Of Judges and Jurisdictions

An Overture to Comparative Legal Reasoning in National Case Law

by Thomas Coendet*

"No foreign judges" is a recurrent clamor in contemporary Swiss politics. With this slogan some Swiss politicians challenge the European Supreme Court's jurisdiction within the bilateral agreements between Switzerland and the European Union. Treaty negotiations usually associated with sober diplomacy thereby receive a strong emotional flavor. Even academic discussions on more subtle forms of how "foreign law" influences national legal discourse sometimes turn emotional: Should courts be permitted to look to foreign jurisdictions to guide their decisions, to create their arguments by comparing foreign law with their own? Occasionally, such idea is subject to harsh criticism. Concerns raised against it partially coincide with those "against foreign judges": Such references to "foreign law" lack democratic legitimacy. They threaten national sovereignty and distort the cultural identity of one's own law. And legal professionals may add: Comparative arguments impurify the doctrinal system of domestic law. In a nutshell, the influence of foreign law on national case law needs to be avoided. For there is a lot to lose, but little to gain.

Proponents of comparative legal reasoning paint quite a different picture of foreign judges and jurisdictions. The origins of their idea lead us back to the International Congress of Comparative Law, which took place in Paris in 1900. Here, comparative law became the academic device to reunite the legal discourse that had been split up by the rise of nation states in the modern age. Raymond Saleilles (1855–1912), the organizer of the congress, took this idea another step further. He held that courts should interpret and improve national law in cross-border matters by drawing on an international common core established by comparative law.[1] His basic argument is easy to grasp and holds true more than ever: International problems ought to be solved internationally. Around the same time, Ernst Zitelmann (1852–1923) summed up the advantages of comparative law in the catchword that comparative law increases the "stock of solutions" for legal problems.[2] And, half a century later, Konrad Zweigert (1911–1996) reached out to comparative law as an opportunity to evade the obses-

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1 *Raymond Saleilles*, La Fonction juridique du Droit comparé, in: Fritz Berolzheimer (ed.), Rechtswissenschaftliche Beiträge, Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag. 9. März 1909 (Aalen, 1981), 164–175, 168 et seqq.

2 Following Rabel, this statement has to be ascribed to Zitelmann, cf. *Ernst Rabel*, Aufgabe und Notwendigkeit der Rechtsvergleichung, in: Hans G. Leser (ed.), Ernst Rabel, Gesammelte Aufsätze, vol. III (Tübingen, 1967), 1–21, 9.

sion of pursuing law's pure doctrinal system and recommended "comparative law as a universal method of interpretation".[3]

Up until the present day, numerous authors have followed these early postulates to take foreign law into account when dealing with national law, and have offered further reasoning to legitimize this approach. They argue for instance that positive law provides certain explicit connection points to foreign law. Ever since Zweigert, Article 1 of the Swiss Civil Code has served to support this argument. It states that the court shall follow "established doctrine and case law"[4] when filling gaps in the legal system. For it is tempting to include here *foreign* "established doctrine and case law" as well.[5] Hence, connection points within positive law bridge the abyss between national laws and clear the way for discussing foreign law before domestic courts. As further strategies of legitimization we can identify legal authority and universal concepts of law. Pursuant to the strategy of legal authority, arguments deriving from another jurisdiction have to be admitted if they imply persuasive authority. Universal concepts of law, such as principles of public international law or international model rules in contract law, on the other hand, foster the idea that national laws are not separate normative regimes but the "lower class" of a universal "upper class", where national normativities merge into one. Arguments referring to universal concepts of law may therefore be legitimate in national case law.[6]

Opponents of comparative legal reasoning could, however, counter those strategies of legitimization. Connection points within positive law might be missing. Article 1 of the Swiss Civil Code, for instance, applies exclusively in Switzerland and, moreover, one is not compelled to interpret this provision to allow for comparative references to foreign jurisdictions. Universal concepts of law and legal authority could be considered as rather imperialistic or diffuse. Nevertheless, comparative arguments occur particularly often in Swiss Supreme Court decisions. The court frequently cites foreign statutes, case law and doctrine.[7]

Yet to speak of comparative legal reasoning's triumphant progress would not be appropriate. For the reasons outlined in the opening paragraph, lawyers take a deeply skeptical view of it. If we burn the bridges of legitimization (connection points, universal concepts of law, legal authority) to foreign law and define our own law as a radically self-contained system, we will hardly find anyone ready to assign normative significance to foreign law in purely national matters. More likely, those skeptics will now conceive the other law as some-

3 *Konrad Zweigert*, Rechtsvergleichung als universale Interpretationsmethode, Rabels Zeitschrift für ausländisches und internationales Privatrecht 15 (1949/50), 5–21.

4 The translation reflects the French and Italian versions of the Swiss Civil Code *(consacrées par la doctrine et la jurisprudence, dottrina ed giurisprudenza più autorevoli)*. The German text, however, refers to "established doctrine and tradition" *(bewährte Lehre und Überlieferung)*.

5 Fundamental in this respect is the account of *Arthur Meier-Hayoz*, Der Richter als Gesetzgeber. Eine Besinnung auf die von den Gerichten befolgten Verfahrensgrundsätze im Bereiche der freien richterlichen Rechtsfindung gemäss Art. 1 Abs. 2 des schweizerischen Zivilgesetzbuches (Zurich, 1951), 197–200, 265 et seqq.

6 For references to the respective strategies, cf. *Thomas Coendet*, Rechtsvergleichende Argumentation. Phänomenologie der Veranderung im rechtlichen Diskurs (Tübingen, 2012), 10 et seqq.

7 *Konrad Zweigert/Hein Kötz*, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts, 3rd ed. (Tübingen, 1996), 18. For a detailed empirical review of Swiss case law, cf. notably *Alexandra Gerber*, Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts, in: Publications of the Swiss Institute of Comparative Law (ed.), The Responsiveness of Legal Systems to Foreign Influences. Reports presented to a colloquium on the occasion of the tenth anniversary of the Swiss Institute of Comparative Law (Zurich, 1992), 141–163.

thing "entirely different". – This conviction does not appear from nowhere. Rather, it is strongly backed up by the 20th century's dominating legal theory (legal positivism) with its separation between "is" (*Sein*) and "ought" (*Sollen*). From a positivistic viewpoint, the meaning of the rule, i.e., what one ought to do, exclusively results from national law. Foreign law is a mere fact; its rules are just a *Sein*, not a *Sollen* with authority for national courts.[8] This positivistic "logic of separation" constitutes the strongest conceivable opposition to a theory of comparative legal reasoning. And thus, it points to a pivotal question that such a theory needs to answer: What do we usually think of law that is "entirely different"?[9]

Legal positivism confines national law to a "national ought" and declares all other law to be "entirely different". What safeguards the borders between the two realms are authorities such as democracy, autonomy, territoriality, nationality, identity and culture. Yet the question remains the same: Can such authorities really safeguard the positivistic "logic of separation"? Are they actually as powerful as they claim to be? One theory is particularly well suited to address questions like these: Jacques Derrida's philosophy of deconstruction. The strength of this philosophy lies in its strategy not to criticize normative regimes from the outside, but rather to devote itself to *internal* criticism. On the other hand, deconstruction closely examines how meaning in texts occurs. It focuses on the constitution of sense, meaning, normativity in semiotic systems. Because of those characteristics, deconstruction serves perfectly to analyze the constitution of legal meaning by texts (statutes, precedents, etc.) in a closed system.[10]

The question that deconstruction shall answer is this: Can authorities such as nationality, democracy, culture, etc. define what constitutes legal normativity *entirely* by themselves (self-contained)? An affirmative answer presumes that the identity of their *self* exclusively follows from themselves, thus, without differing from something *else*. Thinking anything without drawing a distinction is, however, unthinkable; it resembles the attempt to create "formless whiteness", an idea to immerse oneself "in the void of the absolute" – as Hegel puts it in the preface to his *Phenomenology of Spirit*.[11] Derrida takes the same view.[12] And following him, we can state more precisely: The process of differentiation (*différance*) that each *self* runs through implies that the *self* constitutes *it-self* only by way of a detour to the *other*. The self has to cover an inevitable detour to the other in order to reach its self.[13] In spite of that, to assume an authority coming into being without such detour means attaching a privileged presence to this authority – a presence *beyond* all differences in time and space. Derrida refers to this paradigm as the "metaphysics of presence" and to the authority it privileges as

8 Cf. *Michal Bobek*, Comparative Reasoning in European Supreme Courts (Oxford, 2013), 214 et seq.; *Jörg Manfred Mössner*, Rechtsvergleichung und Verfassungsrechtsprechung, Archiv des öffentlichen Rechts 99 (1974), 193–242, 203.

9 Personally, I do not favor the narrow notion of positivism that underpins this question. The strict positivistic framework I present in this paper responds to the earlier discussions on comparative legal reasoning and hence has been chosen strategically – cf. *Thomas Coendet*, Rechtsvergleichende Argumentation. Phänomenologie der Veranderung im rechtlichen Diskurs (Tübingen, 2012), 6 et seqq., 27 et seqq.

10 For an introduction to deconstruction in the present context, cf. *Thomas Coendet*, Rechtsvergleichende Argumentation. Phänomenologie der Veranderung im rechtlichen Diskurs (Tübingen, 2012), 29 et seqq. The following argument relies on the book's first chapter. I will therefore keep references to a minimum.

11 *Georg Wilhelm Friedrich Hegel*, Phänomenologie des Geistes (Frankfurt am Main, 1986), 51.

12 Drawing on Hegel, he chooses the difference between past and future as his basic one; cf. *Jacques Derrida*, Marges de la philosophie (Paris, 1972), 13 et seqq.

13 I owe the metaphor of the "inevitable detour" *(unumgänglicher Umweg)* to *Georg W. Bertram*, Hermeneutik und Dekonstruktion. Konturen einer Auseinandersetzung der Gegenwartsphilosophie (Munich, 2002), 90.

the "transcendental signified".[14] In the occidental tradition, transcendental signifieds are called God, subject, reason, consciousness, etc.

Against the background of metaphysics of presence, we may judge legal positivism as follows: If positivism wants to claim any normativity, it needs authority for its legal norms – sources of law, in the traditional term. Yet such authority is no transcendental signified, a source to create law from nowhere (*creatio ex nihilo*). Authorities of legal meaning also have to differentiate themselves and make an inevitable detour to the other in order to ascertain their self. Thus, they incorporate the question about the other who helps them to achieve their self from the outset. This question may be oppressed, but no authority of positivism will manage to *ex-clude* it from its system – even if positivism brings everything into play, cuts off any connection with its origins (God, nation, rule of recognition, etc.), and proclaims itself as a holistic *pure ought*. Since this self-proclaimed *pure ought* (*Sollen*) will also undertake a detour to the facts (*Sein*), and so, even the ostensibly *purest ought* of a legal system contains traces of facticity.

Deconstructive legal theory does, consequently, not support the positivistic "logic of separation" between facts and norms. By doing so, it offers us the chance to broaden and deepen our understanding of legal normativity: The *ought* of any rule is not something merely intelligible, purely ideal on the one side, to be confronted with the facts of the case, on the other. Rather, normativity arises from a basic entanglement of facticity and ideality, of *Sein* and *Sollen*. Hence, a legal norm is not a simple, objective product of reason that tells us what we ought to do. The norm results from a decision that includes also the reason's *other* part (*Das Andere der Vernunft*).[15] Legal norms are therefore: the case's consequence; the result of political and historical contingencies; the end point of legal proceedings, marked by the courts' "impure" reasoning; occasionally, speculations on the future; or a psychological outlet for the responsibilities attendant on judicial decision making.

What does and does not follow from this widened legal normativity for the agenda of comparative legal reasoning? To deconstruct the notion of one's own law does not entail compelling the courts to engage in comparative legal reasoning. The deconstructive claim is more modest, yet more fundamental: Deconstruction puts forward another mode of thinking about foreign law. Within this mode, questions of law's autonomy and identity are answered as follows: Are we to define our own law by *our-selves* and is our own law really our own? Following Derrida, we become aware that self-determination by *our-selves* appears impossible. Self rather defines *it-self* via an inevitable detour to the other. Domestic law, therefore, has to be seen in the irreducible context of the other law. For this reason, there is no such thing as an "autonomous-internal" or "purely national" law. Likewise, this affects our notion of law's identity: Our own norms are the norms of others, too. And this legal *othering* indicates why one's own normative orientation could be sought in the law of others. Accordingly, deconstruction (or *différance*) claims to understand legal normativity in a way that does not allow for one thing: to remain *in-different* towards the norms of others.[16]

14 Cf. e.g. *Jacques Derrida*, Positions (Paris, 1972); *Simon Morgan Wortham*, The Derrida Dictionary (London, 2010), 103 et seqq.

15 Cf. *Hartmut Böhme/Gernot Böhme*, Das Andere der Vernunft. Zur Entwicklung von Rationalitätsstrukturen am Beispiel Kants (Frankfurt am Main, 1985).

16 For this sentence, I drew on *Georg W. Bertram*, Die Dekonstruktion der Normen und die Normen der Dekonstruktion, in: Andrea Kern/Christoph Menke (eds.), Philosophie der Dekonstruktion. Zum Verhältnis von Normativität und Praxis (Frankfurt am Main, 2002), 289–310, 306.

The question as to what we usually think of law that is "entirely different", thus, invites a simple answer: To stigmatize foreign law as "entirely different" misses the point, for it reflects a mind-set that would benefit from the philosophical corrections sketched above. To a positivistic skeptic, this might be shocking and he may retort: Is this supposed to mean that we should abolish all boundaries and cover the cultural identity mirrored in our own law by a foreign one? Asking such a question reveals a lack of understanding for the deconstructive argument. Deconstruction does not purport a naive annulment of boundaries. It critically points out the limits of limitation; it shows that one cannot draw the line as legal positivism suggests, but it does not argue that one must not draw it. An argument to this effect would not be promising anyway. The authority of statutes and precedents illustrates quite well how legal discourse distances itself from other discourses. Law is, to speak with Foucault, an "ordered discourse" where not everyone is allowed to say what he or she feels like.[17] And yet, deconstruction provides a valuable overture to *open* reasoning on comparative legal reasoning. Starting from here, we can embark on an insightful journey to realize:

> *Comparative work on national law consists in a constant liberation:*
> *to do everything to acknowledge but also to pass*
> *without necessarily betraying one's own law*
> *as one's ethnocentric and geographic limitation.*[18]

17 Cf. *Michel Foucault*, L'ordre du discours (Paris, 1971).

18 The last sentence is a variation of a statement by *Jacques Derrida*, Choisir son héritage, in: Jacques Derrida/Elisabeth Roudinesco (eds.), De quoi demain… – Dialogue (Paris, 2001), 11–40, 40.