

## Judicial Borrowing- a Comparative Analysis of the Situation in North America

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### Introduction

Nowadays, in the era of globalization, reciprocal influence of Nations in almost every field is highly visible. Thus, national laws respectively legal systems are not immune against this development. Moreover, legal borrowing beyond that legal transplants, i.e. the enactment of foreign laws and codes by some Nations, was observable around the world long before globalization was an emerging issue. Nonetheless, even less dramatical usage of foreign sources, like the interpretation of domestic law by reference to foreign law, seems not to be fully accepted by everyone.

Therefore, the reasons for this repudiation shall be assessed with special reference to the United States in contrast to Canada with an allegedly more open attitude towards the use of foreign legal sources. While examining, whether the concerns regarding the usage of foreign sources in national context are legitimate or not, alternative approaches to justify such an usage shall be presented.

### The Canadian Experience with Foreign Sources

Whereas the controversial discussion in the U.S. focuses on the question, whether the usage of foreign sources in domestic context is or can be justified, and if it should be embanked; its permissibility seems to be commonly accepted in Canada. (McCormick,2009-2010: 212)

Accordingly, the Canadian discourse, “dominated by internationalists”(Beaulac,2003: 227), goes beyond the mere question of the permissibility of the usage of foreign law and its appreciation as “persuasive authority”.

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It is even discussed, whether some foreign respectively international law has to be deemed as domestically binding. (Knop,2000; Toope,2001) But the dominance of international lawyers in the Canadian discussion, which are naturally well-disposed towards the impact of international law, might just overshadow the concerns. Accordingly, “the lack of serious and substantive doctrinal input from the point of view of the domestic legal system, in particular, from the statutory interpretation perspective” is criticised. (Beaulac, 2003: 227-8)

Nevertheless, the liberal attitude towards foreign law may roots in Canada’s history and its formal and informal connections to the traditions of Britain and France. Many statutes were based on British counterparts, so that recourse to English precedents is not surprising. Moreover, the Privy Council in London remained the final court of appeal until 1949. Besides commercial and other forces, the use of American materials in Canada can be explained with the common law heritage in private law and similar governmental structures in both countries. (Forest, 1994: 212-3) Accordingly, especially in the interpretation of the Canadian Charter of Rights and Freedoms (Charter) recourse to the American repertoire, with respect to its experience with the Bill of Rights, was inevitable. Canadian Supreme Court Justice La Forest therefore admits, that he was very much influenced by American material, for example in assessing the constitutionality of indeterminate sentences for dangerous offenders. (Forest, 1994: 214)

Nevertheless, in *R. v Rahey* (1987) he made clear, that American jurisprudence, might be helpful but should not be followed “slavishly”. Rather, American principles always would have to be adjusted to the different Canadian context. (Forest, 1994: 214) Thus, he concluded: “American jurisprudence, like the British, must be viewed as a tool, not as a master.” (1987: 639) In this regard, he points out the greater communitarian and less individualistic Canadian traditions, which could be observed in the Charter’s affirmation of multiculturalism or rights of linguistic minorities. Thus, apparent differences to the American legal tradition are easily determinable. Canada, for example, has not followed the American “strict scrutiny” standard regarding the freedom of hate speech. In the central case *R. v Keegstra*(1990) the hate propaganda laws in the Canadian Criminal Code were upheld by referring to international conventions. (Forest, 1994: 214)

However, according to Justice La Forest the repeatedly recourse to American constitutional material is simply an aspect of a more general “trend”. According to him, this trend is proved by the frequent reference

to international instruments and their application both by international bodies and domestic courts in various countries. Accordingly, European sources would be steadily cited in Canada with regard to both human rights and economic integration. He justifies the frequently citing of foreign sources with the fact, that the Charter and other human rights instruments were adopted against the background of the post-war international recognition of human rights throughout the world and the belief in the value of comparative analysis. (Forest, 1994: 215-6)

Thus, Justice La Forest encourages his American counterparts to looking north from time to time, as there can be lessons to learn. Looking outwards could reveal refreshing perspectives and enhance their effectiveness and sophistication. (Forest, 1994: 220) Sometimes Canadian courts face first, novel issues like the criminalisation of physician-assisted suicide, and their treatment would be of interest for Americans not least because of the similarity of the constitutional protections relied on. (Forest, 1994: 218-9)

However, an empirical study from 2009 (McCormick, 2009-2010: 215) does not support the asserted “trend” by Justice La Forest. Accordingly, the number of foreign citations has declined steadily from 2000 onwards and there are relatively few citations, which are spread over many cases. This suggests that the impact of foreign precedents is rather declining in Canada. According to this study, only one out of ten citations is to non-Canadian sources. From 2000 onwards 88.8% of the cited judicial authority in the Supreme Court of Canada was from Canadian, 6.1% from English, 3.5 % from U.S., and only 1.6% from sources of other countries; whereas in 1949 the proportion of English authority was about 60 %. It is also remarkable, that the cited foreign authority overwhelmingly derived from countries with close historical and cultural ties to Canada. From this data McCormick draws the conclusion: “In this first decade of the twenty-first century...call of a law ‘by and for Canadians’ is still by far a more useful description of our Supreme Court’s performance than Anne-Marie Slaughter’s (Slaughter, 2003) talk of an emerging transnational community of judges.” (McCormick, 2009-2010: 243)

Nevertheless, Canadian Supreme Court judges repeatedly confirmed their willingness to refer to foreign, inter alia, U.S. precedents, while abiding by own constitutional values and history. (L’Heureux-Dubd, 1993; La Forest, 1994: 216-220; Smithey, 2001: 1192-1209) But it is bemoaned, that their attempt to start a dialogue with their U.S. counterparts by “either openly adopting, rejecting, modifying, or critiquing major Canadian decisions” was of no avail yet, although such a dialogue could be of mutual benefit

for both sides. (Days, 2007; Harvie,1992)

### **Resistance against the Usage of Foreign Sources**

But in fact, three years after Justice La Forest expressed these concerns, U.S. Chief Justice Rehnquist referred in *Washington v Glucksberg* (1997), where the right to assisted suicide was rejected, to Canadian sources. (*Washington v Glucksberg*, 1997: 718)

Nevertheless, such referring is highly challenged in America. When the majority of the U.S. Supreme Court in its decision *Roper v Simmons* (2005) referred to international authorities as instructive for its interpretation of the prohibition of “cruel and unusual punishment”, foreseen in the Eight Amendment of the U.S. Constitution, and stated that the opinion of the world community provide respected and significant confirmation for its own decision, this was not without repudiation.

According to U.S. Supreme Court Justice Scalia, even referring to a country like Britain, with whom historical and cultural ties are undeniable, is not comprehensible, since the U.K. is due to its submission to European Courts highly influenced by continental jurists with a different legal, political and social culture. He argues, that the law of most other countries differ from U.S. law in many significant respects. By giving an example, he points to the ‘exclusionary rule’ as an uniquely American feature, which was “universally rejected by other countries”.(*Roper v Simmons*,2005:624) Even countries like Canada, although prohibiting illegal searches and police misconduct, would rarely exclude evidence and would only do so “if admission will bring the administration of justice into disrepute”. (*Roper v Simmons*,2005: 625) In *Printz v. United States* (1997) he declared: “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”.(*Printz v. United States*, 1997: 921) In *Sosa v. Alvarez-Machain* (2004) he commented: “the Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty...could be judicially nullified because of the disapproving of foreigners”.(*Sosa v. Alvarez-Machain*, 2004: 2776)

The list of such antagonistic comments could be extended. But for the sake of lucidity common objections to comparative approaches shall be identified. According to Zubaty (Zubaty, 2006-2007), the main objections against foreign source usage refer to the lack of accountability, the lack of standards as well as to the international agenda.

Accordingly, foreign judges and legislators are not accountable to the American people. (Zubaty, 2006-2007: 1416-7) Closely connected with this argumentation are the sovereignty concerns, whereupon the idea of sovereignty is 'under attack' by judges who rely on extraterritorial authority. (Kochan, 2005-2006: 540-1) It is argued that a nation should have the freedom to develop its own law through its elected branches and that these branches would lose the control when judges were "able to exhort extraterritorial and extraconstitutional sources for the determination of legally applicable standards". (Kochan, 2005-2006: 541-2) Furthermore, in democracies the lawmaking power lies with the lawmakers and not the judges. (Kochan, 2005-2006: 546) Thus, the allowance for judges to adopt or import foreign laws would furnish them with undemocratic lawmaking power. Furthermore democratic control would be lost when sources outside the domestic political process serve as the bases of decisions. (Kochan, 2005-2006: 548)

The lack of standards evolve from the assumption, that judges are merely "looking over the heads of the crowd and picking out their friends" when citing foreign law.(Glendon, 2005) In that sense Justice Scalia remarked: "to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."(Roper v Simmons: 627) In fact, when foreign and international law becomes an acceptable source of authority the repertory to choose from seems endless. Thus, personal preferences could be injected at the expense of adherence to established law. (Kochan, 2005-2006: 543-44)

Ultimately, the propagandists of the usage of foreign law are considered as international scholars with a different agenda to promote. In line of their goal to advance a conception of transnational law in American courts, comparativists extol "the internationalisation of constitutional law as if it were an inherent good, used to cure the American legal system of its insularity".(Alford, 2005: 641-2)

### **Typology of the Usage Of Foreign Sources**

Before assessing whether these objections are justified, to determine in which manner the courts are using foreign sources would be helpful. Larsen (Larsen, 2004: 1288-1291) identifies three types of usage of foreign sources by the U.S. Supreme Court.

#### ***Expository***

Accordingly, a court uses comparative or international law "expository"

when it uses the foreign law rule to contrast and thereby explain a domestic constitutional rule. That is, as a way of explaining what the domestic law is by contrasting it with an example of what it is not.

In *Raines v. Byrd* (1997), for example, Chief Justice Rehnquist referred to some European constitutional courts operating under a certain regime to show that such a regime was obviously not obtained under the American constitution, to explain what the U.S. law regarding “standing” is not.

### ***Empirical***

Courts can use foreign sources in an “empirical” sense by looking to a foreign law source for its practical effect, to assess whether a specific ruling would comply with the constitution when similar effects can be assumed in the own country.

In *Washington v Glucksberg* (1997), the Court was asked to decide whether the State of Washington’s ban on physician-assisted suicide violated the Due Process Clause of the Fourteenth Amendment.(McCrudden, 2000) Washington asserted a fear that “permitting assisted suicide would start it down the path to voluntary and perhaps even involuntary euthanasia.” (*Washington v Glucksberg*, 1997: 732) To determine whether this fear was fanciful, the Court looked to the Netherlands, “the only place where experience with physician-assisted suicide and euthanasia has yielded empirical evidence.” (McCrudden, 2000: 785)

### ***Substantive***

Finally, within the “substantive” use of foreign sources, courts seek foreign and international guidance in defining the content of the domestic rule. This can occur in two ways:

Firstly, courts can use the foreign reasoning to help shaping the domestic rule (“reasonborrowing”). In *Smith v California* (1959) Justice Frankfurter referred to “the recent debates in the House of Commons” in Britain, which “impressively explained” the importance of the eligibility to present a certain kind of evidence. (*Smith v California*, 1959: 166)

Alternatively, the courts can look simply to the fact that foreign or international jurisdictions have adopted a particular rule, as a reason to conform the domestic rule to the foreign or international norm (“moral fact-finding”).

This approach was applied, inter alia, in *Lawrence* (2003), where the Court rejected the argumentation, that the prohibition on homosexual sodomy would reflect “values we share with a wider civilization.” (*Lawrence v Texas*, 2003: 576) The Court concluded, that on the contrary the European Court of Human Rights (ECHR) had held that laws forbidding homosexual conduct violated the European Convention on Human Rights. Furthermore, it stated that “other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. (*Lawrence v Texas*, 2003: 573-6) And, finally, the Court announced, “the right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.” (*Lawrence v Texas*, 2003: 577) According to Larsen’s harsh critic the ‘mere fact’ that other nations, respectively the ECHR had accepted a certain right was decisive. (Larsen, 2004: 1297)

### **Possible Justifications for The Usage Of Foreign Sources**

With regard to the comprehensive critique, the question whether the usage of foreign sources in domestic context has any constitutional grounding seems to be crucial.

Accordingly some U.S. judges attempted to reason such an usage. In this regard Justice O’Connor stated, that using comparative materials to interpret the Constitution might make a “good impression,” thereby enhancing America’s ability to act as a rule-of-law model for other nations. (O’Connor, 2003: 643) According to Justice Breyer the “willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a decent respect to the opinions of mankind”. (*Knight v. Florida*, 1999) And Judge Calabresi found that, “though at one time America’s monopoly on judicial review rendered it pointless to look elsewhere, since World War II many countries have adopted forms of judicial review inspired by American constitutional theory and practice.” Thus, he concluded: “Wise parents, do not hesitate to learn from their children”. (*United States v. Then*, 1995)

Whether such explanations or statements can persuade critics is highly arguable. As Tushnet asserts, “the Constitution must license the use of comparative [and, presumably international] material for the courts to be authorized to learn from constitutional experience elsewhere.” (Tushnet, 1999: 1231-32)



In this regard the above explained uses of foreign sources in an “expository” and “empirical” way seem to be “licensed”. Because the expository usage is not to inform the meaning of a domestic rule, but to explain the meaning that the court has determined through other methods. (Larsen, 2004: 1299) Likewise, some determinations of the Court depend upon predictions about the effect of legislation. To pick up the above cited example, the Court may ask if it is rational to believe that a state’s ban on physician-assisted suicide will prevent euthanasia? (Washington v. Glucksberg,1997) For the reason of answering such a question it seems not illegitimate to gather the necessary empirical data from foreign sources and to look to the Netherlands, where relevant experience regarding this issue exists. (Larsen, 2004: 1299-1300)

However, to “license” the “substantive” usage of foreign sources in the form of “reasonborrowing” and “moral-fact-finding” is much more difficult. It is said, that reason-borrowing is nothing more than to look to the reasoning of other domestic courts and that the latter’s permissibility is undoubted. (Hart v. Massanari, 2001) As one can learn much about the own language by studying a foreign language, there is much to learn from other distinguished jurists who have pondered a certain issue. (Zubaty, 2006-2007: 1426) However, concerns in respect of democratic legitimacy remain. Legitimate government is stipulated by the consensus of the governed. This consent is reflected through enactments by democratically elected representatives. The dilemma however is, that judicial review is subjective and inherently “countermajoritarian”. Judicial review of legislative decision-making sets the judgement of unaccountable courts against the judgement of accountable legislatures. (Larsen, 2004: 1308) And a judge who “look[s] abroad for solutions to common problems ... risks eschewing the distinctive choices that have been made at home.” (Alford, 2005: 697) However learning how foreign practices differ may improve judges’ capacities to appreciate and, therefore, defend local policies. (Jackson,1999: 583, 600) Potential risks to local policymaking are tried to be solved by identifying neutral criteria for differentiating and selection among foreign authorities. (Zubaty, 2006-2007: 1439)

Attempts to justify the “moral-fact-finding” can be summarised in four principal arguments. (Larsen,2004:1303) The first one proclaims, that importing foreign and international law norms avoids the problem of judicial subjectivity, as foreign and international law rules are readily ascertainable and are formulated by sources external to the judiciary itself.(Murphy, 1991) This argumentation reveals worries about the arbitrary or unequal application of legal rules and aims to avoid that judges rely on their own subjective, individualistic notions of morality.



(Strossen, 1990: 830) But this argumentation is in conflict with another concern about judicial subjectivity, namely the above mentioned “countermajoritarianism”. Because the usage of foreign sources, over which the own people have no control, for example through the power of election, may exacerbate the countermajoritarian dilemma. And relying on foreign sources can not resolve this dilemma, for it merely replaces one domestically unaccountable decision-maker (the judiciary) with another (foreign governments, foreign or international courts, or the international community). (Larsen, 2004: 1309)

A historical approach considers the fact, that in the founding era of the United States judicial decisions frequently relied upon international norms when resolving domestic cases. (Murphy, 1991: 453-55, 457-59) Accordingly, the “resort to international human rights standards for purposes of construing domestic constitutions is fully consistent with, and justified by...the intent of the framers of the U.S. Constitution.” (Strossen, 1990: 819) This approach is however criticised, for the cases cited by the proponents of this approach “did not look to international law to define or give content to constitutional rights.” (Larsen, 2004: 1313)

Thirdly, the ongoing ignorance of comparative and international norms by U.S. courts deemed to be detrimental for foreign policy goals and the moral authority of America.<sup>2</sup> (Strossen, 1990: 825-7) But it is argued, that it is simply neither the task of the judiciary to “rehabilitate” the foreign policy nor is such an approach in conformity with the fundamental doctrine of distribution of powers. (Larsen, 2004: 1318)

Finally, the usage of foreign sources is propagated from a pragmatic point view, because of the fact, that such an approach would deliver “good” substantive outcomes, and at the end of the day, it is the result what matters. (Bilder, 1981: 10; Murphy, 1991: 480) It is accompanied by an argument of “broad consensus”. According to which, a norm with a high international recognition is more reliable than the decisions of an individual nation. (Strossen, 1990: 830) Though, the broad-consensus argument gives again raise to the countermajoritarian concerns discussed above. Reference to foreign sources, simply because they are deemed to be recognised by the rest of the world, can not overshadow the need for domestic legitimacy when adopting laws. (Larsen, 2004: 1319)

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<sup>2</sup> See Brief of Amici Curiae former U.S. Diplomat Morton Abramowitz et al., *Roper v Simmons* (No. 03-633) (“Amici believe that persisting in [the] aberrant practice of executing juveniles will further the diplomatic isolation of the United States and inevitably harm foreign policy objectives.”).

By contrast, the argument of palatability of result seems to be more well-founded. That, “substantive implications of an interpretive theory should count as a reason for accepting or rejecting the theory” (Perry, 1981: 294), is accepted by many constitutional theorists. Accordingly Larsen admits, that “palatability of result is itself a sufficient reason to adopt an interpretive theory.” (Larsen, 2004: 1319) But he argues, that it can only justify the moral-fact-finding approach, when it is used selectively. By enumerating uniquely American doctrines regarding issues like the freedom to hate-speech or the right to abortion, “which many Americans believe to be good”, he warns, that a broad application of the interpretive technique would endanger these fundamental principles. (Larsen, 2004: 1319)

Therefore he suggests some techniques to limit the “harsh blow” to many doctrines. One possible way could be to limit the members of the world community whose opinions “count”. At first glance countries with historical cultural ties, namely England and Continental Europe, appear as logical comparator for the U.S. and Canada. But it is arguable, whether these would really help to protect uniquely American features. American values are often in conflict with that of the European’s. To name one example, the above mentioned right to abortion is only shared with the Netherlands. Furthermore, the selection of nations with moral values that count, seems an explosive enterprise for a country like America, with a multi-cultural society. (Larsen, 2004: 1323-4)

After all, Larsen’s conclusion from the foregoing is, that neither academics nor the courts have offered a satisfying justification for the extensive use of foreign sources in domestic contexts. For him, it reflects rather an “everyone’s doing it mentality” and should be abandoned. (Larsen, 2004: 1327)

### **Refined Comparativism as an Alternative**

However, such a clear-cut rejection is not supported by everyone. Fontana (Fontana, 2001: 539), for example, shows an alternative approach called “refined comparativism”, according to which an accurate and effective use of comparative constitutional law in certain circumstances would be justified.

Accordingly, foreign sources should be viewed as a form of “persuasive authority”. Used in useful but not binding manner, they would just provide an additional source to help courts to deal with “hard cases” and would not overwhelm domestic sources. Recourse to foreign sources would only

be necessary, where a case presents many difficult questions for which domestic sources do not deliver a clear and unambiguous answer, maybe because the issue is new and evolving. (Fontana, 2001: 558)

However, courts must steadily be aware of the contextual differences of the lender country, as the political, social or cultural differences might lead to a wrong assumption. Thus, the more similar the countries the more desirable the use of foreign sources become. (Fontana, 2001: 560) A court must also take into consideration, how the comparative information matters. The more the court is legislating, and the less it is simply announcing broad appellate rules, the more it should be reluctant to use foreign material. The foreign insight can be imported in a limited fashion, if worries about practical difficulties do exist. The court can import one particular case but without all relevant precedents, so the “seed from the other country can grow once planted” at home. It can use a foreign decision for one particular case only with the aim to exclude precedential value of its decision. (Fontana, 2001: 560-1)

Finally, the court must assess, whether the potential foreign material would add anything additional to the case. This might be so, because of the foreign country’s special experience with a particular issue, or simply because of the originality of the idea of another country. For example, the Canadian decision about hate speech in *Regina v Keegstra* (1990) dealt with the role of multiculturalism, and could be helpful for an America with a demographic change never seen before on earth. (Fontana, 2001: 562-3)

Further he explains, how the use could be structured or facilitated and suggests, inter alia, the creation of a transnational law digest, restatements of comparative constitutional law and more comparative casebooks. (Fontana, 2001: 562-3)

Adherence to such an approach would provide several practical advantages, which would lead to “better law”. Simply because the courts would look at a broader range of ideas and possibilities, with the positive effect of a richer judicial dialogue. It could have a positive impact in broadening the cultural horizon, which becomes more important with the evolution of a multicultural society. (Fontana, 2001: 566)

## **Conclusion**

Undoubtedly, the virtues of recourse to foreign sources are apparent. On the other hand, the legitimacy concerns are substantiated as well.

The so-called “refined comparativism” seems not to deliver an adequate answer to these concerns. It rather sounds like a “handbook” for the use of foreign material by trying to structure its application. Many questions, like which case should be regarded as “hard case”, left open to the discretion of judges, and is thus not able to mitigate the concerns about judicial subjectivity. Its aim seems to be the dispersion of concerns about arbitrariness in the selection and application of foreign authority. It pleads for a restrictive application and attempts to provide the necessary criteria concerning this matter. Unfortunately, the criteria offered are pretty vague.

But the use of foreign law in domestic context is a well-established reality, even in the U.S. where it is presumably most challenged. And in the era of globalization with its endless opportunities to gain information about foreign legal sources, there seems no way to circumvent mutual influence of nations. No one can, for example, hinder interested judges to read foreign authorities which may lead them to certain assumptions about certain issues.

Concerns regarding the “countermajoritarian” effect are not only subject to the use of foreign sources by judges. This effect is rather inherent in the system with its division of powers. It is said, that if judges refer to foreign sources they circumvent the legislature, because they apply laws which are not approved by the people’s representatives. But fact is, that no law can anticipate all possibilities in the future. This is one of the reasons why courts as an independent power exist. Because judges have to interpret and apply the inherently abstract laws to concrete situations. By doing so they actually create or give meaning to the law. Therefore, there seems to be no possibility to refrain the law from the subjectivity of single members of the community.

Thus, every judgement whether using foreign sources or not is inherently subjective and countermajoritarian. But again, this is the nature of the system. Hence, politicians seek to anticipate or “control” the outcomes of judgements by appointing or electing judges, which fit with their own world-view. Furthermore, at the end of the day, the legislature has the final say. There is no restriction to correct any judgement by legislation.

Thus, it is not the source of the thought, but the thought itself that matters. If the Supreme Court would, for example, consider that the death penalty is not permissible, the issue would be not from where the reasoning of the Court derives from. The real issue would be, if this reasoning or decision is acceptable or not. That means, whether it satisfies the prevailing moral, cultural or other standards in that country. Because of the fact, that judges

are elected or appointed by politicians, which are in turn elected by the people and therefore representing the majority, a certain balance in the representation of the prevailing values of the country is probable.

The concerns regarding foreign sources appear therefore exacerbated. Unless judges do not act in an “everyone’s doing mentality” and import the foreign thought just for the sake of going conform with another country, the concerns are unreasoned.

A closer look unbosoms that real conflicts could only arise in certain explosive constitutional matters, which are the exceptions than the rule. Certainly, in such matters judges must act very sensitive and should recourse to foreign sources as a last resort. Because, first of all they have to convince their own people and not the world community. It is important to consider the “context” of the foreign source and to assess whether it can be reasonable applied to the circumstances of the own country. This means, that a judge who wants to recourse to a foreign source has to have a very good understanding of that foreign country and its political and legal system.

Thus the benefits of citing foreign sources outweigh the burdens and it should not be abandoned. More important seems the creation of useful criteria for the use of such material. The so-called “refined comparativism” approach, even not satisfying, is at least an attempt, left to development by future generations.

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