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ON THE USE OF COMPARATIVE LAW BY JUDGES IN PRIVATE AND COMMERCIAL LAW CASES

1. INTRODUCTION

A quick overview of the practice of comparative law uses by courts around the world allows one to formulate promptly a few general observations as to this particular phenomenon. First of all, courts in general, regardless of their jurisdictions or the type of cases they handle, refer to foreign law only occasionally. Second, a majority of scholarly research is focused on the use of comparative law by courts in constitutional, human rights and generally in public law cases. This is due to the fact that if references to foreign law occur in courts, it is mainly in those areas of law. Third, the practice of using foreign law by judges is more frequent in some countries than in others. It is in particular more prevailing in the countries belonging to the common law system – especially within the Commonwealth, where different courts frequently cite each other's case law and refer in particular to English precedents.

It stems from the above that references to foreign law in private and commercial law cases are not so frequent as those in constitutional or human rights law cases. This is one of the reasons why scholars usually prefer to focus on jurisprudential uses of comparison in public law. Such references also raise important questions of legitimacy, especially in constitutional law, and often lead to a heated debate. Such a debate is taking place for instance in the U.S. where some scholars encourage the use of foreign law by the U.S. Supreme Court and find that it plays an important role in solving constitutional problems, while others view it as an inadmissible violation of American constitutional law.

Furthermore, scholars often overlook the uses of foreign law in private and commercial law cases as they deem them to be more "evident" and hence offering a less spectacular area for debate. Numerous achievements in terms of private law unification, as well as frequent uses of foreign law by courts in private international law cases lead to an oversimplification of some issues that arise around the uses of comparison in private and commercial law cases. The following article

will look at some of these issues and address them accordingly by contending that references to foreign law in private and commercial law cases have an important purpose in today's global world.

As this article will cover the issue of "uses of foreign law by judges", it is important to clarify first what is understood by "foreign law" and what is understood by "uses", in particular in light of the on-going discussion surrounding the meaning of these terms. By referring to "foreign law", this article understands case law as well as written law such as acts, constitutions and other instruments of law, which originate in another country or jurisdiction than the one solving the dispute at hand. Foreign law also means the law of international organizations, the EU law for instance, if it is applied by a court not normally bound by it. While speaking about "uses" of foreign law by judges, this article means jurisprudential quotations of and references to foreign law which are done by courts in order to solve a case. The use of foreign law is meant as the use of an extra tool which, along with national case law and scholarly research, allows a given court to reach the right conclusions while solving a dispute.

This article focuses on two main issues linked with the uses of foreign law by judges. The first part focuses on the "why" question. It will analyse the purpose, advantages and benefits of using comparative law in courts. This part will answer two main questions – first, why comparison is important in the area of private and commercial law and second, why it is important that judges in particular, and not only legislators and scholars, engage into comparative work. The second part of the article focuses on the legitimacy of foreign law uses in courts. It presents and overview of the criticism of such uses and how comparative law should be admitted as a legitimate source of law in courts all over the world.

2. THE PURPOSE

2.1. THE ADVANTAGES OF COMPARISON IN PRIVATE AND COMMERCIAL LAW

One of the first questions that needs to be addressed when explaining the purpose of comparative law uses by judges in commercial and comparative law cases is the question of the advantages and benefits that comparison can have in the area of private and commercial law in general. The arguments presented below are mostly the same as those presented in favor of comparative law in other branches of law.

The value of comparison and the advantages it presents are unprecedented in the study of law. By offering a larger perspective on it and by showing solutions adopted in other countries, comparison allows us to look back at our local law and to form a judgement as to the correctness of the rules contained therein. In

a sense, to use Plato's allegory of the cave, the lawyer who through comparison has acquired a knowledge of foreign law frees himself from the cave and from the images on the wall projected by the national lawmaker. There is no mystery in the fact that comparative law can be a beneficial tool when it comes to understanding the law and creating it. It is a common practice, used by legislatures all around the world, to refer to foreign systems while drafting new laws. Legal history offers a plethora of such examples: civil codes, constitutions, public and private law acts, judicial systems, commercial regulations and many other which were inspired by previous solutions adopted in other countries.

First of all, it has to be pointed out that beyond the possible "inspiration" that one system may draw from another, comparative law plays an important role when it comes to convergence and unification of the law. It is nothing more than the study of differences and similarities between different systems that allows us to see the areas in which two or more legal systems are identical, similar or divergent. This allows in turn, to unify the law by upholding what is identical, adjusting what is similar and modifying what is different. The developments that took place in the last couple of decades are filled with examples of convergence on national, regional or international level. The unification of laws has proved to be very beneficial for one major reason – it allows to create rules common to many countries and therefore, to eliminate legal barriers. Barriers which are often a hindrance to economic growth. An example can be made here with the law of the European Union. The unification of rules in such areas as custom duties or free movement of capital, goods and persons has led to a growth of the European economy.

Convergence and unification have, therefore, a special significance in private and commercial law since any differences in the legal systems of various countries are one of the hindrances to commerce between states. A system of unified – to an even greater extent than it currently is – commercial law would facilitate international commerce. This in turn, would generate more economic exchanges and lead to a faster economic growth. As the example of the European Union shows so far, the unification of commercial and private law can only be positive. It is, therefore, important to continue on this path and embrace even greater unification of commercial law within all of the EU Member States.

Furthermore, a similar unification of the law, as the one that has occurred on the European continent could help countries in developing regions of the world, such as Africa. Such a unification of the law would allow to address and solve many of the pressing legal and political problems that countries on the African continent are currently struggling with. A unification of African laws could also lead to an improvement of their internal commerce. The EU serves here, therefore, as an essential example of a legal system based on unified law.

Beyond the clear benefits of unification, comparative law does present also other advantages. As mentioned above, it can be an important source of inspira-

tion. Inspiration which in commercial law can be essential in improving a given legal system. Such inspirations can come from many sources. One of them can be, for instance, the annual Doing Business – Ranking of Economies created by the World Bank Group. It presents a classification of countries which, among other things, have the best legal systems to conduct business. The solutions adopted in the legal systems of those countries that are considered as the "easiest to do business in" – such as Singapore, New Zealand, Hong-Kong SAR China or Denmark – can be an important source of inspiration for many countries. In particular, those with developing economies, which are often considered as "hostile" to investors and which could benefit by turning their laws into more business-friendly ones.

It stems from the above that the use of comparative law allows to fill the lacunae in a given legal system and to improve one's legal system by taking examples from a more experienced one. Not doing so might in fact, be counter-productive for various reasons. Different laws after all face similar issues and problems. It is, therefore, justified to seek foreign solutions if they can effectively address a local problem. The benefits of such references to foreign law can be illustrated with the stellar example of the practice of the Court of Justice of the European Union and of its Advocates General in the past decades. The Court played throughout the years not only an interpretative role, but mostly an important role in creating standards and rules which laid the foundations of the current EU law. In many areas however, the inspiration to solve cases and create legal standards has come from foreign law and foreign jurisprudence. It was the case with the European competition law, which the ECJ has established throughout frequent references to the U.S. antitrust law. Similarly, the references to foreign law have helped the Court to establish fundamental principles in intellectual property law as well as in damage compensation cases.

As the above examples illustrate, comparison in the area of private and commercial law can have many benefits. It allows further unification which in turn, eliminates various legal barriers that might hinder international trade or commerce. It also serves as an important inspiration, allows to fill the gaps of one legal system or to seek better solutions that would allow improving the existing local legal framework. Such improvements can only be beneficial to the economic growth of the country, since they will facilitate the conduct of business.

2.2. THE IMPORTANCE OF THE JUDGES' COMPARATIVE ACTIVISM

The second question that needs to be addressed in this first part is the question of why it is important to demand from judges, and not only from legislators or scholars, to engage in this comparative dialogue with other countries?

The main reason for conferring this particular task of comparison upon courts, more than upon law commissions, is linked with the function of the judge.

The main task of courts is to interpret the law and apply it to a given case in order to solve the legal problem that appears in it. Nevertheless, it has to be pointed out that courts, beyond their interpretative role, are also lawmakers. It is the case, of course, in common law systems where the law making function of the judge is obvious but also, more and more recently, in civil law countries. In the latter, judges – in particular those sitting on the benches of supreme or constitutional courts – do not limit themselves to a mere interpretation of the law but create important and lasting principles which complement the written law. Whether such a law making function is desirable in a judge or not, is not important for this debate. What has to be kept in mind is that the judge is in both common law and civil law countries a lawmaker. Therefore, as a lawmaker he should be engaged in "comparative activism". He should encourage counsels and attorneys to research and cite foreign law to him. He should also himself refer to comparative law and seek to base his decisions not only on local law and local precedent but also on solutions adopted to similar problems in other countries. The advantages that a judge can offer to comparison come also from the fact that courts are flexible and dynamic lawmakers. Therefore, the changes that a judge could bring through comparative law can be brought faster, easier and better than those a legislator can offer.

In addition, even when interpreting laws, it is desirable for a judge to use foreign jurisprudence. It is so, for instance, in cases where the rule of law interpreted in one country has a similar counterpart. Such situations naturally require looking into foreign law in order to find the foreign interpretation of that identical rule. Such common rules, shared by many legal systems, come from various sources. They can be present due to shared values between the different legal systems, which historically arrived to possess similar rules in their respective civil codes. They are also frequently introduced by international conventions that aim to unify the law in a particular area and to introduce the same regulations in each country. When interpreting rules which have been transposed in a given country from and international convention, it is almost impossible and illogical to overlook foreign jurisprudence relating to those same rules in respective countries. If a given convention aims at unifying the law, then this unification should mean not only introducing common rules but also maintaining a unified interpretation among different courts. An interpretation of conventional rules that would be different in various countries would defeat the purpose of the unification aimed by the convention. In relation to those rules that are similar or identical in various systems due to the cultural and historical similarities, it can be said that it can be nothing but helpful and beneficial to interpret them together.

To summarize, it can be said that the importance of judges engaging in "comparative activism" is linked with the fact that their role, both as interpreters of the law and as lawmakers, puts them in a very suitable position in which they can make a great impact in terms of unification and convergence. Their function, and

the fact that they are close to real problems and real issues when using the law, leads to the conclusion that if they engage in "comparative activism", then comparative law can have a direct and important impact on the people's lives.

3. THE LEGITIMACY

The first part of this article has presented an answer to the question of "why?" judges and courts should engage in "comparative activism". The various benefits and advantages that stem from such an activism have been clearly illustrated. This second part aims at answering another essential question, the question of "how?" the legitimacy of such uses can be justified. It is an important question since, as it has been pointed out at the beginning of this article, references to foreign law have raised many concerns and are often criticized as being an illegitimate infringement of constitutional rules. This part will first address those arguments and try to present compelling reasons justifying the legitimacy of judicial "comparative activism".

3.1. ARGUMENTS AGAINST AND IN FAVOR OF THE LEGITIMACY OF THE JUDGES' COMPARATIVE ACTIVISM

Citing foreign courts is criticized as being undemocratic, since foreign laws do not have the same constitutional legitimacy to shape a society that national laws do. They are not deemed as a "source of national law" and hence do not benefit from the same constitutional legitimacy that the national lawmaker has accorded to its own laws. The judge, seeking to rely in his ruling on a piece of foreign jurisprudence does so, in fact, without any particular legal ground. This argument is in particular prevailing in civil law countries where the concept of a binding precedent does not exist, even in relation to national judgments. It is, therefore, harder to refer to a foreign ruling or law and use it as a basis for the solution to the problem in national law.

Various arguments come to complement the one described above regarding the lack of constitutional legitimacy. It is often pointed out that interpreting national law by references to foreign law is pointless. The main contention here is that it does not makes logical sense, nor does it bring any argumentative value to point out, for instance, that the constitutional laws of France, Germany or Zimbabwe have solved this issue in a particular way so, therefore, the U.S. constitution should be interpreted in the same way. In other words, the legal history, culture, research and scholarly as well as jurisprudential contributions of one legal system should be sufficient to solve any legal problem that may arise in that system without any use of foreign law.

In order to address such a criticism, one can say that judges often base themselves on national judgments and extensively cite the works of legal scholars. All in all, it is impossible for any court to solve a legal problem just on the basis of what is considered a legitimate source of law. In that case, if courts cite legal scholars and we attach a legitimate value to academic works and comments, why should such legitimacy not be given to foreign courts? It is only fair to deem that a foreign court, having the constitutional legitimacy in its country, can be considered as an additional "method of interpretation" or even an additional source of law. It is so especially in light of the fact that certain value is attached to the work of legal scholars which, despite their usefulness, does have less legitimacy than foreign courts.

Furthermore, as it was already pointed out in the first part, various legal systems share usually the same problems and goals. In many cases they also share similar, if not identical, functions, principles and rules. There is, therefore, nothing unnatural or illegitimate in looking into foreign law to see how it resolves a given question or problem to which a judge seeks the answer and which is not clearly addressed by national law.

3.2. THE PATH TO AN INTERNATIONAL LEGITIMACY OF COMPARATIVE LAW IN COURTS – PROJECT OF AN INTERNATIONAL CONVENTION

Despite the various arguments in favor of a judicial legitimacy to refer to foreign law, it remains true that judges in most countries lack a formal "permission" to consider foreign sources in their rulings. Only very few countries allow judges, more or less expressly, to look into foreign law. It is, for instance, the case in South Africa where references to foreign law by courts proved to be essential in "rebuilding" the legal system after years of apartheid. Another example is Switzerland. On the other hand, there are some countries that explicitly prohibit any references to foreign law (for instance in South America) or others where such uses, although not explicitly prohibited, are often criticized and judges are still reluctant to make such uses (for instance the U.S.). A beacon of hope remains in the fact that, despite any clear constitutional mandate, courts in many countries and in many jurisdictions have made at some point or the other a reference to foreign law in their case law. This proves that such references are, at least to some extent, necessary and desirable.

The important task that has to be, therefore, achieved is conferring upon judges, in as many countries as possible, a legitimate basis for the use of comparative law. This article's contention is that such a global legitimacy for judicial comparative activism could be achieved by an international convention. A convention that would offer national judges a legal basis for the use of foreign rulings and foreign law in their daily work. Drafting such a convention properly would demand addressing a number of questions as to the constitutional compatibility of such

a convention with national legal systems. Other problems that would need to be addressed in the convention include the issue of the extent to which judges would be allowed to make references to foreign law, the conditions of such references and the areas of law in which they can be made. Among other things, the convention should put on its signatory states an obligation to translate all judgements into English, which would facilitate the cross-country references to foreign law.

4. CONCLUSION

To summarize the analysis presented in this article, it has to be said that there are important advantages of the use of comparative law by judges in private and commercial law cases. Such uses will allow further unification of private law which, in turn, will allow to diminish the hindrances to international trade and commerce. It seems that to some extent, the convergence taking currently place within the law, and the ongoing globalization of the law are still one step behind the globalization of the world which we see in other areas such as communication, transport, commerce, finances or economics. In other words, the law is in a constant need to adapt and to erase national barriers in order to keep up with the economic, financial and technological convergence which the world experiences. In that sense, there is a growing need to study comparative law, to teach it and to use it as much in the process of creating it as in the process of applying it in courts. Nevertheless, the courts are sometimes criticized for making such foreign law references, as lacking legitimacy. To address this problem an international convention could be drafted which would offer judges the legitimacy of using foreign law in their rulings.

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Summary

The author presents an analysis of the problem of uses of comparative law by judges in private and commercial law cases. The starting point of this article is the assumption that national judges, ruling on cases, seldom make any references to law and case law of other countries. Although such uses sometimes appear in public law cases but are almost inexistent in private law. The author's contention is that such uses should be more frequent, and become common ground, since they are beneficial for the development of national law. This contention is defended in two parts. First, the author presents the purpose of comparative law uses by national judges – the advantages that such uses can

bring and a description of how such uses can contribute to a better and stronger unification of different legal systems. Second, the author focuses on the issue of the legitimacy of comparative law references in court rulings. The arguments presented defend the thesis that national judges are allowed to make reference to foreign law and that such uses are not against their national law.

ROZWAŻANIA NA TEMAT WYKORZYSTANIA PRAWA PORÓWNAWCZEGO PRZEZ SĘDZIÓW W SPRAWACH Z ZAKRESU PRAWA PRYWATNEGO I HANDLOWEGO

Streszczenie

Autor w artykule analizuje zagadnienie problemu wykorzystywania prawa porównawczego przez sędziów orzekających w sprawach cywilnych i handlowych. Założeniem wyjściowym dla analizy jest fakt, że odwołania do prawa obcego przez sędziów krajowych występują bardzo rzadko. Zdarzają się one czasem w prawie publicznym, ale nie istnieją niemalże w ogóle w prawie prywatnym. Autor stawia tezę zakładającą, że stosowanie przez sędziów prawa porównawczego przy orzekaniu w sprawach cywilnych i handlowych powinno stać się regułą. Tezę tę uzasadniono, używając dwóch argumentów. Po pierwsze, autor przedstawia zalety, jakie niesie ze sobą wykorzystywanie prawa porównawczego w orzecznictwie cywilnym oraz możliwości jakie przedstawia w kontekście coraz dalej idącego ujednolicania systemów prawnych. Po drugie, autor daje uzasadnienie prawne powoływania się przez sądy krajowe na prawo zagraniczne i wyjaśnia, dlaczego taka praktyka jest dopuszczalna *de lege lata* oraz jak można by ją rozpowszechnić *de lege ferenda*.

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