretation, re-interpretation, and contextualization. All these operations may be subject to different degrees of manipulation and rebranding. The comparative lawyer does not only mechanically "translate" from another legal order. But which authority confers upon the comparatist the power to adapt one legal order to another?

The third problem is the process of change produced by implantation into a different context. It is easy to say that the Spanish "Defensor del pueblo", the Italian "Difensore civico", the British "Parliamentary Commissioner for Administration", are different from the original Swedish Ombudsman. It is possible to say that an institution or legal product changes if transplanted in a different environment. The interactions between transplanted and national institutions constitutes a subject of study of the greatest interest.

To conclude, I wish to recall the caveat given by Jean Carbonnier: "...[L']invocation à la législation comparée n'est souvent qu'instrument de propagande. Des statistiques fragmentaires, isolées, interprétées; une sociologie de tourisme; une psychologie par impression...".8

8 CARBONNIER, p. 237.
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