

The normativity of judicial borrowings: A blind spot in judicial decision-making studies

A normatividade dos empréstimos judiciais: um ponto cego nos estudos das decisões jurídicas

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Artigo recebido em 13/12/2015 e aceito em 19/05/2016.

Abstract

The study of judicial borrowings, courts' appropriation of foreign legal material, has been kept aside from the methodological shift that placed judicial decision-making in the centre of legal theory. In the second half of the 20th century, two premises became largely accepted among legal theorists: that judicial decisions ought to be justifiable and that the arguments judges offer in justification for their rulings are necessarily normative. These premises imply a methodological standpoint known as the participant's perspective. However, the prevailing approach in comparative legal studies is still descriptive and explanatory and adopts the observer's perspective. As a consequence, comparatists have failed in tackling the normative issues that judicial borrowings raise. The most obvious but rarely asked question is: 'Are judges legally authorized to do so?'. Particularly the democratic principle poses a serious objection: judges would not be entrusted with authority to draw conclusions from legal sources that the people have not accredited. The main purpose of this paper is to provide the basis for an analytic and normative approach to this and other objections, by construing them as demands of justification. The essay takes the postures of three constitutional courts towards borrowings—the U.S. Supreme Court's resistance, the German Federal Constitutional Court's selectiveness, and the Brazilian Supreme Federal Court's enthusiasm—as three distinct normative attitudes. As I submit, if the choice of sources on which judges base their decisions ought not to be arbitrary, each court should be provoked to justify its own attitude towards borrowing, and scholars must be prepared to contribute to the debate. This paper should provide a starting point for these discussions.

Key-words: judicial borrowings; duty of justification; U.S. Supreme Court; Federal Constitutional Court of Germany; Supreme Federal Court of Brazil.

Resumo

O estudo dos “empréstimos judiciais”, ou a apropriação de material estrangeiro por tribunais nacionais, passou ao largo da virada metodológica que colocou a decisão jurídica no centro da Teoria do Direito. Na segunda metade do século XX, duas premissas ganharam ampla aceitação entre teóricos do Direito: as decisões judiciais devem ser justificadas, e os argumentos usados por juízes [em justificação para as] para a justificação das decisões que proferem são necessariamente normativos. Essas premissas supõem uma perspectiva metodológica chamada de ponto-de-vista do participante. No entanto, a abordagem que ainda prevalece no Direito Comparado é basicamente descritiva, explicativa e construída a partir da perspectiva do observador. Consequentemente, comparatistas tem falhado em lidar com as questões normativas que os empréstimos judiciais aventam. Entre tais questões, a mais óbvia, embora raramente formulada é: “juízes estão legalmente autorizados a decidirem com base em material estrangeiro?” O princípio democrático, em particular, oferece uma séria objeção: os membros do Poder Judiciário não teriam autoridade legal para derivar conclusões de fontes jurídicas que não tenham sido acreditadas pelo povo em nome do qual eles decidem. O principal objetivo deste trabalho é lançar as bases de um modelo analítico-normativo que permita tratar essa e outras objeções como demandas de justificação. O artigo adota o comportamento de três tribunais diante de materiais estrangeiros – a resistência da Suprema Corte dos EUA, o cuidado do Tribunal Constitucional Federal da Alemanha, e o entusiasmo do Supremo Tribunal Federal do Brasil – como paradigmas de atitudes normativas distintas. Afirma-se que, se a escolha das fontes em que juízes baseiam suas decisões não deve ser arbitrária, cada tribunal deveria ser provocado a justificar sua própria atitude diante de materiais estrangeiros, e juristas deveriam estar preparados para contribuir para o debate. Este trabalho pretende oferecer um ponto inicial para essa discussão.

Palavras-chave: empréstimos judiciais; dever de justificação; Suprema Corte dos EUA; Tribunal Constitucional Federal da Alemanha; Supremo Tribunal Federal do Brasil.

1. Introduction

The transfer of elements among legal systems has gained ample space in the field of comparative law, and particularly in comparative constitutional law, which should come as no surprise. The sharing of constitutional experiences is an essential element of the arrangement that emerged after World War II, which authors call “post-war,”¹ “global,”² or “new” constitutionalism.³ The first studies exclusively dedicated to the foreign influence of domestic law came out in the 1970s.⁴ Constitutional borrowing, as the phenomenon is more often known, has been the subject of countless works since then.⁵ Scholarship has reached a more or less consensual understanding that a country’s constitution, from the process of drafting to its subsequent interpretation and application, is not built in isolation.⁶ Explanations for the phenomenon abound. Nevertheless, researchers have generally paid scant attention to the normative issues that judicial recourse to foreign legal material raises.

The present study shall cast light on these questions. But this essay is not concerned with constitutional borrowings in general. Rather, it examines a specific type: the judicial appropriation of foreign legal arguments that will be used in constitutional adjudication. Judicial borrowings put forward implicit

¹ WEINRIB, Lorraine, *The Postwar Paradigm and American Exceptionalism*, in: CHOUDHRY, Sujit (Org.), *The migration of constitutional ideas*, Cambridge: Cambridge University Press, 2006, p. 89 ff.

² LAW, David S.; VERSTEEG, Mila, *The Evolution and Ideology of Global Constitutionalism*, *Cal. L. Rev.*, v. 99, 2011, p. 1163.

³ HIRSCHL, Ran, *The political origins of the new constitutionalism*, *Indiana Journal of Global Legal Studies*, v. 11, n. 1, 2004, p. 72 ff.

⁴ GRAZIADEI, Michele, *Comparative Law as the Study of Transplants and Receptions*, in: *The Oxford handbook of comparative law*, Oxford: Oxford University Press, 2006, p. 442. The seminal work on the matter is reputedly WATSON, Alan, *Legal transplants: an approach to comparative law*, Edinburgh; London: Scottish Academic Press, 1974.

⁵ See, for instance, LEGRAND, Pierre, *The Impossibility of “Legal Transplants”*, *Maastricht Journal of European & Comparative Law*, v. 4, p. 111–124, 1997; MILLER, Jonathan M., *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, *The American Journal of Comparative Law*, v. 51, n. 4, p. 839, 2003; DAVIS, Dennis M., *Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience*, *International Journal of Constitutional Law*, v. 1, n. 2, p. 181–195, 2003.

⁶ JACKSON, Vicki C., *Constitutions as “Living Trees”?* *Comparative Constitutional Law and Interpretive Metaphors*, *Fordham Law Review*, v. 75, n. 2, 2006, p. 927 ff.; MCWHINNEY, Edward, *Constitution-making: principles, process, practice*, Toronto: University of Toronto Press, 1981, p. 6.

“demands of justification [that] must be met,”⁷ whether the court that engaged in borrowing recognises it or not. To tackle the question of justification, a normative issue by definition, is the main purpose here.

The concept of normativity is as controversial as important to legal theory.⁸ Without delving deep into the controversy, I posit that normative arguments (or conclusions connected to ought) cannot logically follow from empirical arguments (or statements connected to is).⁹ I hope that most readers can agree with this premise. This separation between empirical and normative reasons is central to the argument developed below, for it correlates to the distinction between explanation and justification. A researcher who inquires whether a constitutional court can legitimately decide cases with recourse to foreign legal materials asks for legal justification. She asks whether it is legally permitted, prohibited, or commanded for judges to have recourse to comparative constitutional law. This question can only be answered from the perspective of a participant in the debate about what the law correctly understood commands, prohibits, or permits.¹⁰ From this perspective, explanations for borrowing do not suffice.

Few works have actually focused on the normative aspects of constitutional borrowings,¹¹ such as the argumentative role they play in constitutional interpretation,¹² or the question of whether courts have legitimate reasons for incorporating foreign material in their decision-

⁷ Ibid., p. 5.

⁸ Supporting the normative thesis on the nature of law, see HART, H. L. A., *The concept of law*, 2. ed., Oxford: Clarendon Press, 1994, p. 10-13); and ALEXY, Robert, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, Oxford; New York: Oxford University Press, 2010a, p. 6, footnote 19. On authors who question the thesis, see GREEN, Michael Steven, *Legal Realism as Theory of Law*, *William and Mary Law Review*, v. 46, 2005, p. 1917-2000.

⁹ David Hume is reputedly the first to have made a case on the problematic transition from “is” to “ought.” See his *Treatise of Human Nature*, Oxford: Oxford Univ. Press, 2000, p. 302.

¹⁰ For more on the participant’s perspective, see ALEXY, Robert, *The Argument from Injustice: A Reply to Legal Positivism*, New York: Oxford University Press, 2010b, p. 35-82, and 3.3 below.

¹¹ Cf. CHOUDHRY, Sujit, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, *Indiana Law Journal*, v. 74, n. 3, 1999, p. 827; PULIDO, Carlos Bernal, *The Migration of Proportionality Across Europe*, *New Zealand Journal of Public and International Law*, v. 11, n. 3, 2013, p. 483 ff.; ALFORD, Roger P., *In search of a theory for constitutional comparativism*, *UCLA Law Review*, v. 52, 2004, p. 639–714.

¹² Cf. KOMMERS, Donald P., *The Value of Comparative Constitutional Law*, *John Marshall Journal of Practice and Procedure*, v. 9, 1976, p. 688; GLENN, Patrick H., *Persuasive Authority*, *McGill Law Journal*, v. 32, n. 2, 1987, p. 261 ff.; HÄBERLE, Peter, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat*, *Juristen Zeitung*, n. 44, 1989, p. 916–918.

making.¹³ The uncommonness of this type of inquiry is also noticeable in a field typically dedicated to normative studies: constitutional theory.¹⁴ As a comparatist observed, ‘normative constitutional theorists’ have not dedicated much effort in examining “how the migration of constitutional ideas figures into their narratives.”¹⁵

This essay aims at fulfilling this gap and is structured as follows. Part two introduces the expression ‘judicial borrowing,’ which will be used to term judicial reference to all types of legal material taken from foreign legal systems. Part three suggests some refinements to the methodology that legal comparatists have usually followed. These refinements respect the choice of a context—justification, explanation, or deliberation—, type of reasons—explanatory or justificatory—, and perspective—participant or observer. Part four separates judicial borrowings into voluntary or necessary, and argumentative or non-argumentative. Part five advances three normative attitudes constitutional courts may adopt towards foreign legal material: resistance, convergence, and engagement. Three constitutional courts, namely the U.S. Supreme Court, the Supremo Tribunal Federal (STF) of Brazil, and the Bundesverfassungsgericht (BVerfG) of Germany, are taken as paradigms. Part six explains why courts carry a special duty of justification when they have recourse to borrowing. Part seven advances the main reason against borrowing: the democratic objection. Finally, part eight classifies the reasons for borrowing into system-dependent and system-independent.

Importantly, it is beyond the scope of this essay to analyse the actual reasons that the three paradigmatic courts give for having recourse to foreign material. Nor is my intention to determine which of the three normative attitudes is correct—or more adequate. The objective of this study is limited in

¹³ Cf. ANNUS, Taavi, *Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments*, *Duke Journal of Comparative & International Law*, v. 14, n. 2, 2004, p. 309, 321–336; DAMMANN, Jens C., *The Role of Comparative Law in Statutory and Constitutional Interpretation*, *St. Thomas Law Review*, v. 14, 2002, p. 516; MARKESINIS, Basil; FEDTKE, Jorg, *The Judge as Comparatist*, *Tulane Law Review*, v. 80, p. 2005, p. 12.

¹⁴ Cf. WALDRON, Jeremy, *Foreign Law and the Modern *Ius Gentium**, *Harvard Law Review*, v. 119, n. 1, 2005, p. 129–130.

¹⁵ CHOUDHRY, Sujit, *Migration as a New Metaphor in Comparative Constitutional Law*, in: CHOUDHRY, Sujit (Org.), *The migration of constitutional ideas*, Cambridge: Cambridge University Press, 2011, p. 16.

this sense. The argumentative issues it tackles are rather methodological than substantive. I demonstrate that the attitude a court has towards foreign legal material can be construed as a normative choice in which reasons for and against borrowings have to be considered. I do so in the hope that scholars and judges may use this argumentative scheme to assess the correctness of the practices they are faced with in actual legal systems. Furthermore, I submit that comparatists confronted with normative problems presented by judicial borrowings may benefit from the improved methods as devised here.

2. Terminological remarks

A dispute over the terminology that best depicts constitutional borrowings has dragged comparatists into a “battle of metaphors.”¹⁶ Scholars are far from arriving at a consensus about the correct term to use in reference to the incorporation of foreign elements in a national legal system. Bricolage,¹⁷ cross-fertilization,¹⁸ entanglement,¹⁹ influence,²⁰ inspiration,²¹ irritation,²² migration,²³ reception,²⁴ transmission,²⁵ and transplants²⁶ are examples of words that legal

¹⁶ PERJU, Vlad, Constitutional Transplants, Borrowing and Migrations, in: ROSENFELD, Michel; SAJÓ, András (Orgs.), *The Oxford handbook of comparative constitutional law*, 1. ed. Oxford: Oxford University Press, 2012, p. 1306.

¹⁷ TUSHNET, Mark, The Possibilities of Comparative Constitutional Law, *The Yale Law Journal*, v. 108, n. 6, 1999, p. 1229.

¹⁸ ALLISON, John W. F., Transplantation and Cross-fertilisation, in: BEATSON, Jack; TRIDIMAS, Takis (Orgs.), *New Directions in European Public Law*, London: Hart Publishing, 1998, p. 169–182.

¹⁹ NEVES, Marcelo, *Transconstitutionalism*, Oxford; Portland, Oregon: Hart Publishing, 2013, p. 75 ff.

²⁰ SCHEPPELE, K. L., Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models, *International Journal of Constitutional Law*, v. 1, n. 2, 2003, p. 297.

²¹ SMITS, Jan M., Comparative Law and its Influence on National Legal Systems, in: ZIMMERMANN, Reinhard; REIMANN, Mathias (Orgs.), *The Oxford handbook of comparative law*, Oxford: Oxford University Press, 2006, p. 525.

²² TEUBNER, Gunther, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies, *The Modern Law Review*, v. 61, n. 1, 1998, p. 12.

²³ CHOUDHRY, 2011, p. 13.

²⁴ WATSON, Alan, Aspects of Reception of Law, *The American Journal of Comparative Law*, v. 44, n. 2, 1996, p. 335.

²⁵ SCHAUER, Frederick, The Politics and Incentives of Legal Transplantation, in: NYE, Joseph S.; DONAHUE, John D. (Orgs.), *Governance in a globalizing world*, Cambridge, Mass.; Washington, D.C: Brookings Institution Press, 2000, p. 21.

²⁶ WISE, Edward M., The Transplant of Legal Patterns, *The American Journal of Comparative Law*, v. 38, 1990, p. 1.

comparatists often use. The terminological struggle frequently “bears on perceptions of the kinds of questions it is relevant to ask,”²⁷ although some terms are “at times deployed casually.”²⁸ In fact, choosing a term matters, but all metaphors are somehow misleading, and none of them is fully satisfactory. Hence, this essay subscribes to the use of ‘judicial borrowing’ to refer to the recourse courts have to foreign legal material, but concedes that this choice is not free from objections.

Borrowing seemingly became the dominant metaphor in comparative constitutional law after the most influential journal on the matter set the seal on it.²⁹ But the term also creates some difficulties. Firstly, it suggests a voluntary, consented exchange between equals, each aware of lending or borrowing, respectively.³⁰ Secondly, it implies that the borrowed good can return without modifications to its original owner after a period of time.³¹ Yet, judicial borrowings feature neither the consent nor the possibility of return that the common use of the word implies.³² In any case, the alternatives that comparative constitutional theorists suggest are not free from serious objections either. And the danger of misinterpretation that these metaphors pose should not be exaggerated.³³ It is therefore advisable not to take this terminological choice too seriously.

In any case, a further remark on terminology is required. The phrase ‘judicial borrowing’ is sometimes narrowly used as a synonym for borrowing case law only.³⁴ And that is so because foreign courts’ opinions on constitutional matters are the main source of material for judges who seek for inspiration when they find themselves before a hard case.³⁵ Nevertheless, in this study, ‘judicial borrowing’ designates reference to all kinds of alien

²⁷ Ibid.

²⁸ FRANKENBERG, G., Constitutional transfer: The IKEA theory revisited, *International Journal of Constitutional Law*, v. 8, n. 3, 2010, p. 566.

²⁹ See FRIEDMAN, Barry; SAUNDERS, Cheryl (Orgs.), Symposium: Constitutional Borrowing, *International Journal of Constitutional Law*, v. 1, n. 2, 2003, p. 177–403.

³⁰ SCHEPPELE, 2003, p. 296.

³¹ PERJU, 2012, p. 1307.

³² SCHEPPELE, 2003, p. 296–301.

³³ PERJU, 2012, p. 1308.

³⁴ ANNUS, 2004, p. 314.

³⁵ KOOPMANS, T., Comparative Law and the Courts, *The International and Comparative Law Quarterly*, v. 45, n. 3, 1996, p. 545, 549; ANNUS, 2004, p. 314.

sources: certainly the jurisprudence from other national or supranational courts, but also foreign constitutions, statutes, and legal scholarly writings.³⁶

3. Methodological remarks

This essay is not a piece of research in the field of legal sociology, nor does it aim at contributing to the development of a legal realist theory on constitutional borrowings.³⁷ And this is not due to its subject, but rather because of the way the subject is approached. To ask whether a constitutional court can legitimately decide difficult cases by resort to foreign legal material is to quest after justification. One must advance justifying reasons to answer whether it is legally permitted, prohibited, or commanded for decision-makers to have recourse to comparative constitutional law. This is a normative question by nature and, as such, can only be answered by someone who puts himself within the legal system and tries to make sense of it from inside. Thus, the decisive factors, which in the end distinguish this research from sociological or realist ones, is that it focuses on the context of justification, inquiries into justifying reasons, and adopts the participant's perspective. These distinctions between contexts, types of reasons, and perspectives are presented below as refinements in the methodology of studies on judicial borrowings.

3.1 Context matters

Despite the vast literature on comparative constitutional law dedicated to borrowings, its methodology lacks some refinement. The first thing to consider is that, for analytical reasons, one may group the phenomena that are

³⁶ DROBNIG, Ulrich, The Use of Comparative Law by Courts, in: DROBNIG, Ulrich; VAN ERP, J. H. M. (Orgs.), The use of comparative law by courts: XIVe Congrès international de droit comparé, Athènes = XIVth International Congress of Comparative Law, Athens: 1997, The Hague ; Boston: Kluwer Law International, 1999, p. 4.

³⁷ On "legal realism", see GREEN, 2005, p. 1917 ff.

somehow involved with adjudication as pertaining to three contexts: justification, explanation, and deliberation.³⁸ Each context carries particularities that a constitutional comparatist should be aware of when approaching decision-making. The context of deliberation refers to the moment of decision properly speaking. That is when the judge “discovers” or “finds” the legal answer for the case she has before her.³⁹ The context of explanation refers to the factors that can explain how a judge came to a certain conclusion instead of another. Possible explanations range from the moral and religious beliefs of a decision-maker⁴⁰ to whether she decided before or after a food break, for example.⁴¹ They also include the kind of legal training she had and particular constraints of the judiciary organization to which she is submitted.⁴² At any rate, however relevant these explanations are, they are not admitted in legal argumentation as reasons apt to justify a judicial ruling. In judicial decision-making, relevant is the context of justification, or “whether the given reasons are adequate to establish the conclusions.”⁴³ The present study does not concern the context of deliberation (or discovery). Thus, let us put it aside and focus on the other two, justification and explanation, and the kind of reasons connected to each.

3.2 The type of reasons matters

The second methodological refinement is the distinction between explanatory and justificatory reasons. Explanatory reasons are the causal conditions that explain “why a certain event has occurred or why a certain state of affairs

³⁸ BAIER, Kurt, *The moral point of view: a rational basis of ethics*, Ithaca, NY: Cornell Univ. Press, 1966, cap. 6.

³⁹ GOLDING, Martin P., *Legal reasoning*, Peterborough, Ontario: Broadview Press, 2001, p. 2.

⁴⁰ MILLIGAN, Joy, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Public Morality*, *New York University Law Review*, v. 81, n. 3, 2006, p. 1231–1240.

⁴¹ DANZIGER, Shai; LEVAV, Jonathan; AVNAIM-PESSO, Liora, *Extraneous factors in judicial decisions*, *Proceedings of the National Academy of Sciences*, v. 108, n. 17, 2011, p. 6889.

⁴² VIDMAR, N., *The Psychology of Trial Judging*, *Current Directions in Psychological Science*, v. 20, n. 1, 2011, p. 58–62.

⁴³ GOLDING, Martin P., *A Note on Discovery and Justification in Science and Law*, in: PENNOCK, J. Roland; CHAPMAN, John W. (Orgs.), *Justification*, New York: New York University Press, 1986, p. 128.

exists.”⁴⁴ Justifying reasons, by contrast, are “the reasons for asserting a given judgement or statement to be true or correct.”⁴⁵ This basic distinction, which has been endorsed by several authors,⁴⁶ is relevant for the understanding of judicial borrowings. Historical, psychological, and sociological approaches to borrowings are mainly concerned with explanatory reasons, even when their subject is the reasoning of courts. They ask “about the manner in which a decision or conclusion was reached” and are interested in the “factors that led to or produced the conclusion.”⁴⁷ Thus, a researcher that considered the explicit reasons presented in the written opinion of a court, but did so “by construing such reasons as expressive of beliefs or values that have a psychological effect on the judge’s action,”⁴⁸ would search for explanatory reasons and relations of natural causality. Very different is the case of legal theorists that inquire “whether a given decision or conclusion is justifiable.”⁴⁹ They regard judicial reasoning as grounded not in subjective states of mind like beliefs, but in norms, the existence of which is relatively independent of the judge. Studies of this type—for instance, the one conducted here—must necessarily set forth justificatory reasons for their conclusions.

3.3 Perspective matters

There is a third refinement to add when discussing the methods this study employs. It regards the choice of perspectives, or from which point of view one sees legal phenomena in general and judicial borrowings in particular. Firstly, a scholar can examine a judicial decision from outside, as a social or political fact. Purposes for this type of inquiry may be those of “illustrating the judicial role in the formulation of public policy,” for example.⁵⁰ Secondly, however, the scholar can deal with a judicial decision from inside, figuratively placing himself

⁴⁴ GOLDING, 2001, p. 3.

⁴⁵ Ibid., p. 4.

⁴⁶ GOLDING, 1986, p. 136; 2001, p. 3–6; DAMMANN, 2002, p. 518.

⁴⁷ WASSERSTROM, Richard A., *The judicial decision: toward a theory of legal justification*, Stanford, California; London: Stanford University Press; Oxford University Press, 1972, p. 25.

⁴⁸ GOLDING, 2001, p. 5.

⁴⁹ WASSERSTROM, 1972, p. 25.

⁵⁰ KOMMERS, 1976, p. 688.

in the position of someone who takes part in legal argumentation. In this sense, relevant are, for example, the reasons a judge puts forward for her ruling, or how she has interpreted the constitution and other sources she implicitly or explicitly relied on to justify her decision.⁵¹ These two methodological approaches correspond to the traditional distinction that legal theorists have made between participant's perspective and observer's perspective.⁵² Distinctive of the methodological perspective of a participant is the aptitude to claim that something is legally commanded, prohibited, or permitted. The possibility to make such statements implies the aptitude to accept, challenge, or reject similar claims made by other participants, as well as to engage in an argumentative dispute about the correct meaning of normative propositions.⁵³

Importantly, the terms 'participant' and 'observer' are not meant to designate real persons. Rather, they are metaphors that stand for different methodological perspectives or ways to approach legal phenomena.⁵⁴ Particularly 'participant' and 'member' are not interchangeable positions methodologically speaking. This carries implications for comparative constitutional law and the study being. It advances the possibility of adopting the internal point of view to a legal system without being a member of that community.⁵⁵ Furthermore, it permits us to overcome an objection that might be addressed to the use of this methodological refinement in researching on comparative constitutional law. This objection holds that someone that is an outsider to a legal system—which is the case of the constitutional comparatist that is not a member of the legal communities under comparison—cannot answer as a participant the normative questions posed by the same system.⁵⁶

⁵¹ Ibid., p. 687–688.

⁵² HART, 1994, p. 56.

⁵³ ALEXY, Robert, An Answer to Joseph Raz, in: PAVLAKOS, George (Org.), *Law, rights and discourse: the legal philosophy of Robert Alexy*, Oxford; Portland, Or.: Hart Pub., 2007, p. 45–46.

⁵⁴ ALEXY, Robert, Between positivism and non-positivism? A third reply to Eugenio Bulygin, in: BELTRAN, Jordi Ferrer; MORESO, José Juan; PAPAYANNIS, Diego M. (Orgs.), *Neutrality and theory of law*, New York: Springer, 2013, p. 9.

⁵⁵ MACCORMICK, Neil, *Legal reasoning and legal theory*, 1. ed. Oxford: Clarendon Press, 1994, p. 291.

⁵⁶ RAZ, Joseph, The Argument from Justice, or How Not to Reply to Legal Positivism, in: PAVLAKOS, George (Org.), *Law, rights and discourse: the legal philosophy of Robert Alexy*, Oxford; Portland, Or.: Hart Pub., 2007, p. 23.

Yet, once ‘member’ and ‘participant’ are taken as non-synonymous terms, no theoretic objection remains in using the participant’s perspective to approach comparative constitutional law.

Another consequence follows from adopting the participant’s perspective as defined above. The participant’s perspective allows researchers to see law as an argumentative enterprise and hence assess the correctness of legal arguments. A comparatist who adopts the participant’s perspective in comparative constitutional studies is required “to come to terms with the force and merit of arguments found in the opinions of foreign constitutional courts”⁵⁷ and other extra-national sources. Admittedly, from the observer’s perspective, a scholar can certainly describe the justifying reasons in the opinions of a constitutional court and even “the debate in which the Court is engaged.”⁵⁸ Nevertheless, without leaving the observer’s perspective, our scholar “cannot engage in argument on the question of which answer is legally correct. As soon as he does so, he ceases to be an observer and becomes a participant.”⁵⁹ Respecting judicial borrowings, to ask whether the constitutional court is permitted to resort to foreign materials is to query what is legally correct. As such, these questions demand that a scholar conducting the inquiry adopts the perspective of a participant.

4. Types of judicial borrowings

Judicial borrowings have peculiar properties and invite to specific classification. They can be voluntary or necessary, and argumentative or non-argumentative. Regarding the first classification, borrowings are necessary if courts are textually commanded to apply or at least consider foreign law. With remarkable exceptions, judicial borrowings are normally voluntary, for constitutions often silence about the validity of foreign legal sources.⁶⁰ South

⁵⁷ KOMMERS, 1976, p. 693.

⁵⁸ ALEXY, 2007, p. 46.

⁵⁹ Ibid.

⁶⁰ See DROBNIG, 1999, p. 6–17, for more on necessary and voluntary recourse to foreign law.

Africa probably offers the most remarkable exception.⁶¹ Section 39 (1) (c) of the South African Constitution states that, “when interpreting the Bill of Rights, a court ... may consider foreign law.”⁶² But that is not usually the case. Particularly the three courts considered here, namely the U.S. Supreme Court, the German BVerfG, and the Brazilian STF, have some discretion in the choice of legal sources, which characterises their borrowings as voluntary. They are by no means obliged to draw solutions and arguments from foreign legal material. For being non-binding extra-national sources of law, the authority of these materials is strictly persuasive: they “attract adherence as opposed to obliging it.”⁶³

In a sense, all voluntary judicial borrowings are argumentative. Judges that opt to resort to foreign legal experiences do so by virtue of the argumentative properties the borrowed material show rather than due to its authoritativeness or another formal attribute. But in detail, borrowings may play two very different roles in legal argumentation. On the one hand, courts can borrow from foreign material an obiter dictum, an incidental remark, which is not essential to the ruling and plays an accessory or decorative role in legal argumentation. This kind of borrowing can be called non-argumentative in the narrow sense, because it may contribute to the acceptance and social efficacy of decisions, and this is often the case, but without aiming at rational persuasion. On the other hand, it is sometimes the case that courts borrow foreign material that is seen as a sound and compelling argument.⁶⁴ Judges can use these borrowings as inspiration for a ruling, which is the conclusion of a legal argument, or as *ratio decidendi*, which is the reasoning that provides justification for an original solution.⁶⁵ In these cases, even if the borrowings are not central to the decision, they are argumentative in the narrow sense and, by their very nature, aim at rationally persuading an audience.⁶⁶ The separation between argumentative and non-argumentative borrowings in the

⁶¹ Annus, 2004, 334; JACKSON, Vicki C., *Constitutional Comparisons: Convergence, Resistance, Engagement*, Harvard Law Review, v. 119, 2005, p. 113.

⁶² SOUTH AFRICA. Constitution of the Republic of South Africa, Act 108 of 1996, s. 39 (1) (c).

⁶³ GLENN, 1987, p. 263.

⁶⁴ MARKESINIS; FEDTKE, 2005, p. 16–17.

⁶⁵ KOOPMANS, 1996, p. 550.

⁶⁶ See GOLDING, 2001, p. v, 6–10, on the structure of legal arguments and reasoned decisions.

narrow sense departs from the premise that there is “a difference between what constitutes a good legal argument and what makes a decision useful in relation to the strategic goals the court or individual justice might pursue outside of legal analysis.”⁶⁷

5. Three attitudes towards borrowing

As explained above, judicial borrowings are normally voluntary because, with remarkable exceptions, no constitutional clause explicitly commands indigenous authorities to borrow material from alien legal systems.⁶⁸ Yet, it is a mistake to confuse with arbitrariness the discretion courts have in cases of voluntary borrowings. From the fact that judges are not explicitly commanded to have recourse to comparative legal material does not follow that courts carry no responsibility in justifying the use they make. It is actually the opposite. Judges have to put forward especially convincing reasons for judgments if their premises cannot be directly drawn from any constitutional or statutory clause.⁶⁹ Where the constitution explicitly and undoubtedly makes it obligatory to apply foreign legal material, a court does not have to offer any justification other than the valid constitutional command for relying on extra-national sources. The court’s legitimacy is however challenged, and as a consequence, justices bear a special duty of justification, if it is not clear whether borrowing is definitively obligatory, permitted, or prohibited, and relevant arguments for and against migration exist.

Let us assume that a court is *prima facie* allowed to borrow from foreign legal systems, for there is no impeding clause in the constitution. A question that then remains is: under which circumstances and to which extent is borrowing definitively permitted? One can think of three possible answers, each corresponding to a normative attitude a court may have towards foreign

⁶⁷ ANNUS, 2004, p. 303.

⁶⁸ CHOUDHRY, Sujit (Org.), *The migration of constitutional ideas*, Cambridge: Cambridge University Press, 2006, p. 3.

⁶⁹ ALEXY, 2010a, p. 228.

legal material: resistance, engagement, and convergence.⁷⁰ The first answer says that judges ought to resist the influence. The second says that they ought to be critical and selective and only engage in borrowing after considering the peculiarities of their own legal culture. The third says that they ought to deliberately set the course of their case law towards convergence with an international community governed by the same values.⁷¹

Except maybe for the U.S., where part of the scholarship and the judicature explicitly resist the usage, the general attitude of judges towards judicial borrowings seemingly varies between engagement (selective approval) and convergence (enthusiasm), whether or not they admit it openly. As comparatists have documented, the U.S. Supreme Court has given the first answer, resistance, to the question of which attitude judges are expected to have towards borrowing.⁷² The BVerfG and the STF have offered the latter two: engagement and convergence, respectively.⁷³ To make it clear, judicial ‘attitude’ is not taken as a psychological state here; rather, it points to normative reasons behind the subjective frame of mind that leads to acceptance.⁷⁴ The question whether judges should “undertake voluntary comparative reasoning” is necessarily normative,⁷⁵ and the answer, whether affirmative or negative, requires legal justification.⁷⁶ Justification consists in demonstrating that the appeal to comparative law was commanded or at least permitted—not prohibited.

⁷⁰ JACKSON, 2005, p. 112–113; CHOUDHRY, 1999, p. 830.

⁷¹ Ibid.

⁷² MARKESINIS; FEDTKE, 2005, p. 25–76; CHOUDHRY, 1999, p. 830.

⁷³ MARKESINIS, Basil S, *Comparative law in the courtroom and classroom: the story of the last thirty-five years*, Oxford: Hart, 2003, p. 107; DALY, Tom Gerald, *The Differential Openness of Brazil’s Supreme Federal Court to External Jurisprudence*, in: *International Association of Constitutional Law World Congress*, Oslo, 2014.

⁷⁴ HART, 1994, p. 57.

⁷⁵ SMITS, 2006, p. 527.

⁷⁶ ALEXY, Robert, *The Dual Nature of Law*, *Ratio Juris*, v. 23, n. 2, 2010c, p. 172, footnote 4.

6. The duty of justification

The relatively common use of borrowings in case law despite the inexistence of any permissive allowance in the authoritative material raises a question about justifiability. In contemporary legal systems, it is incumbent upon judges to advance justifying reasons for their decisions. While in easy cases they can do so by pointing out an authoritative clause that explicitly makes it obligatory to act in a way instead of another, in difficult cases either such clauses are not available or it is doubtful what they really command. Where premises cannot be directly drawn from the authoritative legal material, courts have to advance especially convincing reasons for their rulings.⁷⁷ In fact, a basic rule of legal argumentation reads, ‘premises that cannot be derived directly from authoritative law are to be justified.’⁷⁸ Applied to constitutional borrowings, this can be read as follows. The court of destination carries a duty of justification if it is not clear whether borrowing is definitively obligatory, prohibited, or permitted, and relevant arguments exist for and against judges having recourse to comparative legal material.

This conclusion is valid for borrowings in two ways. Courts ought to justify why and what they borrow. Judges ought to justify why they had recourse to foreign statutes, constitutional clauses, and case law. But they are also under the obligation to advance justifying reasons for the use they make of foreign legal scholarship and methods. Altogether, “courts are obliged to justify their interpretive methodologies,” notably the borrowed ones, insofar as they are under the more general “obligation to engage in a process of justification for their own decisions.”⁷⁹ In any case, courts are faced with a choice that they would not have in other circumstances, where only valid national law—therefore binding law—was in play. Provided that judges are not prohibited to borrow elements from another legal systems, they can deliberately select which materials to appropriate. This means they can freely seek for rules and precedents that support the conclusion they intend to

⁷⁷ ALEXY, 1993, p. 228.

⁷⁸ This is my reformulation of Alexy’s thoughts. See *ibid.*, p. 228, 230.

⁷⁹ CHOUDHRY, 1999, p. 885–886.

reach, and ignore those in contrary. Their choice must nonetheless be justifiable. The flip side of the lack of an unequivocal legal provision on borrowing is not arbitrariness, but a duty of justification.

6.1 Justification and justifiability

Although it is desirable that courts state explicitly in their opinions all the normative premises that support their decisions, judges do not always do so. It is often the case that relevant arguments are disclosed while others are assumed. Even in the latter case, a decision may be however legally justifiable if one can demonstrate it to be normatively commanded or permitted after exposing its tacit assumptions and construing the chain of arguments that pointed to the result.⁸⁰ That is of special importance here, for in many jurisdictions and most cases, courts' opinions do not expose the justifying reasons on which judicial borrowings can be grounded. These borrowings may nonetheless be justified if they are demonstrated to be non-prohibited. In what follows, a complete answer to the question, 'was the appropriation of foreign legal material justified?', depends essentially on the justifiability of the judicial borrowings at hand.

One can extract two conclusions from the fact that the justifiability of judicial decisions is not entirely coincidental with the explicit justification judges put forward for a ruling. Firstly, a comparatist interested in assessing the legitimacy of judicial borrowings should not circumscribe the inquiry to the analysis of the justifying reasons that courts have disclosed in their opinions. Secondly, the same comparatist is correct in making a basic assumption. As justification presupposes justifiability,⁸¹ a judge who decides by resort to foreign law must believe that borrowing is justifiable—definitively permitted in that case. The alternative—to admit that courts deliberately engage in

⁸⁰ GOLDING, 2001, p. 3.

⁸¹ ALEXI, 2010b, p. 78.

borrowing although they are convinced that this is prohibited—sounds absurd.⁸²

6.2 Prima facie and definitive reasons

Some readers may find confusing the assertion that something can be legally commanded, permitted, or prohibited if no legal clause explicitly commands, permits, or prohibits it. In order to make sense of this assertion, one must differentiate a prima facie ought (or prima facie commands, permissions, and prohibitions) from a definitive ought (or definitive commands, permissions, and prohibitions). It is not possible to discuss the difference between the two types of statements in depth here. The distinction has deserved attention from Alexy.⁸³ But in what concerns this study, it should suffice to say that a definitive ought is stated after everything has been considered, including all possible arguments in contrary. By contrast, a prima facie ought says little about how one is really expected to act, for it depends on a further decision on what is exactly commanded, prohibited, or permitted in the case. For the sake of simplicity, the idea can be rephrased as follows: prima facie commands are only the beginning of a process of justification from which definitive commands result.

As asserted above, the court of destination carries a duty of justification if authoritative law does not clearly answers whether borrowing is obligatory, prohibited, or permitted, and relevant arguments exist for and against resorting to foreign legal material. This assertion can be now reformulated with assistance of the basic concepts of prima facie and definitive commands. Judicial borrowings are voluntary if the authoritative material is silent about their possibility. Affirming that is the same as to say that borrowing is prima facie permitted—i.e, prima facie neither obligatory nor prohibited. It is thus reasonable to assume that a court is prima facie allowed to borrow from foreign legal cultures if there is no impeding clause in the

⁸² Ibid., p. 38–39.

⁸³ ALEXY, 2010c, p. 180.

constitution. But by definition, a *prima facie* permission does not provide sufficient justification for a decision *per se*; it is only the beginning of a more complex process, and additional reasoning is required.

Although judicial borrowings are *prima facie* permitted, it may be the case that the answer emerging after everything has been considered points to a definitive prohibition, for instance. The alternative is either a definitive permission or a definitive obligation. These deontic possibilities correspond to the normative attitudes expected from courts: resistance, convergence, or engagement.⁸⁴ Authors who defend the model of resistance argue that judges ought to resist the appeal of constitutional borrowing.⁸⁵ This claim can be reformulated as asserting that judicial borrowings are definitively prohibited. At the other extreme, there are authors who support a model of convergence. They exhort courts to deliberately participate in constitutional migration and adjust their case law according to an international community of interpreters.⁸⁶ These authors must assume that borrowing is definitively commanded. Finally, in between resistance and engagement, authors who endorse the model of engagement advocate that courts should be selective and engage in borrowing only after careful consideration. Therefore, they do not agree that courts should adopt the same basic normative attitude towards all situations.⁸⁷ On the contrary, they acknowledge that determining whether borrowing is definitively permitted, obligatory, or prohibited is a task to perform in every case where foreign experiences appear to be relevant.

The “unwillingness of American courts to look at foreign jurisprudence” has been mentioned as the typical example of resistance to judicial borrowings.⁸⁸ An illustrative case is *Stanford v. Kentucky*, in which the petitioner claimed that imposing capital punishment on a juvenile constituted cruel and unusual punishment.⁸⁹ An argument given in support of his claim was

⁸⁴ JACKSON, 2005, p. 112–113.

⁸⁵ E.g., SCHAUER, Frederick, *Free Speech and the Cultural Contingency of Constitutional Categories*, *Cardozo Law Review*, v. 14, 1993, p. 880; ROSENKRANTZ, Carlos F., *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, *International Journal of Constitutional Law*, v. 1, n. 2, 2003, p. 290-295.

⁸⁶ For instance, KOMMERS, 1976, p. 692.

⁸⁷ JACKSON, 2005, p. 116–118.

⁸⁸ CHOUDHRY, 1999, p. 832. See also DAMMANN, 2002, p. 515

⁸⁹ UNITED STATES OF AMERICA. U.S. Court. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

that Western countries had banned death sentence in similar cases. Nonetheless, a majority of the U.S. Supreme Court denied that sentencing practices of other countries was relevant to determine whether a punishment was cruel under the U.S. Constitution. For many scholars, similar refusal to use comparative case law “underlies most American theories of constitutional interpretation.”⁹⁰ It is however noteworthy that the U.S. Supreme Court later overruled *Stanford v. Kentucky* in *Roper v. Simmons*.⁹¹ Yet, according to Waldron, “one of the frustrating things about *Roper* ... is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law.”⁹²

In any event, very different is the situation in Germany and Brazil. BVerfG’s opinions sometimes make reference to the case law of alien courts.⁹³ As Kommers noticed, “the Constitutional Court’s jurisprudence now and then includes words, phrases, and sentences that suggest familiarity with the work of other national courts of judicial review.”⁹⁴ For instance, in the Abortion Case I (1975),⁹⁵ the minority cited the U.S. Supreme Court’s decision in *Roe v. Wade*,⁹⁶ which shows that the German court was aware of the U.S. experience.⁹⁷ Other examples could be given to demonstrate that the BVerfG does not endorse the model of resistance. Strikingly, references to foreign material in German case law do not happen frequently enough to classify the court’s attitude as that of convergence either.⁹⁸ Thus, more appropriate is to assume that the BVerfG sanctions the model of engagement.

⁹⁰ See, for instance, ACKERMAN, Bruce, *The Rise of World Constitutionalism*, *Virginia Law Review*, v. 83, n. 4, p. 771–797, 1997, p. 772–773. Cf. JACKSON, Vicki C., *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism*, *University of Pennsylvania Journal of Constitutional Law*, v. 1, n. 3, 1999, p. 583.

⁹¹ UNITED STATES OF AMERICA. U.S. Supreme Court. *Roper v. Simmons*, 543 U.S. 551 (2005). See on this respect, PERJU, Vlad, *Comparative Constitutionalism and the Making of A New World Order, Constellations*, v. 12, n. 4, 2005, p. 464.

⁹² WALDRON, 2005, p. 129.

⁹³ MARKESINIS, 2003, p. 107–120.

⁹⁴ KOMMERS, Donald P.; MILLER, Russell A., *The constitutional jurisprudence of the Federal Republic of Germany*, 3rd ed., rev. and expanded. Durham, N.C: Duke University Press, 2012, p. 74.

⁹⁵ GERMANY. Federal Constitutional Court, 25.02.1975 (“Abortion I Case”), 39 BVerfGE 1.

⁹⁶ UNITED STATES OF AMERICA, U.S. Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973).

⁹⁷ KOMMERS, 1976, p. 694.

⁹⁸ MÖSSNER, Jörg Manfred, *Rechtsvergleichung und Verfassungsrechtsprechung*, *Archiv des öffentlichen Rechts*, n. 99/2, 1974, p. 228–242; PAULSEN, Aura María Cárdenas, *Über die*

Indeed, German judges have a more critical and selective attitude towards constitutional borrowings than their Brazilian counterparts. The STF does not endorse any variant of the model of resistance, studies demonstrate.⁹⁹ On the contrary, the Brazilian court systematically borrows from foreign legal sources, either authoritative or scholarly material, and although exact numbers for comparison are lacking, evidence suggests that Brazilian justices do it more frequently than European ones.¹⁰⁰ In several matters, Brazil is closer than Germany to become an example of convergence towards migration.

7. A reason against borrowing

Judicial borrowings are normatively contentious. The main normative challenge to borrowings is drawn from the principle of democratic legitimacy.¹⁰¹ The democratic objection is more often debated in the U.S., but it is extensive to some degree to other democratic countries. The objection consists in that courts hold their authority to interpret and apply the laws that have been enacted by the representatives of the people on behalf of the same people; judges would have no authority to interpret and apply the laws that had been enacted by the representatives of other peoples on behalf of those peoples.¹⁰² Making use of the terminology introduced within last sub-section, the objection can be reformulated as follows: judicial borrowing is *prima facie* prohibited vis-à-vis the democratic principle.

The democratic principle prohibits judicial borrowings, but this is a *prima facie*, not a definitive prohibition. That is, democratic representation

Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts: Analyse der Heranziehung ausländischer Judikatur, Hamburg: Dr. Kovač, 2009.

⁹⁹ MONTORO, Franco, *Filosofia do direito e colonialismo cultural*, Revista de informação legislativa, v. 10, n. 37, 1973, p. 4–9, 17–19.

¹⁰⁰ SILVA, Virgílio Afonso da, *Integração e diálogo constitucional na América do Sul*, in: BOGDANDY, Armin von; PIOVESAN, Flávia (Orgs.), *Direitos humanos, democracia e integração jurídica na América do Sul*, Rio de Janeiro: Lumen Juris, 2010, p. 528–529.

¹⁰¹ SITARAMAN, Ganesh, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, Harvard Journal of Law & Public Policy, v. 32, n. 2, 2009, p. 658–661.

¹⁰² CHOUDHRY, 2011, p. 9–13; ALFORD, 2004, p. 709–710.

offers a relevant reason against judicial appeals to extra-national material, but other arguments that favour borrowing are still to be scrutinized. After all reasons were considered, the conclusion may be that borrowing is definitively permitted under certain circumstances, but whether or not this is the case is a matter of justification. The court that acts against what is *prima facie* prohibited carries a burden of justification: it is incumbent upon judges to put convincing arguments forward for acting differently from what one would expect from the common reading of the democratic principle.

8. Reasons for borrowing

Despite the counter-argument derived from the democratic principle, constitutional borrowings have been a reality in many countries. In fact, the legitimacy of borrowing is an issue that some courts have never explicitly tackled in their opinions. In either event, it is reasonable to assume that judges only resort to comparative material because they believe it is not forbidden to do so. Or in accordance with the methodology detailed above, courts that engage in borrowing must implicitly claim that the reasons in favour of doing so are stronger than the democratic objection against it. Were the democratic objection to prevail over every competing argument, borrowing would be definitively prohibited and judges expected to resist the foreign influence. Conversely, if borrowing is justifiable, there might be a normative reason that favours it and prevails over the democratic objection.

From the perspective of the participants in the public debate about what the law commands, prohibits, or permits, “to say that courts rely upon or use foreign jurisprudence because it is useful or helpful ... does not ... justify the appropriateness of seeking that kind of help.”¹⁰³ One who asks about the legitimacy of a constitutional borrowing formulates a question that demands normative answers.¹⁰⁴ Inasmuch as “to furnish legal justification for a decision

¹⁰³ CHOUDHRY, 2011, p. 10.

¹⁰⁴ SMITS, 2006, p. 513-538.

is to show that the decision is according to law,”¹⁰⁵ one that aims at justifying borrowings must demonstrate that it is normatively commanded or permitted, and thus not prohibited, that judges have recourse to foreign legal material. This is also true the other way around. One who demonstrates that there are convincing normative grounds for judges to appeal to extra-national sources somehow justifies borrowings. The reasons offered in justification for borrowing can be grouped into system-independent and system-dependent.

8.1 System-dependent reasons

System-dependent reasons are drawn from a certain legal system to justify that a foreign idea fits within that particular normative arrangement. This type of justification accentuates the institutional character of law, or the fact that legal conventions are not the same everywhere, but are formed against a peculiar background.¹⁰⁶ As a consequence, system-dependent reasons basically comprehend arguments “directly or indirectly supported by the authority of the positive law,”¹⁰⁷ although not necessarily drawn directly from the authoritative material. Systemic considerations, which are “based on the idea of the unity and coherence of the legal system,”¹⁰⁸ are of especial relevance here. Authors who agree that judicial borrowings are subject to system-dependent justification say that “changes must be resisted as undemocratic unless ... they follow the mechanisms provided for in the constitutional text” or are “according to the self-referential logic of the constitution.”¹⁰⁹ In other words, a comparatist who claims that there are reasons for borrowing must examine not only the constitutional wording, undoubtedly an essential authoritative source, but also the other factors that shape a constitutional

¹⁰⁵ MICHELMAN, Frank I., Justification (and Justifiability) of Law in a Contradictory World, in: PENNOCK, J. Roland; CHAPMAN, John W. (Orgs.), Justification, New York: New York University Press, 1986, p. 72.

¹⁰⁶ On the institutional character of law, see ALEXY, Robert, Problems of Discourse Theory, *Crítica, Revista Hispanoamericana de Filosofía*, v. XX, n. 58, p. 43–65, 1988, p. 44.

¹⁰⁷ ALEXY, Robert, Legal argumentation as rational discourse, *Rivista Internazionale di Filosofia del Diritto*, n. 70, 1993, p. 177.

¹⁰⁸ *Ibid.*, p. 176.

¹⁰⁹ PERJU, 2012, p. 1322.

culture: the interpretative practice, including scholarship and case law, and the institutional framework.

8.2 System-independent reasons

System-independent reasons given in support of judicial borrowings draw attention to universalist aspects of constitutional migrations and tend to overlook features of a particular legal system. In spite of what the word ‘universalist’ may suggest, not all system-independent reasons imply that a same principle or structure is universally shared. Many scholars argue for more modest commonalities and believe that it suffices if “a transcendent principle is found within more than one legal system.”¹¹⁰ Accordingly, a court relies on universalist justification when judges regard themselves and other constitutional justices as engaged in a common enterprise that transcends national borders. As this enterprise may be common due either certain content or structure, it is possible to separate between content-based universalists and structure-based universalists.

Content-based universalists say that judges ought to borrow from another legal system so as to fulfil a norm that both systems share. Most commonly, comparatists of this type have in mind universal sets of principles that should justify constitutional migrations.¹¹¹ Judges who endorse this view are convinced that their own task consists chiefly in interpreting, applying, and fostering “substantive principles of political morality,” that is, legal norms that are morally appealing and lie behind concrete institutional arrangements.¹¹² Another version of content-based universalism advocates something different. Legal systems would not share the same basic principles, but the same basic goal: “finding and applying the best and most just legal rules.”¹¹³ Since “it is likely that some [legal systems] will have succeeded earlier or more convincingly than others” in the pursuit of justice, borrowing would provide

¹¹⁰ CHOUDHRY, 1999, p. 844.

¹¹¹ PERJU, 2012, p. 1319.

¹¹² CHOUDHRY, 1999, p. 870.

¹¹³ SMITS, 2006, p. 528–529.

parochial officers with a shortcut to approximate their own system to this goal.¹¹⁴

By contrast, structure-based universalists claim that their variant of universalism rely on purely conceptual premises, such as “theoretical concepts of a universal legal language,”¹¹⁵ or “a deep structure of constitutional grammar that forms the basis of all different constitutional languages and cultures,”¹¹⁶ which make some legal arrangements conceptually necessary in several legal systems.¹¹⁷ Supposing that structure-based universalism is sound, the dialogue between courts would not create anything new, but merely disclose structures that were possibly hidden. In sum, structure-based universalists attribute some essential or necessary properties to legal systems, “without which law would not be law.”¹¹⁸ These properties “must be there, quite apart from space and time, wherever and whenever law exists.”¹¹⁹ The same properties are universal not due to a normative command, but by definition. Or so structure-based universalists believe.¹²⁰

9. Concluding remark

This essay attempted to provide a methodological basis for studying judicial borrowings as a normative phenomenon. Some refinements on comparative methods, which are required if one intends to tackle the normative problems borrowing poses, were introduced above. A first refinement concerns the distinction between the contexts of deliberation, explanation, and justification. A second distinguishes between explanatory and justifying reasons. A third

¹¹⁴ Ibid.

¹¹⁵ CHOUDHRY, 1999, p. 834.

¹¹⁶ SCHLINK, Bernhard, Proportionality in Constitutional Law: Why Everywhere but Here, *Duke J. Comp. & Int'l L.*, v. 22, 2011, p. 302.

¹¹⁷ For a definition of “conceptual necessity” see ALEXY, Robert, On Necessary Relations Between Law and Morality, *Ratio Juris*, v. 2, n. 2, 1989, p. 169, footnote 4.

¹¹⁸ ALEXY, Robert, On the concept and the nature of law, *Ratio Juris*, v. 21, n. 3, 2008, p. 290.

¹¹⁹ Ibid.

¹²⁰ I have recently argued against structure-based universalism in ANDRADE NETO, João. The debatable universality of the proportionality test and the wide-scope conception of fundamental rights, in: *II Congresso Internacional em Direito e Inovação: O Pensamento de Robert Alexy como Sistema – Argumentação Jurídica, Direitos Fundamentais, Conceito e Validade do Direito*, Universidade Federal de Juiz de Fora, Juiz de Fora (MG), 2015.

invites comparatists to choose between the participant's and the observer's perspective. Altogether, a researcher who inquires whether a constitutional court can legitimately decide cases with recourse to foreign legal material asks for justification. In other words, our researcher asks whether it is legally permitted, prohibited, or commanded for judges to have recourse to comparative constitutional law. This question can only be answered from the perspective of a participant in the public debate about what the law correctly understood commands, prohibits, or permits. From the participant's perspective, explanations for borrowing do not (and ought not to) suffice.

Courts ought to justify why they appropriate foreign legal material because a general rule of legal argumentation reads, 'premises that cannot be derived directly from authoritative law are to be justified.' And that is the case with voluntary judicial borrowings. Judicial borrowings are voluntary because, with remarkable exceptions, no constitutional clause explicitly commands indigenous authorities to borrow legal solutions from alien legal systems. This lack of an authoritative provision that is applicable to the case leads to the problem of justifiability. The court of destination bears a burden of justification if it is not clear whether borrowing is definitively obligatory, prohibited, or permitted, and relevant arguments exist for and against decision making with recourse to comparative legal material.

The burden of justification presupposes the justifiability of judicial decisions. Although the legitimacy of borrowing is an issue that most courts have never explicitly tackled in their opinions, it is reasonable to assume that they only resort to comparative material because they believe it to be permitted. The alternative is to assume that courts act deceitfully and deliberately engage in borrowing even knowing that this is prohibited. And no evidence supports such an assumption. Therefore, courts must implicitly claim that borrowing is either definitively commanded or permitted. This does not mean that judicial borrowings are not normatively contentious. Indeed, arguments exist both for and against reference to foreign legal material.

The main counter-argument derives from the democratic principle. Courts would go far beyond their jurisdiction to appropriate an adjudicative method that does not derive from the material acknowledged as authoritative

by the people on behalf of which judges decide. In short, it follows from the democratic objection that borrowing is *prima facie* prohibited. Conversely, there are system-dependent and system-independent reasons for borrowing, the most known of which bear on universalist premises, whether about a common normative background shared by legal systems, or about conceptually necessary attributes of law.

With this in mind, it is possible to construe the three attitudes that courts have towards borrowing as three different answers to the question whether borrowing is definitively permitted or prohibited. The resistance that is characteristic of the U.S. Supreme Court can be read as a normative assertion such as: ‘borrowing is definitively prohibited because, under ordinary circumstances, the democratic objection should prevail over all the other arguments.’ By contrast, the STF’s attitude of convergence signals that ‘borrowing is definitively permitted in Brazil because, under ordinary circumstances, the democratic objection should yield to the reasons judges have for resorting to foreign legal material.’ Finally, the BVerfG’s selective engagement with comparative law points to that borrowing can be either definitively permitted or prohibited depending on the circumstances of a case, for no definitive answer can be drawn from the conflict between the reasons for and against borrowing if these are only abstractly considered.

References

ACKERMAN, Bruce. The Rise of World Constitutionalism. *Virginia Law Review*, v. 83, n. 4, p. 771–797, 1997.

ALEXY, Robert. An Answer to Joseph Raz. In: PAVLAKOS, George (Org.). *Law, rights and discourse : the legal philosophy of Robert Alexy*. Oxford; Portland, Or.: Hart Pub., 2007, p. 37–55.

_____. A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification. Trad. Ruth Adler; Neil MacCormic. Oxford; New York: Oxford University Press, 2010a.

_____. Between positivism and non-positivism? A third reply to Eugenio Bulygin. In: BELTRAN, Jordi Ferrer; MORESO, José Juan; PAPAYANNIS, Diego M. (Orgs.). Neutrality and theory of law. New York: Springer, 2013, p. 225–238.

_____. Legal argumentation as rational discourse. *Rivista Internazionale di Filosofia del Diritto*, n. 70, p. 165–178, 1993.

_____. On Necessary Relations Between Law and Morality. *Ratio Juris*, v. 2, n. 2, p. 167–183, 1989.

_____. On the concept and the nature of law. *Ratio Juris*, v. 21, n. 3, p. 281–299, 2008.

_____. Problems of Discourse Theory. *Crítica: Revista Hispanoamericana de Filosofia*, v. XX, n. 58, p. 43–65, 1988.

_____. The Argument from Injustice: A Reply to Legal Positivism. Trad. Stanley L. Paulson; Bonnie Litschewski Paulson. New York: Oxford University Press, 2010b.

_____. The Dual Nature of Law. *Ratio Juris*, v. 23, n. 2, p. 167–182, 2010c.

ALFORD, Roger P. In search of a theory for constitutional comparativism. *UCLA Law Review*, v. 52, p. 639–714, 2004.

ALLISON, John W. F. Transplantation and Cross-fertilisation. In: BEATSON, Jack; TRIDIMAS, Takis (Orgs.). *New Directions in European Public Law*. London: Hart Publishing, 1998, p. 169–182.

ANDRADE NETO, João. The debatable universality of the proportionality test and the wide-scope conception of fundamental rights. In: II Congresso Internacional em Direito e Inovação: O Pensamento de Robert Alexy como Sistema – Argumentação Jurídica, Direitos Fundamentais, Conceito e Validade do Direito. Universidade Federal de Juiz de Fora. Juiz de Fora (MG), 2015.

ANNUS, Taavi. Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Arguments. *Duke Journal of Comparative & International Law*, v. 14, n. 2, p. 301–350, 2004.

BAIER, Kurt. *The moral point of view: a rational basis of ethics*. 5. print. Ithaca, NY: Cornell Univ. Press, 1966.

CHOUDHRY, Sujit. Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation. *Indiana Law Journal*, v. 74, n. 3, 1999.

_____. Migration as a New Metaphor in Comparative Constitutional Law. In: CHOUDHRY, Sujit (Org.). *The migration of constitutional ideas*. Cambridge: Cambridge University Press, 2011, p. 1–36.

DALY, Tom Gerald. The Differential Openness of Brazil's Supreme Federal Court to External Jurisprudence. Conference. In: *International Association of Constitutional Law World Congress*. Oslo, 2014.

DAMMANN, Jens C. The Role of Comparative Law in Statutory and Constitutional Interpretation. *St. Thomas Law Review*, v. 14, p. 513-559, 2002.

DANZIGER, Shai; LEVAV, Jonathan; AVNAIM-PESSO, Liora. Extraneous factors in judicial decisions. *Proceedings of the National Academy of Sciences*, v. 108, n. 17, p. 6889–6892, 2011.

DAVIS, Dennis M. Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience. *International Journal of Constitutional Law*, v. 1, n. 2, p. 181–195, 2003.

DROBNIG, Ulrich. The Use of Comparative Law by Courts. In: DROBNIG, Ulrich; VAN ERP, J. H. M. (Orgs.). *The use of comparative law by courts: XIVe Congrès international de droit comparé, Athènes = XIVth International Congress of Comparative Law*, Athens: 1997. The Hague; Boston: Kluwer Law International, 1999, p. 3–21.

FRANKENBERG, G. Constitutional transfer: The IKEA theory revisited. *International Journal of Constitutional Law*, v. 8, n. 3, p. 563–579, 2010.

FRIEDMAN, Barry; SAUNDERS, Cheryl (Orgs.). Symposium: Constitutional Borrowing. *International Journal of Constitutional Law*, v. 1, n. 2, p. 177–403, 2003.

GERMANY. Federal Constitutional Court [Bundesverfassungsgericht][BVerfG], 25.02.1975 (“Abortion I Case”), 39 BVerfGE 1.

GLENN, Patrick H. Persuasive Authority. *McGill Law Journal*, v. 32, n. 2, p. 261–298, 1987.

GOLDING, Martin P. A Note on Discovery and Justification in Science and Law. In: PENNOCK, J. Roland; CHAPMAN, John W. (Orgs.). *Justification*. New York: New York University Press, 1986, p. 124–140.

_____. *Legal reasoning*. Encore ed. Peterborough, Ontario: Broadview Press, 2001.

GRAZIADEI, Michele. Comparative Law as the Study of Transplants and Receptions. In: The Oxford handbook of comparative law. Oxford: Oxford University Press, 2006, p. 441–475.

GREEN, Michael Steven. Legal Realism as Theory of Law. William and Mary Law Review, v. 46, p. 1915-2000, 2005.

HÄBERLE, Peter. Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Juristen Zeitung, n. 44, p. 913–919, 1989.

HART, H. L. A. The concept of law. 2. ed. Oxford: Clarendon Press, 1994.

HIRSCHL, Ran. The political origins of the new constitutionalism. Indiana Journal of Global Legal Studies, v. 11, n. 1, p. 71–108, 2004.

HUME, David. A Treatise of Human Nature. Oxford: Oxford Univ. Press, 2000.

JACKSON, Vicki C. Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on “Proportionality,” Rights and Federalism. University of Pennsylvania Journal of Constitutional Law, v. 1, n. 3, p. 583-639, 1999.

_____. Constitutional Comparisons: Convergence, Resistance, Engagement. Harvard Law Review, v. 119, p. 109-128, 2005.

_____. Constitutions as “Living Trees”? Comparative Constitutional Law and Interpretive Metaphors. Fordham Law Review, v. 75, n. 2, p. 921–960, 2006.

KOMMERS, Donald P. The Value of Comparative Constitutional Law. John Marshall Journal of Practice and Procedure, v. 9, p. 685-695, 1976.

KOMMERS, Donald P.; MILLER, Russell A. The constitutional jurisprudence of the Federal Republic of Germany. 3rd ed., rev. and expanded. Durham, N.C: Duke University Press, 2012.

KOOPMANS, T. Comparative Law and the Courts. The International and Comparative Law Quarterly, v. 45, n. 3, p. 545–556, 1996.

LAW, David S.; VERSTEEG, Mila. The Evolution and Ideology of Global Constitutionalism. Cal. L. Rev., v. 99, p. 1163-1257, 2011.

LEGRAND, Pierre. The Impossibility of “Legal Transplants”. Maastricht Journal of European & Comparative Law, v. 4, p. 111–124, 1997.

MACCORMICK, Neil. Legal reasoning and legal theory. 1. ed. Oxford: Clarendon Press, 1994.

MARKESINIS, Basil. Comparative law in the courtroom and classroom: the story of the last thirty-five years. Oxford; Portland, Or.: Hart, 2003.

MARKESINIS, Basil; FEDTKE, Jorg. The Judge as Comparatist. Tulane Law Review, v. 80, p. 11, 2005.

MCWHINNEY, Edward. Constitution-making: principles, process, practice. Toronto: University of Toronto Press, 1981.

MICHELMAN, Frank I. Justification (and Justifiability) of Law in a Contradictory World. In: PENNOCK, J. Roland; CHAPMAN, John W. (Orgs.). Justification. New York: New York University Press, 1986, p. 71–99.

MILLER, Jonathan M. A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process. The American Journal of Comparative Law, v. 51, n. 4, p. 839-885, 2003.

MILLIGAN, Joy. Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Public Morality. *New York University Law Review*, v. 81, n. 3, p. 1206–1248, 2006.

MONTORO, Franco. Filosofia do direito e colonialismo cultural. *Revista de informação legislativa*, v. 10, n. 37, p. 3–20, 1973.

MÖSSNER, Jörg Manfred. Rechtsvergleichung und Verfassungsrechtsprechung. *Archiv des öffentlichen Rechts*, n. 99/2, p. 193–242, 1974.

NEVES, Marcelo. *Transconstitutionalism*. Oxford; Portland, Oregon: Hart Publishing, 2013.

PAULSEN, Aura María Cárdenas. Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts: Analyse der Heranziehung ausländischer Judikatur. Hamburg: Dr. Kovač, 2009. (Schriftenreihe Verfassungsrecht in Forschung und Praxis, Bd. 72).

PERJU, Vlad. Comparative Constitutionalism and the Making of A New World Order. *Constellations*, v. 12, n. 4, p. 464–486, 2005.

_____. Constitutional Transplants, Borrowing and Migrations. In: ROSENFELD, Michel; SAJÓ, András (Orgs.). *The Oxford handbook of comparative constitutional law*. 1. ed. Oxford: Oxford University Press, 2012, p. 1304–1327.

PULIDO, Carlos Bernal. The Migration of Proportionality Across Europe. *New Zealand Journal of Public and International Law*, v. 11, n. 3, p. 483–516, 2013.

RAZ, Joseph. The Argument from Justice, or How Not to Reply to Legal Positivism. In: PAVLAKOS, George (Org.). *Law, rights and discourse : the legal philosophy of Robert Alexy*. Oxford; Portland, Or.: Hart Pub., 2007.

ROSENKRANTZ, Carlos F. Against Borrowings and Other Nonauthoritative Uses of Foreign Law. *International Journal of Constitutional Law*, v. 1, n. 2, p. 269–295, 2003.

SCHAUER, Frederick. Free Speech and the Cultural Contingency of Constitutional Categories. *Cardozo Law Review*, v. 14, p. 865, 1993.

_____. The Politics and Incentives of Legal Transplantation. In: NYE, Joseph S.; DONAHUE, John D. (Orgs.). *Governance in a globalizing world*. Cambridge, Mass.; Washington, D.C: Brookings Institution Press, 2000, p. 253–268.

SCHEPPELE, K. L. Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models. *International Journal of Constitutional Law*, v. 1, n. 2, p. 296–324, 2003.

SCHLINK, Bernhard. Proportionality in Constitutional Law: Why Everywhere but Here. *Duke J. Comp. & Int'l L.*, v. 22, p. 291-302, 2011.

SILVA, Virgílio Afonso da. Integração e diálogo constitucional na América do Sul. In: BOGDANDY, Armin von; PIOVESAN, Flávia (Orgs.). *Direitos humanos, democracia e integração jurídica na América do Sul*. Rio de Janeiro: Lumen Juris, 2010, p. 515–530.

SITARAMAN, Ganesh. The Use and Abuse of Foreign Law in Constitutional Interpretation. *Harvard Journal of Law & Public Policy*, v. 32, n. 2, p. 653–693, 2009.

SMITS, Jan M. Comparative Law and its Influence on National Legal Systems. In: ZIMMERMANN, Reinhard; REIMANN, Mathias (Orgs.). *The Oxford handbook of comparative law*. Oxford: Oxford University Press, 2006, p. 513–538.

SOUTH AFRICA. Constitution of the Republic of South Africa (1986).

TEUBNER, Gunther. Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies. *The Modern Law Review*, v. 61, n. 1, p. 11–32, 1998.

TUSHNET, Mark. The Possibilities of Comparative Constitutional Law. *The Yale Law Journal*, v. 108, n. 6, p. 1225–1309, 1999.

UNITED STATES OF AMERICA. U.S. Supreme Court. *Roe v. Wade*, 410 U.S. 113 (1973).

UNITED STATES OF AMERICA. U.S. Supreme Court. *Roper v. Simmons*, 543 U.S. 551 (2005).

UNITED STATES OF AMERICA. U.S. Supreme Court. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

VIDMAR, N. The Psychology of Trial Judging. *Current Directions in Psychological Science*, v. 20, n. 1, p. 58–62, 2011.

WALDRON, Jeremy. Foreign Law and the Modern *Ius Gentium*. *Harvard Law Review*, v. 119, n. 1, p. 129–147, 2005.

WASSERSTROM, Richard A. *The judicial decision: toward a theory of legal justification*. Stanford, California; London: Stanford University Press; Oxford University Press, 1972.

WATSON, Alan. Aspects of Reception of Law. *The American Journal of Comparative Law*, v. 44, n. 2, p. 335–351, 1996.

_____. *Legal transplants: an approach to comparative law*. Edinburgh; London: Scottish Academic Press, 1974.

WEINRIB, Lorraine. The Postwar Paradigm and American Exceptionalism. In: CHOUDHRY, Sujit (Org.). The migration of constitutional ideas. Cambridge: Cambridge University Press, 2006, p. 84-111.

WISE, Edward M. The Transplant of Legal Patterns. The American Journal of Comparative Law, v. 38, p. 1-22, 1990.

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