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Legal Reasoning: Arguments from Comparison

ABSTRACT: Referring to foreign legal systems for the sake of producing a convincing judicial argument has been a custom in judicial decision-making for more than a century. However, a generally accepted theoretical framework for this kind of reasoning is yet to be established. The article suggests that such a framework must answer at least the following three fundamental questions: first, what is the normative relationship, as a matter of principle, between domestic and foreign law?; second, what is the primary motive and functioning of comparative legal reasoning?; and third, what methodological approach enables such reasoning to work in practice? Drawing in particular on linguistic philosophy, as well as recent work on the theory of argumentation, the article outlines a theoretical framework that addresses these questions in order to understand, evaluate and rationalise the use of comparative arguments in legal practice.

Keywords: Theory of argumentation, legal reasoning, comparative law, comparative legal reasoning, methodology of comparative law, foreign law, deconstruction, legal pragmatism

A. Introduction: The Problem of Comparative Legal Reasoning

The practical examples of comparative legal reasoning by courts are countless.¹ I choose here but one example to initiate the argument: in *Greatorex v Greatorex* an English court had to decide ‘whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury. As stated, Cazalet J acknowledged that there was no binding authority on the question of duty. For guidance he was thus directed to German law, among other systems, and his conclusion was, undoubtedly, influenced by a decision of the German Federal Court of 11 May 1971’, which had denied that a duty of care existed: ‘In the opinion of the Federal Court the imposition of such a duty would unduly restrict the ... right to self-determination ... Cazalet J expressly followed the reasoning of the BGH and regarded the argument derived from the right of self-determination as enunciated in the German case as “powerful”’.² The *Greatorex* case is an example of a court answering a question of its own national law by drawing on a ‘powerful’ argument from a foreign legal system. But how powerful is this argument really? Does it bind or merely inspire the court’s reasoning? May its

- 1 See Ulrich Drobnig, Sjev v. Erp (eds): *The Use of Comparative Law by Courts*, The Hague 1999; Guy Canivet, Mads Andenas, Duncan Fairgrieve (eds): *Comparative law before the courts*, London 2004; Basil Markesinis, Jörg Fedtke, *Judicial recourse to foreign law*, London 2006; Michal Bobek, *Comparative Reasoning in European Supreme Courts*, Oxford 2013, part II.
- 2 Basil Markesinis, *Comparative Law in the Courtroom and Classroom*, Oxford 2003, 164

power threaten the stability of a legal system and should we therefore ban it, or could we define specific methodological standards to control its use by courts? Clearly, to *speak* of the ‘power’ of comparative arguments is one thing, to *analyse* their ‘power’ is another, a much more puzzling undertaking.

To date, numerous attempts have been made to elucidate comparative legal reasoning. Raymond Saleilles (1855–1912) and later on Konrad Zweigert (1911–1996) pioneered the idea.³ Saleilles promoted the use of comparative law by courts by arguing that international problems ought to be solved internationally. Zweigert famously referred to Article 1 of the Swiss Civil Code to legitimise the comparative approach. According to this provision, a court shall follow ‘established doctrine and case law’⁴ when filling gaps in the legal system. From here, it was only a small step to suggest that the court may include not only domestic but also *foreign* ‘established doctrine and case law’. These two ideas have been repeated ever since, albeit in different guises. In contemporary discourse, Saleilles’ argument is often framed in the language of ‘globalisation’.⁵ Zweigert’s argument, on the other hand, has been generalised by the more technical expression that one may have regard to ‘explicit links’ within the positive law to include foreign law in domestic legal reasoning.⁶ Yet, perhaps unsurprisingly, no theoretical breakthrough has been achieved on these grounds. This is because one could simply point out that such connections to other legal systems, deriving from legal problems or legal norms, may be missing.

Comparative lawyers have put forward further arguments to endow comparative arguments with normative power. Three concepts stand out: the ‘idea of law’ (*Rechts-idee*), ‘universal principles of law’, and ‘legal authority’. The concept of legal authority suggests that arguments deriving from other jurisdictions must be taken into account if they imply ‘persuasive authority’. This concept opposes comparative arguments to other legal arguments that originate directly in the domestic law and therefore enjoy ‘binding authority’. Comparative arguments, on the other hand, may merely ‘inspire’ the court’s reasoning and be followed by reason of their ‘persuasiveness’.⁷ There are two major problems with this approach. In a civil law context, one may rightly doubt

3 Raymond Saleilles, *La Fonction juridique du Droit comparé*, in: Fritz Berolzheimer (ed): *Rechtswissenschaftliche Beiträge*, Aalen 1981, 164–175; Konrad Zweigert, *Rechtsvergleichung als universale Interpretationsmethode*, *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 15 (1949/50), 5–21

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

5 Cf Anne-Marie Slaughter, *Judicial Globalization*, *Virginia Journal of International Law* 40 (2000), 1103; David Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, *Tulane Law Review* 75 (2001), 949.

6 For such ‘explicit links’ Wendehorst suggests the term of ‘transmission points’ (Christiane Wendehorst, *Von Arbeit im Recht, am Recht und über Recht*, in: Andreas Heldrich, Jürgen Prölss, Ingo Koller et al. (eds): *Festschrift für Claus-Wilhelm Canaris*, vol. II, München 2007, 1408). Some examples of ‘explicit links’ are given by Ernst Kramer, *Konvergenz und Internationalisierung der juristischen Methode*, in: Christian Meier-Schatz (ed): *Die Zukunft des Rechts*, Basel 1999, 82.

7 Cf Jan Smits, *Comparative Law and its Influence on National Legal Systems*, in: Mathias Reimann, Reinhard Zimmermann (eds): *The Oxford Handbook of Comparative Law*, Oxford 2006, 536 et seq; Bobek (note 1), 213–215.

whether it is helpful to introduce a concept that seems far more appropriate in a common law system. More importantly, the theoretical structure attached to this concept overshadows the theoretical challenge of comparative legal reasoning from the outset: comparative arguments do not possess real normative power, they are at best a matter of inspiration. But why should we confine our theoretical analysis in such a way at this stage?

The concepts of universal principles of law and idea of law do not do much better than the concept of legal authority. The concept of the idea of law is connected to comparative legal reasoning in the following way: foreign legal systems strive for justice, legal certainty and practicability just as much as domestic legal systems do, and thus a domestic court is permitted to draw on foreign law in its legal reasoning.⁸ This argument thus seeks to subordinate different legal systems to a universal idea of law that concerns justice, legal certainty and practicability. Universal principles of law, such as principles of public international law or international model rules in contract law, operate in similar ways to bring foreign law into domestic legal reasoning.⁹ They reflect the idea that national laws are not really separate normative regimes but mere variations of a universal normative system. Again, national legal systems are subordinated to a universal concept in order to establish a common frame of reference for comparative reasoning. Yet, particularly in comparative legal theory, such subordinative concepts have been subject to harsh criticism: they are portrayed as ethnocentric and imperialistic. We may prefer to build a theory of comparative legal reasoning on more solid ground. Moreover, even if we considered the idea of law or universal principles as a valid starting point, what would we gain? Obviously, this would still tell us very little about comparative legal reasoning.¹⁰

But what would we like to know about comparative legal reasoning; how are we to unpack this problem into smaller problems? To be sure, a theory of comparative legal reasoning needs to explain more than just the 'power' of comparative arguments if it seeks to provide meaningful guidance for judicial practice and academic discourse. I suggest that we must consider at least the following three fundamental questions: first, what is the normative relationship, as a matter of principle, between domestic and foreign law?; second, what is the primary motive and the functioning of (the power of) comparative legal reasoning?; and third, what methodological approach to such reasoning enables it to work in practice? The following section (B) addresses the first question, aimed at creating a level playing field for comparative arguments within a 'strictly posi-

8 On this approach cf Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd ed, Wien 1991, 386, 461 et seq; Hans Stoll, Zur Legitimität und normativen Relevanz rechtsvergleichender Argumente im Zivilrecht, in: Helmut Koziol, Peter Rummel (eds): *Im Dienste der Gerechtigkeit*, Wien 2002, 441; Smits (note 7), 528; Zweigert (note 3), 13.

9 On this approach cf Otto Sandrock, *Über Sinn und Methode zivilistischer Rechtsvergleichung*, Frankfurt 1966, 66–75; Marie-Claire Ponthoreau, *L'argument fondé sur la comparaison dans le raisonnement juridique*, in: Pierre Legrand (ed): *Comparer les droits, résolument*, Paris 2009, 555; Bydlinski (note 8), 386; Saleilles (note 3), 170.

10 The account of the state of research given here is, of course, rather short; for a more detailed version see Thomas Coendet, *Rechtsvergleichende Argumentation*, Tübingen 2012, 10–16.

tivistic' concept of law. It seeks to create a space in which the idea of comparative legal reasoning can be assessed carefully and fairly. The second section (C), dealing with the second question, will then structure this space by proposing a theory of legal and comparative legal reasoning. In the third section (D) the same will be done by a concept of comparative methodology and hence it is devoted to the third question.¹¹

B. Deconstructing Limits: A Space for Comparative Legal Reasoning

I. The Positivist Divide

In the introduction, I outlined several concepts that aim to bring comparative arguments into play in national case law: the universality of legal problems, explicit links within positive law, legal authority, universal principles of law and the idea of law. Yet for the reasons given earlier, I would not recommend any of these as a starting point in an analysis of the deep structure of comparative legal reasoning. The approach I suggest is more challenging but also, I hope, more promising: suppose that we burn all the aforementioned bridges to foreign law and instead define our own national law as a self-contained system. Legal issues arising under such a legal system then become *purely national* matters. Let us, moreover, take the view of a national lawyer who is sceptical of the idea of comparative legal reasoning and who will not assign any normative significance to foreign law, at least in those purely national matters. *Au contraire*, the sceptic will conceive of the other (national) law as something '*entirely different*' from his own.

The sceptic's conviction does not appear out of nowhere. Rather, it is quite strongly supported by what is arguably the 20th century's dominating legal tradition (legal positivism) with its separation between 'is' and 'ought'. From a 'strictly positivistic' viewpoint, the meaning of the rule, i. e. what one ought to do, flows exclusively from national law. Foreign law is a mere fact, its rules are just an 'is', not an 'ought' with authority for national courts. While this positivist divide between domestic and foreign law may comfort the sceptical national lawyer, it will stir up the critical legal theorist. The latter will see it as just another myth about legal positivism and its deconstruction as tilting at windmills.¹² If the critical legal theorist is right, our task becomes much easier. But, unfortunately, I think her suggestion does not offer a real solution to the problem. Because even if the proposition of the separation between 'is' and 'ought' restates a myth of legal positivism, one cannot deny that this myth has had a considerable impact on the debate on comparative legal reasoning. Consider the recent statement of an author who is not a sceptic but argues *in favour* of this mode of reasoning within, as he puts it, a '*positivistic framework*':

- 11 As will be noted, the theory presented here is written against a private law background – which is not to say, however, that it has nothing to say about comparative reasoning in other areas of the law.
- 12 On the myths of legal positivism cf John Gardner, Legal Positivism: 5½ Myths, in his *Law as a Leap of Faith*, Oxford 2012, chapter 2.

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'Finally the absence of any binding force of foreign law in cases where its use is not mandatory [sc. where national law does not expressly command to use and refer to foreign law] also means that it has no normative quality. Yet again, this is the logic of two different sets of norms, which are in no hierarchical or other connection: the 'ought' of the foreign system is just an 'is' in the domestic. The foreign 'ought' has *no normative relevance* for the domestic 'ought'. It functions just as an empirical fact about a social phenomenon (legal regulation) in a different normative system. Arguing out of a foreign model is, from the point of view of domestic legal norms, *just an empirical argument*.'¹³

This statement illustrates nicely why a theory of comparative legal reasoning should engage with the positivist divide. Whether or not it adds a myth to the positivistic project, the divide pervades the history of the comparative one. We may therefore adopt the 'strictly positivistic' viewpoint of our sceptic. This brings us to the first pivotal question that a theory of comparative legal reasoning needs to answer: what do we usually think of law that is '*entirely different*'?

II. Deconstructing the Positivist Divide

The positivist divide confines national law to a 'national ought' and declares all other law to be 'entirely different'. What underpins and safeguards the borders between those two realms of one's own and the other law are ideas such as democracy, autonomy, territoriality, nationality, identity and culture. The question, however, remains the same for each of them: are such ideas powerful enough to defend the positivist divide and to refute the other law as a *normative* category of one's own? One theory is particularly well suited to addressing such a question: Jacques Derrida's philosophy of deconstruction. Because one strength of this philosophy lies in its stratagem not to criticise normative regimes from an external perspective or privileged vantage point, but to devote itself to internal criticism. Deconstruction always focuses on specific contexts and hence does not require a subordinative, universal concept of law. It therefore allows one to circumvent the shortcomings of the idea of law and universal principles of law encountered earlier. On the other hand, deconstruction precisely analyses how meaning in texts arises. It centres on the emergence of sense, meaning and normativity in semiotic systems. Due to these characteristics, deconstruction provides an ideal theoretical instrument to examine the emergence of legal normativity by texts (statutes, precedents, etc.) in the radically closed system we presupposed

13 Bobek (note 1), 213 and 214 et seq (emphases added). An earlier study provides us with a similar statement: 'Es ist zuzugeben, daß die vergleichende Heranziehung ausländischen Rechts logisch kein Element der Anwendung inländischer Rechtsnormen sein kann. Sollenssätze der einen Rechtsquelle sind als solche nicht von dem einer anderen Rechtsordnung zugehörenden Rechtsanwender zu beachten – von der Ausnahme der Verweisung abgesehen. Die Bindung des Sollens wirkt nur innerhalb der eigenen Rechtsordnung.' (Jörg Manfred Mössner, Rechtsvergleichung und Verfassungsrechtsprechung, *Archiv des öffentlichen Rechts* 99 (1974), 203).

by following our positivist sceptic. What follows is a very short introduction to some core elements of deconstruction, which I will briefly interpret in a legal context before outlining some consequences for the comparative project.¹⁴

Derrida's philosophy can be understood as an explanation of how to think about differences. He argues, first, that difference is something that is required for thought and, second, that it should not be thought of as an inflexible demarcation between separated entities but as a process of differentiation from which those entities originate. On the first point, he follows Hegel: thinking without marking a difference is unthinkable. It resembles the attempt to create the 'formless whiteness', an idea whereby one immerses oneself 'in the void of the Absolute'.¹⁵ On the second point, Derrida takes Hegel's argument one step further: difference must be thought of as a process of differentiation formed by three elements: *différance*, trace and repetition. I cannot dwell on the subtleties of these elements each of which provide detailed insights into how normativity in law emerges.¹⁶ Within the confines of this article, I prefer simply to state the main idea, viz. how this process of differentiation sharpens our sight for the emergence of specific entities. According to Derrida, it is naive to understand facts and ideas as monolithic building blocks; blocks with their exclusive, *full* presence, which are *differentiated* from others. To think of differences and entities in this way credits a paradigm that he calls the 'metaphysics of presence'. His notion of difference is, instead, that differences are a moving between elements that never come to rest in a full presence. Elements of facts or thought are thus always *differentiating* and they emerge as entities not exclusively from their own full presence but by way of a detour to other elements. The process of differentiation is therefore a constant movement of the detour one element has to cover to establish itself as a specific entity. This process thus becomes unavoidable to think of, realise, establish, form (etc.) any kind of entity.¹⁷ If we try to establish an entity *outside* this process, we seek an entity that *transcends* all the differentiation in time and space. Derrida denominates those 'outside entities' ironically as 'transcendental signifieds'.¹⁸

14 For an introduction to Jacques Derrida's philosophy in the context of comparative legal reasoning see Coendet (note 10), 29–53; of Derrida's primary texts, the following are particularly helpful to get a grip on the material: *Of Grammatology*, Baltimore 1976, part I; *Positions*, London 1981; *Margins of Philosophy*, Brighton 1982; *Limited Inc*, Evanston 1988.

15 Georg Wilhelm Friedrich Hegel, *Phenomenology of Spirit*, Oxford 1977, 31. For Derrida the basic difference that runs through human thinking is the one between past and future; he refers to it, accordingly, as the 'archi-trace' (Jacques Derrida, *Margins of Philosophy*, Brighton 1982, 13).

16 I have given it some thought elsewhere (Coendet (note 10), 54–72).

17 In Derrida's own words: 'The play of differences supposes, in effect, syntheses and referrals which forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring only to itself. Whether in the order of spoken or written discourse, no element can function as a sign without referring to another element which itself is not simply present. This interweaving results in each "element" ... being constituted on the basis of the trace within it of the other elements of the chain or system. ... Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent. There are only, everywhere, differences and traces of traces.' (Jacques Derrida, *Positions*, London 1981, 26).

18 Cf Derrida, *ibid*, 19 et seq.

Against this background, the positivist sceptic may consider revising his 'strictly positivistic' viewpoint as follows: if legal positivism aspires to claim any normativity, it needs an authority for its legal norms – sources of law, in traditional terms. Yet whatever form such source takes, it is not to take the position of a transcendental signified, a source to create law from nowhere. For any source of legal normativity needs to differentiate itself and make a detour to other sources to ascertain its self. The question about sources beyond this self is thus incorporated from the outset. A narrow positivistic concept may oppress this question, but no authority of positivism can *exclude* it from its system – even if such a concept brings everything into play, cuts off any connection with its origins (God, nation, *Grundnorm*, etc.), and proclaims its normativity as a holistic *pure* 'ought'. Because this *pure* 'ought' will also undertake a detour to the 'is', and so, even the ostensibly purest 'ought' of a legal system will contain traces of facticity. The positivist divide can therefore no longer be upheld. This, however, causes no loss. It rather offers the chance to broaden and deepen our understanding of how legal normativity emerges in a given legal system: the 'ought' of any rule is not something merely intelligible, purely ideal on the one side, to be confronted with the facts of the case, on the other. The normativity of the law rather arises from a fundamental intertwinement of facticity and ideality, of 'is' and 'ought'. Therefore, a legal norm is not a simple, objective product of reason that tells us what we ought to do. The complexity reduced in a specific norm as it is used by a court covers as well political and historical contingencies, policy considerations the court deems appropriate in a given case, and speculations about the future when assessing legal consequences. In short – and in contrast to the idea of a *pure* 'ought' – legal norms also involve the court's *impure* reasoning.

III. Consequences for Comparative Legal Reasoning

What follows from this widened legal normativity for the agenda of comparative legal reasoning? We may stress from the beginning that deconstructing the positivist divide does *not* entail compelling the courts to engage in comparative legal reasoning. The deconstructive claim is more modest, yet more fundamental: deconstruction puts forward another mode of thinking about foreign law. How are we to characterise this mode? We need to recall that the positivist divide defends a *difference* between domestic and foreign law that marks the other law as 'entirely different'. From the deconstructive angle, we can see that such stigmatisation misses the point and that a more humble idea of the domestic law's autonomy and identity may be appropriate; because, according to Derrida, self-determination *exclusively* by *our-selves* appears to be an odd metaphysical project. An entity rather defines *it-self* via the inevitable detour to the other. Domestic law therefore has to be seen in the irreducible context of the other law. That does not imply to extinguish the difference between domestic and foreign law, but rather that we think of them not as *differentiated* but as *differentiating* systems of normativity.

The gist of the matter for comparative legal reasoning is thus to displace a stiff notion of *difference* between domestic and foreign law by a thinking of differentiation (*différance*). Derrida describes the effect of this displacement as follows: ‘What is *universalizable* about *différance* with regard to *differences* is that it allows one to think the process of differentiation beyond every kind of limit: whether it is a matter of cultural, national, linguistic, or even human limits.’¹⁹ In other words, thinking about the positivist divide in terms of *différance* allows us to take legal reasoning beyond any national limits. As I mentioned earlier, ideas such as democracy, autonomy, territoriality, identity, and culture will block our thinking of the process of differentiation between legal systems only if we consider them as ‘transcendental signifieds’; entities to control the domestic law’s normativity from outside this process. Derrida provides us with a way of freeing legal reasoning from such metaphysical constraints and of creating a *space* in which we can universalise *normative* legal thinking, but – and this marks it off from many previous arguments on comparative legal reasoning – without signing up for a universal concept of law such as the idea of law or universal principles of law. Thus, the deconstructive claim understands legal normativity in a way that does not allow for one thing: to remain *in-different* towards the law of others.

C. Reconstructing Limits: Structures of Argumentation

The deconstruction of national limits to comparative legal reasoning may shock our positivist sceptic, and he may retort: is this supposed to mean that we should abolish all limits and cover the cultural identity mirrored in our own law with a foreign one? Such a question misunderstands the deconstructive argument. A deconstructive legal theory does not purport a naive annulment of legal limitations. It critically points out the limits of limitations; it shows that one cannot draw the line as the positivist divide suggests, but it does not argue that one must not draw it. An argument to this effect would not, in any event, be promising. The authority of statutes and precedents illustrates quite nicely how legal discourse distances itself from other discourses. Law is, to speak with Foucault, an ‘ordered discourse’ where not everyone is allowed to say what he or she feels like saying.²⁰ The task we face now, therefore, is to reconstruct the limits in domestic law by a theory of legal and comparative legal reasoning. Yet to form a coherent theory, those structures of argumentation must nevertheless move within the deconstructive space, and this implies three things:

First of all, the structures of argumentation cannot and do not strive for a universal concept of (comparative) legal reasoning. This is because deconstruction does not offer a universal vantage point, but merely a space for thinking about specific contexts.

19 Jacques Derrida, Politics of Difference, in: Jacques Derrida, Elisabeth Roudinesco, *For What Tomorrow... – A Dialogue*, Stanford 2004, 21, emphases added; I changed the term ‘difference’ in the translation back to its French original, viz. *différance*.

20 Michel Foucault, The Order of Discourse, in: Robert Young (ed): *Untying the Text*, London 1981, 48–78

The specific context for reconstructing the limits of what I call 'domestic law' in this study is any given legal system of a European democracy under the rule of law. It goes therefore without saying that in this tradition, democracy, separation of powers or the specific authority of certain texts (statutes and precedents) form core elements of the legal structure. The deconstructive approach (to law) is hence not the (in)famous 'anything goes' with which it is often associated, but a critique of 'how a thing goes'. This brings up the second point: how legal reasoning works cannot be thought within the convenient positivist divide set out earlier. The 'positivist blinkers' towards the facts, the 'impure reasons' of legal reasoning come at too high a price for some allegedly clear cut methodological guidelines.

Thirdly, legal reasoning should not be reconstructed by 'transcendental signifieds' to rationalise adjudication. In traditional legal methodology such transcendental signifieds are, for instance, the intention of the legislator or the semantics of a legal text; in the early theory of legal argumentation they took the form of 'practical reason'.²¹ By following those signifiers, it is submitted, we can find the rules to distinguish rationally between right and wrong. A rational decision will match the intention behind or the semantics of a legal text, or will be given within a discourse that complies with the rules of practical reason.²² In all those concepts, we measure the rationality of a decision against a point that stabilises legal normativity from *outside* the process of differentiation. Yet, if we re-inscribe those concepts in the process of differentiation (*différance*) they cannot any longer provide such *external* rationality and stability. They are back in the 'play of arguments' before the court and need to be assessed according to their qualities. Against this background, this section evolves as follows: it sets out some philosophical foundations of argumentation, which are then used to unfold structures of legal and comparative legal reasoning.

I. Philosophical Foundations of Argumentation

1) Toulmin's Uses of Argument

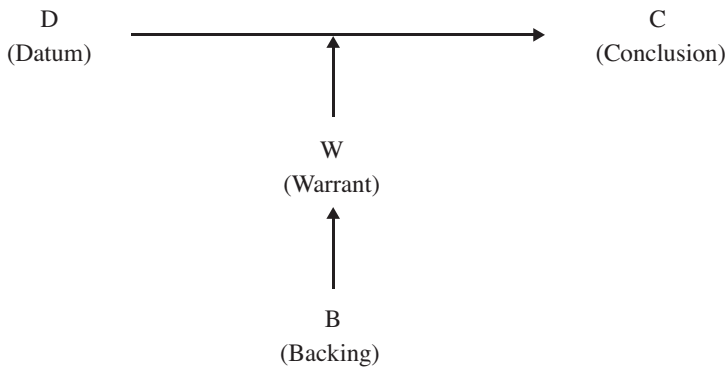
In a review on the development of analytical philosophy, we find the following notion of an argument: 'A valid argument is a transition from premises to a conclusion which transports truth.'²³ This simple definition points to the essential parts of an argument: the transition on the one hand, and the premises on the other. The problems as to the *transition* have been famously addressed by Stephen Toulmin in *The Uses of Ar-*

21 For the tradition of legal methodology see e.g. Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 6th ed, Berlin 1991, 328 and 322 respectively; for the theory of legal argumentation Robert Alexy, *A Theory of Legal Argumentation*, Oxford 1989, 17.

22 As to his 'rules and forms of argument' Alexy, *ibid*, explicitly speaks of 'something akin to a *code of practical reason*' (emphases added).

23 Peter Bieri, Was bleibt von der analytischen Philosophie?, *Deutsche Zeitschrift für Philosophie* 55 (2007), 337

gument which builds essentially on a critical enquiry about the syllogistic model of arguments. In this model the transition between premises and conclusion follows the paradigm of formal logics. According to Toulmin, however, the syllogistic model fails to elucidate the ‘practical business of argumentation’.²⁴ The reason for this is straightforward: formal logic does not *produce* any ideas of substance, it only *structures* ideas in an analytical way.²⁵ Though Toulmin still concerned himself with ‘the categories of applied logic’, he initiated a pragmatic turn in modern argumentation theory by inventing the ‘substantial argument’ as opposed to the ‘analytical argument’.²⁶ The structure of the substantial argument uses a warrant (W) to move from a specific datum (D) to the conclusion (C) while backing (B) the warrant with further information.²⁷



Consider the following example to see how the model works: the conclusion (C) may be that the defendant shall pay default interest on a debt. This conclusion relies, on the one hand, on the datum (D) that the defendant is at default. But in order to move from this datum to the conclusion we need to apply a warrant (W), i. e. the proposition that a defaulting debtor ought to pay default interest. This warrant may be then backed (B) by pointing out this proposition in a statute or precedent. An argument with those elements is substantial because it conveys more information than we can read off separately from datum and warrant. A conclusion, however, that *the* defendant ought to pay default interest because *all* defaulting debtors ought to pay default interest is analytical. It merely restates information we already know from the premise, i. e. that all the defaulting debtors ought to pay interest.²⁸ It is Toulmin's pragmatic turn with regard to the transition of the argument that inspired the theory I will now deploy to elaborate on the second argumentative core element: the premise.

24 Stephen Toulmin, *The Uses of Argument*, Cambridge 1958, 95

25 For an illuminating account of this point see Ulfrid Neumann, *Juristische Argumentationslehre*, Darmstadt 1986, 17–21, 30–33.

26 Cf Toulmin (note 24), 95, 123.

27 Cf Toulmin, *ibid*, 97, 103.

28 Cf Toulmin, *ibid*, 125.

2) Wohlrapp's Concept of Argument

Harald Wohlrapp, until recently a professor of philosophy at the University of Hamburg, first presented his concept of argumentative validity (*Argumentative Geltung*) in the 1990s. He has since fleshed it out to offer a sophisticated 'concept of argument'.²⁹ A critical reflection on Toulmin's theory starts the project.³⁰ Wohlrapp rightly points out that this theory does not show how the knowledge in the premises of the argument arises. To be sure, Toulmin sites the warrants and their backing in the fields of different disciplines, but he then simply presumes the knowledge in those fields.³¹ So in legal reasoning, for instance, a lawyer will simply *know* that there is a statute (backing) and how it operates (warrant) to come to a certain conclusion in a given case (datum). Legal practice, however, shows that legal reasoning does not work nearly so smoothly. In his theory, Wohlrapp addresses these shortcomings: he explains how we *produce* the knowledge for our premises and thus how we find orientation in situations where we do *not know* what to do. I will now briefly describe this theory in eight key words.³²

Pragmatism – By focussing on orientation for practical action, Wohlrapp opts for a pragmatic theory of argumentation. According to Wohlrapp, a view is pragmatic if it assesses the significance and validity of theories in terms of the success of their practical application. It is thus practical success or, as Wohlrapp puts it more specifically, the felicity of actions (*das Gelingen von Handlungen*) that focuses our actions. This felicity of action is secured on two different levels. On the first level, the felicity of actions will be supported by developing specific practices in different areas of life: if people are not merely *doing* something, but have the *skills* to do something, they rely on practices which enhance their chances to succeed in their actions. Practices therefore appear to be something very common. Among many, Wohlrapp mentions the practices to produce and execute decisions in legislation, adjudication, and administration.³³

Theory – While specific practices safeguard the felicity of our actions on the first level, theory steps in on the second in order to *analyse* those practices and to *teach* them. Consequently, Wohlrapp marks two gateways to theory: research and teaching. The change from the first to the second level, from practice to theory is thus a change of focus: while practice focuses on the felicity of actions, theory focuses on guiding practical action. Theory aims, in other words, to supplement the practice by providing orientation in a specific field of human action. In any case, Wohlrapp concludes, a theory strives for identifying, differentiating, and explaining the relevant conditions of action to allow for informed and, ultimately, free human endeavours.

29 A first article on the concept of argumentative validity (*Argumentative Geltung*) appeared in Harald Wohlrapp (ed): *Wege der Argumentationsforschung*, Stuttgart 1995, 280–305; the full account of the theory was then published under the title *Der Begriff des Arguments*, Würzburg 2008.

30 Cf Harald Wohlrapp, *The Concept of Argument*, Dordrecht 2014, xxxii–xxxiv.

31 Cf Toulmin (note 24), 36–38.

32 For an outline see also Wohlrapp (note 30), lix–lxii and Coendet (note 10), 94–114.

33 Cf Wohlrapp, *ibid*, 1–16.

In a nutshell, the essential function of a theory is therefore to provide orientation in a practical field.³⁴

Episteme – Of course, not all theories guide human action in the same way. Wohlrapp distinguishes between approved and new theories. A new theory he describes as *thetic* and thereby denotes a theory that is discussed and assessed within a process of argumentation. Approved theories he designates as *epistemic* and separates them into knowledge and *Doxa*. A theory enters into the realm of knowledge if its claim to guide practical action has been specifically tested. This ‘test of knowledge’ requires three things: the theory must actually guide practical action, it needs to be realised; further, it has to be put in a clear methodological order; and finally, it must be coherent in itself as well as with the other elements of knowledge. *Doxa*, on the other hand, are settled opinions which also guide human action, yet as opposed to knowledge they are not common sense but still supported by most of the people of a given social or cultural sphere.³⁵

Thesis – Wohlrapp’s concept of argumentative validity is a pragmatic theory that centres on human practice; theory guides our practice, and theories that do so successfully are epistemic. Thetic theories, in contrast, strive against the unknown: a thesis suggests *new* orientation. A thesis therefore is not something we raise ‘just for fun’; we only need to consider it if we lack sufficient epistemic guidance. Against our current epistemic background, the thesis will therefore emerge as a specific *problem*. Wohlrapp thus reserves argumentation for particular situations. His notion of a problem excludes mere puzzles or quarrels from the argumentative process. Because for such use, he holds, our capacities of argumentation are far too important and precious.³⁶

Dialogue – However, as we face a ‘real’ problem we must research this problem in an argumentative or thetic dialogue. Such a dialogue allocates two major roles: the proponent who asserts and justifies his thesis and the opponent who shall criticise it. Thus, the process of argumentation comprises three basic operations (asserting, justifying, criticising) and one overarching goal: to assess the validity of the thesis. Yet what do we achieve by a valid thesis? I may put it like this: once a thesis is supplemented by a valid justification, we are endowed with a *theoretical* solution how we may reach the yet *unknown* land indicated by the thesis as we leave our safe epistemic grounds.³⁷ Note well, we *may* reach the thesis. A valid thesis neither guarantees practical success nor (logically) compels anyone to follow it and to embark on the journey into the unknown. By this manoeuvre, Wohlrapp clearly keeps distance from

34 Cf Wohlrapp, *ibid*, 16–22.

35 Cf Wohlrapp, *ibid*, 36–51.

36 Cf Wohlrapp, *ibid*, 60–63.

37 The metaphor I am using here hints at an example Wohlrapp uses throughout his book to illustrate his theory, i. e. Christopher Columbus’ quest to find an ocean path to India while accidentally discovering the New World.

what Habermas famously called ‘the un-compelling force of the better argument’ (*der zwanglose Zwang des besseren Arguments*)^{38, 39}

Transsubjectivity – The concept of transsubjectivity is probably best understood as an attempt to frame argumentation as a dynamic and critical process. In the *trans-subjective* move, a proponent of a thesis, i. e. the subject, exposes itself and its thesis to the critique, viz. the subject takes distance from itself and the thesis. Such distancing involves a temporal and a spatial element: the subject will, on the one hand, consider its thesis against the background of its history; it will assess the thesis against the experience of the past. On the other hand, the subject gains distance by asserting its opinion as a thesis and thereby releasing the thesis into the realm of the critique (*Raum der Kritik*).⁴⁰ Why should it matter that the subject transcends itself in this way? Because *no one* will recognise all aspects of a problem and, at the same time, one must – at least in a pragmatic perspective – strive for the best orientation available. On that account, *everyone* will benefit from completing and, possibly, amending his or her own perception in light of the knowledge and the critique of others. Hence, the transsubjective move does not entail following others uncritically, but it requires us to evaluate critique carefully and to strive for further knowledge within the argumentative dialogue.⁴¹

Validity – The argumentative dialogue assesses whether a thesis provides valid guidance for a practical problem. A thesis involves a claim for validity, and hence we must define a standard for the reaching of such validity. Wohlrapp rejects two well-known standards: insight and assent. Since both of them may fail only for reasons unrelated to the argumentative problem, for instance because the opponent simply dislikes the proponent or is incapable of understanding the argument. As regards assent, a pragmatic approach, moreover, poses the question: how can assent indicate whether a thesis provides reliable guidance? And the sober answer is: it cannot, for mere assent does not convey any information whether it is advisable to rely on a thesis or not. It therefore cannot be the gold standard of a pragmatic concept of validity. Rather, such a standard needs to mirror a thesis that was *critically* assessed. For this reason, the standard put forward by Wohlrapp is: the ‘absence of open objections’ (*Einwandfreiheit*) measured against a current ‘state of argumentation’ (*Argumentationsstand*). More specifically, a thesis is valid if and only if (i) there are sufficient reasons to reach the thetic conclusion from its epistemic or practical starting points and (ii) this transition, according to the current state of argumentation, is not challenged by any objection.⁴²

Tentativeness – Does the concept of validity, as just described, not advance a variation of relativism? After all, it measures validity *relative* to a state of argumentation. Why should this not give way to the playful relativistic gesture to point out *any* argu-

38 Jürgen Habermas, *Wahrheitstheorien*, in: Helmut Fahrenbach (ed): *Wirklichkeit und Reflexion*, Pfullingen 1973, 240

39 Cf Wohlrapp (note 30), 85–91, 134–161, esp. 146 together with xvi, note 1.

40 Cf Coendet (note 10), 105 et seq.

41 Cf Wohlrapp (note 30), 403–406.

42 Cf Wohlrapp, *ibid*, 267–284.

mentation as of ‘mere relative validity’ *at any time*? The answer lies in the tentativeness of validity: once the argument is valid it keeps its validity *until* someone comes up with a *new* argument that transcends the state of argumentation. Therefore, the concept of argumentative validity submits not to a playful relativism but to a temporal concept of validity. Within this concept, arguments between different systems of thought are, consequently, never settled once and for all. The tentativeness of their claims will keep the discussion open. Tentativeness therefore requires, similarly to transsubjectivity, a careful and humble approach to a given state of argumentation. New arguments may always be advanced, and because of that, Wohlrapp describes ‘thetic reason’ (*thetische Vernunft*) as the ‘reason of tentativeness’ (*Vernunft des Vorläufigen*).⁴³

Conclusion – We are now in a position to refine our preliminary notion of argument (‘A valid argument is a transition from premises to a conclusion which transports truth’): a valid *argumentation* establishes a transition from an epistemic basis to a thetic conclusion, and whether an argumentation is valid is assessed by *arguments* advanced for and against the thesis in a dialogical, critical process. An argumentation is *valid* if no objections remain to challenge the transition, however, such transition does not transport truth, but new *orientation*.

II. Structures of Legal Reasoning

In this part, some structures of legal reasoning will be outlined, to describe how comparative legal reasoning operates within them. The structures draw on the philosophical foundations set out above and, as mentioned earlier, on the epistemic background of their specific legal context, i. e. the ‘European tradition’. While a deconstructive approach to legal reasoning will essentially be a critique of legal reasoning, the theory of argumentative validity allows for its function to be defined positively. According to this pragmatic outlook on theory, we engage in argumentation because our current knowledge offers insufficient orientation. Legal reasoning thus takes the following functional perspective: it looks for new orientation beyond our legal knowledge. Legal reasoning builds up thetic theories to enhance or complete epistemic theory that already guides legal practice. Ultimately, it aims to increase felicity (*Gelingen*) of our actions as we act in legal practice.

Legal Reasoning as Practical Guidance – The first structure I would like to put forward is that of legal reasoning as practical guidance. Following Wohlrapp’s theory we may say: if we *know* how to decide a case, we do not need to argue about it. If we know something, we do not *argue* but *explain*; we face a pedagogic rather than an argumentative task. Where a court can decide a case by merely drawing on existing statutory law or case law, it explains the law as it stands. Only after such epistemic explanations are exhausted or challenged meaningfully, does the court need to step into the process of legal reasoning. This brings out two questions: (i) how can we distinguish legal

43 Cf Wohlrapp, *ibid*, 303–313, lxi.

argumentation and explanation more precisely? and (ii) when are epistemic theories challenged meaningfully in legal reasoning? I will consider only the first question at this stage, and return to the second question later.

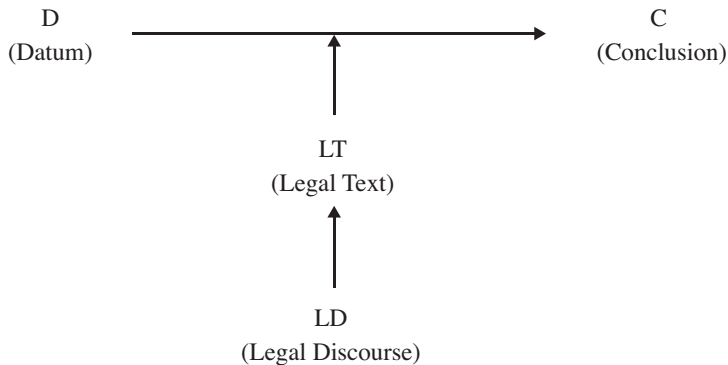
In the perspective of argumentative validity, legal argumentation and explanation share at least one common point: they both reveal how legal practice produces legal knowledge: we *learn* or *explain* existing epistemic theory, which guides legal practice, or we *research* new normative knowledge by legal argumentation. Taking this as a starting point, we are able to separate argumentation and explanation more clearly if we map out the epistemic structure of the domestic law. This epistemic structure may be sketched as follows: the epistemic knowledge of law includes legal institutions such as the institution of contract or limited companies. Also specific principles of law qualify as legal knowledge, for instance, in relation to the law of contract, the principles of formation, or good faith in civil law systems and consideration in common law systems. Moreover, if legal principles are fleshed out by clearly established doctrine and case law they will also provide stable and coherent epistemic guidance. Uncommon doctrines and (notably in civil law) single court decisions will, on the other hand, at best form settled opinions; thus, if legal practice takes them as guidance, they function as doxastic theories in legal discourse. Consequently, as long as legal practice only operates on the epistemic grounds of legal knowledge and *Doxa* the law is constituted either by learning or explanation.

The distinction between explanation and argumentation, understood in this way, highlights two distinctive features of legal discourse: on the one hand, it uncovers something that traditionally receives little attention in legal methodology, viz. that there are plenty of 'standard cases' which legal practice treats differently from cases where there is a real legal problem to solve. This is because under the theory of argumentative validity only 'real' problems call for new orientation to be sorted out in an argumentative dialogue. Numerous cases, however, especially before lower courts, merely require legal explanations, which are sometimes prepared, to some extent by computer programmes or, more conventionally, are included in standard 'building blocks', used by courts to summarise common precedents, definitions and doctrines for a statutory rule. On the other hand, legal practice elucidates for the theory of argumentative validity that new orientation often asks for 'orientation within knowledge': one may know for instance that a certain rule or principle exists, yet it remains unclear what they imply in a given case. We may therefore say that those situations present 'small research projects' to legal reasoning: arguments guide us into reaching a thetic conclusion against our epistemic background, e. g. how to apply a certain rule or principle in the case at hand.

Legal reasoning is, however, not confined exclusively, or even inevitably, to reasoning on particular cases. In the approach of argumentative validity, an argument always sets off from epistemic grounds to construct a thetic theory. Thus, in those references to the *epistemic* structures of the law, legal reasoning *in any case* moves beyond the single case. Legal reasoning will even duplicate this move if it does not focus on a specific case but operates on a meta-case level. This is a type of legal reasoning we usually

encounter in legal scholarship. When academics build a more systematic theory for a particular legal area, they reflect a part of legal practice which transcends a case-by-case approach. How legal reasoning functions to guide legal practice should now be reasonably clear in order to understand at least the following, more general proposition in my argument: legal reasoning as practical guidance argues for a pragmatic turn in legal theory and methodology.

The Inferential Structure of Legal Justification – The ‘inferential structure of legal justification’ ventures to reinterpret Toulmin’s model of justification for the legal context. At the position of the warrant, I place the legal text (LT), i. e. a statute or precedent, as the carrier for legal propositions. The meaning of this text will, if necessary, be clarified in the legal discourse (LD), which may take the form of a legal explanation or argumentation. The warrant, however, will take a less prominent place in the revised model: it is now merely displayed as the transition ($\rightarrow$) between the datum (D) and the conclusion (C). As a result, we arrive at the following model:



Legal discourse (LD) thus comprises both legal explanation and legal reasoning: how should we specify the model for those two forms? I would like to suggest the following terminology: if justification follows from a legal explanation (LE), *epistemic* theory will connect the datum (D) with a specific legal confirmation (*Feststellung*, C'). The transition from the datum to the confirmation ($D \rightarrow C'$) will hence be justified by a legal text (LT) and its explanation (LE). If justification follows from legal reasoning, a *thetic* theory will allow to move from the datum to a thesis (T). The transition from the datum to the thesis ($D \rightarrow T$) is backed by the legal text (LT) as clarified in legal reasoning (LR).

What leaps out clearly in this revised structure of legal justification is the new field for the ‘legal text’. The pragmatic approach of argumentative validity may explain this important shift: authoritative legal texts (statutes and precedents) are *the* central *epistemic* reference points to guide legal discourse. To understand this, we need only recall that in practice a legal justification will typically start to *explain* a certain conclusion by pointing out that ‘the text requires it’. In the first place, the legal text thus functions as a *medium for legal explanations*. Quite often, however, the legal discourse will

not stop here. The answer ‘there are good reasons to read this differently’ heralds the challenge of an epistemic explanation that draws on a given legal text. Against the epistemic background of the legal text, a specific problem thus arises. If this is indeed a legal *problem*, it will trigger a thetic dialogue. In this dialogue, legal reasoning shall clarify which transitions can be established taking into account a given set of legal data and texts. Thus, the legal dialogue will always need to consider and focus on legal texts. The legal text can at this stage therefore be understood as the *medium for legal reasoning*.

The Validity of Legal Justification – If the conclusion (C), in the inferential structure just described, is reached by means of legal reasoning (LR), this conclusion, or more specifically this thesis (T), will be valid if and only if the underpinning legal reasoning produces a valid argument. Hence, when is there a *valid* legal argument? Different answers have been given to this question in legal theory, of which three were mentioned when setting out the philosophical foundations: formal logic, insight and assent. Wohlrapp’s theory rejects those approaches and replaces them with the idea of argumentative validity. And thus, we may wonder: what does his theory imply for the concept of validity in legal justification?

In short, his theory aligns the notion of *validity* with the *function* of legal reasoning to provide practical guidance. If legal reasoning takes the pragmatic turn I suggested earlier, we need a test for validity that reflects the best orientation available. Consequently, the sensible standard of validity must be the ‘absence of open objections’ measured against the current ‘state of legal argumentation’. Now, where do we find the critical objections to test the validity of a legal thesis? Various sources can be listed: objections may be submitted by the parties in legal proceedings, appear in scholarly writings or previous court decisions, or derive from legal history or comparative law. All of these sources enrich the legal dialogue with arguments to assess the quality of a legal thesis (T).

Two important points must be added here. Firstly, argumentative validity makes it a *normative* claim that all arguments submitted in favour or against the thesis (T) must be considered in the process of argumentation. The pragmatic approach requires us to take any argument seriously, whether it derives from previous or other jurisdictions, higher or lower courts, renowned or unknown academics. Secondly, not only may a legal thesis (T) be subject to critical objections, but epistemic theories and even legal *knowledge*, are sometimes challenged by *new* arguments. Legal reasoning must then assess whether the previous theory still provides sound guidance for legal practice. Legal reasoning operates, therefore, not only to establish new guidance in new cases, but also to keep established theories open to critique and (if necessary) revision. This can, however, avoid driving legal validity into relativism as long as we only open the state of argumentation for truly *new* arguments.

The Forms of Legal Arguments – The inferential structure I set out above bears in mind that in legal discourse a lawyer will usually reach first for an established legal text to explain his conclusion. In any case such reference is necessary, yet not always sufficient. Another lawyer may argue against the lawyer’s reading of the text and will

submit good reasons for her view. If we ask what the law considers to be a *good* reason, we enquire the notion of the legal argument. This cannot be answered without clarifying the notion of law, a rather puzzling question. Yet to ‘solve’ the puzzle for the present purpose we find a valuable clue in Wittgenstein’s philosophy:

‘All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life.’⁴⁴

To clarify the essence of an argument, we must therefore look at the system, or as Wittgenstein sometimes calls it, a specific ‘form of life’. The notion of law submitted here is, consequently, to be understood as a specific historical context that is shaped by human practice. This is the ‘system’ or the ‘form of life’.⁴⁵ In order to identify the forms of legal arguments in this specific context, we must analyse legal practice. For the ‘European tradition’, which is as noted the ‘form of life’ that grounds this study, we find several enquiries to research the forms of legal arguments used by judicial practice. The most comprehensive of those studies discerns a great diversity in how judicial arguments are classified and designated; nevertheless it recognises a fundamental unity in judicial practice.⁴⁶ Pulling the threads of those different studies together, the most relevant legal arguments in the ‘European tradition’ can be mapped as follows: when interpreting a rule, courts will consider the rule’s wording, history, systematic context and purpose. Moreover, they will account for ‘extra-legal criteria’ (*außergesetzliche Wertungsmaßstäbe*), which comprise ‘consequential’, ‘theoretical’ and arguments that insist on a ‘reasonable’ result.⁴⁷

III. Structures of Comparative Legal Reasoning

The first section (B) suggested that the question whether foreign law exists as a normative category of domestic law is always *implied* in the idea of one’s own, national law. To such an extent, we can speak of an implicit normativity of foreign law, and therefore we may frame the leading question for a theory of comparative legal reasoning as follows: how is this implicit normativity to be made explicit? This question sets the topic for the structures of comparative legal reasoning which comprise two parts. First, those structures must show *why* comparative reasoning should be a part of legal

44 Ludwig Wittgenstein, *On Certainty*, Oxford 1969, Nr 105

45 Further support for this notion of law may be gleaned from the philosophy of deconstruction – cf Coendet (note 10), 125 et seq.

46 ‘Insgesamt berücksichtigen die Gerichte in allen untersuchten Rechtsordnungen unabhängig von den verschiedenen Klassifizierungen den Wortlaut, die Geschichte, den systematischen Zusammenhang und den Zweck der zu interpretierenden Norm. Darüber hinaus werden überall außergesetzliche Wertungsmaßstäbe herangezogen’ (Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, vol. II, Tübingen 2001, 1255 and further 1254–1261, 1294–1308).

47 Cf Coendet (note 10), 127, with further differentiations and references.

reasoning; they must explain its primary motive. I will elaborate on this under the heading of 'transsubjectivity'. Secondly, the structures should reveal *how* comparative legal reasoning works. This will be discussed under the headings 'inferential function' and 'linking contexts'.

1) *Transsubjectivity*

The term of transsubjectivity has already been briefly introduced. I will now enrich it with some further concepts of Wohlrapp's theory in order to explain it as being the primary motive for comparative legal reasoning. Those concepts are focus, viewpoint and perspective. In Wohlrapp's theory, practices evolve to secure the felicity of actions. The practices guiding the production of court decisions may serve as an example of this. In this area, a practice is established if, for instance, the decision whether an action is admissible follows a certain checklist. Such a checklist might be written down and also include former court decisions on the admissibility of actions. In this case, the checklist not only informs the practice, but reflects it as epistemic theory that guides legal actions.

The process of how legal practices and theories underpin law's 'daily business' could be illustrated at length. What matters at this stage is, however, that such practices and theories will always *focus* the legal context in a specific way: it is an epistemological necessity for practitioners to focus their observations in order to observe anything. What a subject perceives in its focus is described by Wohlrapp as the *viewpoint* (*Sichtweise*). The viewpoint is therefore subjective and inevitably excludes other ways to observe a certain phenomenon.⁴⁸ For law this has dramatic consequences: the legal certainty produced by legal practices and theories implies blind spots in any legal system. The *focus* that a legal system applies may well enhance the felicity of practical action, yet this comes at a price: it excludes other ways of looking at a problem.

Against the shortcomings of one's viewpoint, Wohlrapp advances the concept of *perspective*. A perspective is an objectified viewpoint because it reflects under what aspects it considers a problem. To reach out for such a perspective is the movement of *trans-subjectivity*. On the one hand, this step outside one's own viewpoint is worthwhile because it breaks with habitual structures of the subject's modes of observation. A solution to a *problem* that is only rooted in one's own opinion is, however, prone to reproduce habitual structures, and it may therefore happen that the problem reappears sooner or later. On the other hand, another perspective may be fruitful for the subject because it provides knowledge that the subject was missing in its own viewpoint.⁴⁹

The primary motive for engaging in comparative legal reasoning should be clear from the foregoing: comparative law enriches the viewpoint of the domestic law by

48 Cf Wohlrapp (note 30), 177, 184–185. For reference purposes it may be noted that the English version of the *Concept of Argument* translates *Sichtweise* more literally as 'way of seeing' (Wohlrapp, *ibid*, 184).

49 Cf Wohlrapp, *ibid*, 110, 123, 184–185, 405.

the knowledge and the perspective of other laws. It allows us to build up new thetic theories or to criticise epistemic or thetic viewpoints of the domestic law. Comparative reasoning thus fulfils the task of constructing and criticising theories in one's own legal system. For this task comparative reasoning enjoys a particular capability: it can reveal blind spots in the domestic legal system because it relies for its reasoning on *another* legal system. The other legal system will, of course, also produce its blind spots, but (fortunately) they will never be exactly the same ones.

Perhaps this motivation of comparative legal reasoning sounds familiar. It suffices to recall the well-known statements that comparative law builds up the 'stock of solutions', 'functions as a controlling device', 'relaxes fixed dogmas', or helps to overcome 'national isolationism'.⁵⁰ The basic intuitions behind these statements all seem correct to me; yet I think they should be grasped more sharply. For instance, it is inappropriate to polemicise against the 'dogmatic structure' of the law under the auspices of comparative law.⁵¹ The theory of argumentative validity shows that 'legal dogmatics' or 'legal theories' provide essential guidance for legal practice. Such theoretical constructions will produce blind spots in the legal system, but it does not follow from this that comparative law is the only device to reveal them. Transsubjectivity in law and the critique it entails also emerges from legal history or *national* legal scholarship. Nevertheless, we recognise the vantage point comparative law has here if we differentiate between viewpoint and perspective: because only the perspective of the other law enables us to break free from the domestic law's habitual structures. At the same time, it is simplistic to limit comparative law to mere criticism; since it does indeed enlarge the 'stock of solutions' when working on epistemic and thetic theories. The theory of argumentative validity thus not only allows us to pull all the threads of the earlier statements together, it also permits us to restate them more accurately.

What has been said so far explains the primary motive; *why* we should engage in comparative legal reasoning when dealing with legal problems of domestic law. This does not (yet) make it a normative claim that we *ought* to engage in this exercise. Yet against the pragmatic character of legal reasoning, I suggested above, such a normative claim is not far-fetched: if legal argumentation functions as a device that aims at the *best* orientation we can establish as to a legal problem, we cannot, as a matter of principle, ignore arguments from the perspective of foreign laws and confine legal reasoning to a national viewpoint. Provided one is willing to accept this pragmatic shift, the *trans-subjective* move of comparative law becomes more than just an option; it needs to be taken seriously. Two important qualifications must, however, be noted: first, to make a normative claim to include comparative legal reasoning in national legal discourse does not say anything about the specific normative power of the comparative

50 Cf for the first of these statements: Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, in: Hans G. Leser (ed.): *Ernst Rabel. Gesammelte Aufsätze*, vol. III, Tübingen 1967, 9 (Rabel ascribes this statement to Zitelmann); for the second statement: Zweigert (note 3), 17; for the third and fourth statement: Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law*, 3rd ed, Oxford 1998, 3.

51 As did e.g. Konrad Zweigert, *Rechtsvergleichung, System und Dogmatik*, in: Karl August Bettermann, Albrecht Zeuner (ed.): *Festschrift für Eduard Bötticher*, Berlin 1969, 443–449.

argument. I will elaborate on this power in the next paragraph. Second, to account for comparative law in national matters does not entail adapting another legal system's perspective uncritically. The qualifications set out for transsubjectivity remain unchanged: required is not to follow the other law, but to *open* the national viewpoint for the knowledge and the perspective of other laws. In short: transsubjectivity does not argue for a foreign viewpoint or perspective; it argues for transforming the *national viewpoint* to a *national perspective* by means of comparative reasoning.

2) Inferential Function

Under the term 'inferential function' I consider two things: the position and the functioning of (the power of) comparative arguments within the inferential structure explained earlier. If justification in this structure follows from legal reasoning, a thetic theory will allow us to move from the datum to a thesis. This transition from the datum to the thesis ($D \rightarrow T$) will be backed by the legal text, subject to legal reasoning. Within this structure, comparative arguments feature in the legal dialogue that focuses on the legal text to be clarified; this is their 'inferential position'. In this position comparative arguments share the pragmatic function of legal reasoning to guide legal practice. They will fulfil this function, more specifically, as dialogical operations to construct and criticise theories. When constructing *thetic* theories, we may use them to justify and criticise a thesis as regards a certain warrant ($\rightarrow$). When criticising *epistemic* theories, comparative arguments will take the form of new arguments and turn an epistemic into a thetic claim; on this level, comparative arguments thus challenge our legal knowledge and *Doxa*.

Against the background of this theoretical structure, we can clarify some important issues about comparative legal reasoning. The first one concerns the question whether foreign law enjoys any binding character in domestic legal reasoning. Foreign law makes its way into legal justification in the form of dialogical operations (justifying and criticising). Those operations feature in the legal argumentation focussed on a domestic legal text (LT). From a pragmatic viewpoint, this focus is explainable on two bases. First, it is the text of the domestic law against which the argumentative problem appears: the reading of *this* text is disputed or unclear. Second, the text of the domestic law favours the epistemic authority to be *the* medium for legal reasoning: its text is *the* central epistemic reference point for legal orientation. Consequently, legal reasoning is not bound by foreign law, but by the *arguments* that result from the comparison between domestic and foreign law.

We can now address a second important issue we considered in the introduction: do comparative arguments bind or merely inspire the court's reasoning? I just suggested that they have a binding character. But for what reason? The basic reason has been already given under the motive of 'transsubjectivity'. The claim to accept comparative arguments, as a matter of principle, rests on the pragmatic reason that they contribute to the search for the best legal orientation. This fundamental normativity may now be taken one step further. In the terms of the Wohlrappian theory we can express

the binding character of comparative arguments as follows: as elements of the ‘legal state of argumentation’, comparative arguments decide upon the validity of a legal justification. Thus, the normative value of the comparative argument need no longer be associated with ‘soft’ concepts such as ‘inspiration’. Within argumentative validity, the normative power of comparative arguments shifts decisively from such (rather diffuse) concepts to a *concept of substance*: bad arguments will fail, good arguments prevail – in the form of open objections in the ‘legal state of argumentation’.

3) *Linking Contexts*

In the structures of legal reasoning, I suggested that we should understand law as a specific historical *context* that is shaped by human practice. The title ‘linking contexts’ may therefore not come as a surprise. The following explores comparative legal reasoning as the linking of different legal contexts. Three things need to be explained accordingly: the types of context, the notion of ‘linking’, and the principles to be adhered to when linking the contexts of domestic and foreign law in comparative reasoning.

Contexts – The theoretical model developed here to explain the comparison between different legal systems is by no means universal. Its roots, as mentioned several times, are within the ‘European tradition’. The legal context from which comparative legal reasoning starts is therefore bound to a legal context sharing this tradition. Hereinafter, I will call it the ‘initial context’. Setting out from the initial context, comparative reasoning refers to a foreign legal context, the ‘context of reference’. We hence find two kinds of contexts in the comparative endeavour: the initial context and the context of reference.

Linking – The concept of linking contexts requires at first a terminological remark: why not ‘comparing contexts’? The reason is that the ‘linking’ of contexts addresses the question of how to *structure* the argumentation between different legal contexts. The term ‘comparison’, on the other hand, concentrates on how to approach such argumentation *methodologically*. I reserve this term therefore for the following section (D). The concept of linking thus focuses on the structure of comparative legal argumentation. Against the background of the ‘initial context’, the ‘linking’ of the contexts asks about the structure of the comparative *argument*: how is a comparative argument structured in the legal setting of the initial context?

With the groundwork done so far, it is only a small step to answer this question. The legal arguments in the *initial* context were mapped out as follows: courts consider the rule’s wording, history, systematic context and purpose; furthermore, they account for extra-legal criteria (reason, consequences, theory). Those arguments are specific directions for legal argumentation, pointing at the relevant questions that need to be addressed when dealing with a legal problem. On this basis, the structure of the comparative *argument* must be that a comparative argument will ‘double’ those questions and ask them again as to the context of reference. A comparative argument hence anal-

yses whether the domestic and foreign law can be linked with each other as to wording, history, system, purpose or extra-legal criteria. Structured in this way the comparative argument is not a diffuse, unclear interaction with foreign law, but extends legal reasoning on the forms of argumentation used in the domestic legal context.

Modelling the structure of the comparative argument like this makes sense for two reasons. First, the structure mirrors the relevant questions which are used in the initial context to solve legal problems. Drawing on those questions, legal reasoning will establish new orientation within the domestic law and therefore building on those questions is practically reasonable. Second, the structure provides a clear view of how to *think* about the comparative argument. The comparative argument is no longer a black box characterised by its non-transparent, obscure inside. It is not a free-standing form of legal reasoning or something that is beyond a specific legal context. Considering the comparative argument as an extension of the basic forms of legal reasoning in the initial context thus gives the comparative argument a clear analytical shape and starting point for the comparative enquiry.

Of course, this structure of the comparative argument does not and cannot provide more than the starting (and the end) point of the comparative enquiry. Thus, one should be cautious *not* to overstretch the guidance it offers and to infer from this structure that the basic questions as to legal reasoning in the initial context (wording, history, purpose, etc.) will readily be found in any context of reference. Such inference would likely fall prey to an ethnocentric critique. In other words, one must keep in mind the difference between linking and comparing contexts: linking asks about the structure of the comparative argument, and comparing about how to carry out the comparative enquiry methodologically. The concept of linking does not allow for the deriving of methodological rules for the actual comparison. On the contrary, because the concept of linking is clearly rooted in a particular legal tradition, it suggests that we need to supplement it with a specific methodology to avoid ethnocentrism. This again heralds the topic of the last section (D).

Principles – Comparative argumentation thus links an initial context with a context of reference. That immediately raises the question about the guiding principles for such argumentation to ensure a comparative solution which is acceptable for the *domestic* law. The starting point to develop those principles is the ‘asymmetric approach’ to a comparative problem. What do I mean by this? Basically, the concept rests on the interplay between epistemic and thetic theory, with which we have by now become familiar. We always argue for a thetic theory against a particular epistemic background. Thus, in law, a thetic problem of interpretation arises against the legal text (LT), which is epistemic. Yet, the relevant epistemic background for a legal problem is not confined to the legal text; it is the *whole* legal context that contrasts with a legal problem. For a comparative enquiry on a legal problem, it is clearly the context of the *domestic* law that provides the epistemic background for the problem to be considered. In this prevalence of the initial context we hence find the reason for the asymmetric approach to a comparative enquiry; the asymmetry implies different weight for the contexts under comparison. This difference stems notably from a pragmatic motive: because legal

reasoning seeks for new guidance in the context of one's own law, we must put the context of the domestic law first. It is for this legal context that we must come up with a solution that meaningfully guides legal practice.

The asymmetric approach produces three normative principles: coherence, stability and specificity. *Coherence* is one of the three elements required by Wohlrapp to transform a theory into knowledge; to achieve the epistemic status of knowledge is the ultimate goal for thetic theories and therefore they need to strive for a coherent result as to the existing knowledge. A theory that uses comparative arguments needs therefore to coordinate its solutions in relation to the knowledge of its initial context. This principle of coherence does not bar or oppose comparative innovations, yet it clarifies that the epistemic starting points of the domestic law can never be set at naught. Legal reasoning has its vanishing point in guiding a specific legal practice. Coherence with the domestic legal context can therefore also be understood as *stability*: comparative arguments should stabilise orientation in the initial context, not undermine it. *Specificity*, finally, picks up the idea that a comparative approach links the contexts under comparison as regards a *specific* problem of the *initial* context. Accordingly, a specific problem requires a specific solution for the initial context. While this is straightforward, it is interesting to see how this specificity guides the comparative enquiry in the context of reference: specificity makes it clear that the solution suitable for the initial context must not necessarily lie in the leading authority in the context or among the contexts of reference. The *best* solution for the *initial* context may well be found in a singular opinion held in but one context of reference.

D. Crossing Limits: Structures of Methodology

While the first section aimed at deconstructing the positivist divide between domestic and foreign laws, it was for the second to reconstruct those limits without falling back into previous positions. Those reconstructions tried to show to our positivist sceptic that a clearly structured theory of comparative legal reasoning does not threaten domestic law. On the contrary, comparative arguments may play an important role when building and criticising new and established theories in the domestic legal context. A passionate sceptic, nevertheless, will still doubt whether one actually should cross the national limits, and he can rely on a crucial argument to do so. Practically, he may say, there are no safeguards against the risk of misunderstanding foreign laws and thereby drawing disastrous conclusions for domestic law. This objection needs to be properly considered. The third and last section therefore briefly describes a methodological structure for comparative legal reasoning that addresses the methodological risks involved in the comparative process.⁵²

52 A full picture of the methodological structure would need to include also the more general issues about comparative legal methodology and to embed the methodological points as to comparative legal reasoning within it; for an account to this effect see Coendet (note 10), 158–167.

I. Pragmatism and Eclecticism

Before constructing the methodological structure for comparative reasoning one may consider a surprising question: when applying this kind of reasoning, is it necessary to strive for an accurate understanding of foreign law? In short, does methodology matter at all? Some scholars seem to think it does not:

‘the process [of judicial comparison] is *pragmatic*, not scientific. It is about obtaining ideas and finding inspiration, not about the ‘objective’ scientific truth. Creatively interpreting or even misreading a foreign model is a necessary, and often useful, element of inspiration. A judge can become inspired usefully and for the future workably even if completely misreading the foreign model. What is needed is an idea presumably compatible with the domestic legal environment. Whether such a distilled idea is indeed present in the original legal system is of little relevance, provided that judges look for functional inspiration, not foreign authority for the purpose of representation.’⁵³

Statements like this entail several problems. I will focus here on only one major point: the underpinning notion of pragmatism. Of course, there are different ways to conceptualise a pragmatic approach. In this statement the basic idea is that pragmatism relaxes the methodological constraints on how to engage with foreign law: what is relevant is not the correct, but rather the ‘useful’ reading of foreign law. This suggests, however, nothing other than a variation of the vulgar pragmatic maxim ‘the truth is what is useful’. Thus, under such pragmatism the eclectic reading and use of foreign law will escape scrutiny. There is, however, a simple question to challenge this approach: if the process is just about ‘useful inspiration’, why should a judge study foreign legal systems at all and not, for instance, political or religious scriptures? Most certainly, a comparative eclectic will hold such question to be an absurd interpretation of his methodological position. Yet he can argue this only by shifting his notion of pragmatism: he must understand pragmatism as orientation. Yet if we focus the process on the best orientation available, it not only matters *what* we read, but *how* we read it.

The pragmatic concept of transsubjectivity I suggested in the previous section makes this plain. According to transsubjectivity, the primary motive for comparative argumentation is to enrich the domestic law by the knowledge and the perspective of other laws. Yet, if the *other* knowledge and the *other* perspective fuel the process then one clearly should at least try to understand the ‘other’ law as ‘another’ law. An eclectic approach that gives up on this quest for a correct understanding of the other law waives those benefits of comparative reasoning and reduces it to a risky, at best inspiring adventure. At the same time, such eclecticism gives away the particular capability of comparative law to reveal blind spots in the domestic legal system. To be sure, if one strives *not* to understand the ‘other’ law as ‘another’ law there exists a high risk that blind spots of the domestic system will be transcribed to the foreign one. A more fine-tuned concept of pragmatism therefore does not offer an easy way out of

53 Bobek (note 1), 246

the methodological problem. The opposite is true: pragmatism as orientation (and not as eclecticism) calls on the comparatist to take the methodological problems and risks of comparative legal reasoning seriously.

II. Methodological Structures of Comparative Legal Reasoning

1) Outline

Comparative legal reasoning always comes at a price: the risk of misunderstanding the foreign law and its effects on the domestic legal system. ‘Lawyers who choose to govern a given transaction by adopting legal techniques developed in a different cultural milieu act ... at their own risk, of course.’⁵⁴ The following structures do not suggest that this risk can be eliminated, but they ask whether it can be *calculated*. In this section, I therefore ask how to structure the process of comparison institutionally and intellectually in order to reduce the methodological risks involved in the process. The methodological structure combines three concepts with each other: the density of the analysis, a distinction between small and large comparative projects, and a distinction between dialogical and triallogical comparison. By way of an outline, the structure is as follows:

According to the concept of ‘linking’, a comparative argument analyses whether the domestic and the foreign law can be linked with each other as to wording, history, system, purpose or extra-legal criteria. Those different directions of how to think about a legal question in a comparative perspective will require different efforts of how deeply one must engage with the foreign legal system. If the wording of a rule is similar in both jurisdictions, comparison may be much easier than if we try to compare the systematic position of a legal doctrine. Also within the different forms of reasoning the comparison can be more or less complex. The comparison of a teleological argument may be carried out easily or require quite a sophisticated enquiry. In other words, the density of the analysis will vary according to the specific comparative situation.

The density of the analysis is connected firstly to a pragmatic distinction between small and large comparative projects. In small comparative projects the density of the analysis is limited, while in large comparative projects the comparatist needs to get involved more deeply in the comparative process. Against the background of judicial comparison, this distinction is combined with the one between dialogical and triallogical comparison. The idea is that a judge can deal with small comparative projects on her own and engage directly in a comparative dialogue with the other law. Yet for a larger comparative project she needs support from something or somebody else, which makes it a ‘triallogical’ comparison. The crucial questions for the methodolog-

54 Michele Graziadei, The functionalist heritage, in: Pierre Legrand, Roderick Munday (eds): *Comparative Legal Studies: Traditions and Transitions*, Cambridge 2003, 113

ical structure are therefore: (i) what is a small comparative project and (ii) who or what will supplement the comparative process in the trialogical situation?

2) *Dialogical and Trialogical Comparison*

Dialogical Comparison – In a dialogical comparison the judge acts as comparatist. That means that she has to deal with the methodological problems on her own. No easy task, especially when we consider the time constraints in legal proceedings. Therefore, a judge takes the role of the comparatist only in small comparative projects. How are these to be delimited? A hint is given by what I earlier called ‘small research projects’ for *legal* reasoning. Those comprise situations where we can draw on a considerable epistemic background and the problem merely is where to set some singular thetic signposts; paradigmatically, we could think of adapting a coherent body of case law to a new case. In such circumstances the judge perceives the situation in her own legal system quite well and in doing so she can more likely assess the impacts of a comparative solution. A ‘small *legal* research project’ is thus the first element that indicates more room for comparative manoeuvre.

Naturally, perceiving the situation in the domestic law is not conclusive, for it does not say anything about the situation as to the foreign law. For a small *comparative* project we are therefore also in need of a manageable situation as regards the other law. Such a situation is indicated where the domestic and the foreign legal system are epistemically intertwined. That means that we find epistemic elements in both laws that point to one another. Examples of such elements are similar legal methods, historical connections, events of reception or similar socio-cultural and economic conditions. It is therefore the previous cultural link that allows the comparatist to reduce the density of the comparative analysis. Thus, we might conceive small comparative projects as *intra-cultural* comparisons.⁵⁵

Aside from the small comparative project, it is important to consider *who* actually carries out the project. The dialogical comparison is, in other words, subject to intrinsic constraints. Obviously, in what time, quality and complexity one can compare the domestic with a foreign jurisdiction depends also on the personal skills of the comparatist. In order for a judge to act as comparatist we must therefore not merely assume cultural links between the jurisdictions under comparison; those cultural links must, if possible, extend to the judge’s personality. She needs, consequently, not only to be equipped with the necessary language skills, but also with sufficient knowledge about the political, economic and cultural context of the foreign law. To embark on a dialogical comparison therefore requires critical self-enquiry: the judge must ask

55 On the concept of intra- and trans-cultural comparisons see Mark van Hoecke, Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, *International & Comparative Law Quarterly* 47 (1998), 495–536. Their concept may, on this point, be compared to what Zweigert and Kötz describe as the ‘style of legal families’ (see Zweigert/Kötz (note 50), 67–72).

herself whether she is sufficiently skilled to master the methodological problems of comparison on her own.⁵⁶

Triological Comparison – A comparative project that cannot be conducted dialogically switches to the triological mode. In this category, the judge looks for support in her comparative enquiry. To whom or what can she reach out? In practice, we find four categories: the parties, legal scholarship, expert opinions and model rules.⁵⁷ I will briefly introduce each category and discuss its potential in reducing the methodological risks of judicial comparison.

The parties to the court proceedings are the first ones we can think of to support the court in its comparative approach: it is submitted that a judge may simply ask the parties or their lawyers to produce the relevant comparative material.⁵⁸ There are several problems with this. Firstly, it is far from obvious why the parties should, as a matter of principle, be better equipped than the judge to carry out a comparative analysis, especially as regards time and personal skills. Secondly and more importantly, it must be doubted that the parties are a reliable source to reduce methodological risks. Lawyers naturally select and promote those arguments which best suit their clients' interest. It would be therefore rather naive to assume that they would exchange a 'useful' for a less 'useful', but accurate comparative argument. The parties and their lawyers respectively can play the important role of referring to foreign law where they see fit and thereby they can stimulate comparative reasoning. However, we cannot ask them to cover the court against the methodological risks involved in such an argument.

Legal scholarship provides another source of support. Indeed, this may be the traditional way by which courts acquire their comparative knowledge. There are countless books and papers that take a comparative perspective on domestic legal problems, and sometimes a court will draw on them for its own comparative analysis. On the one hand, legal scholars will have (at least potentially) the necessary time and expertise to deal with a comparative question. On the other hand, it is quite difficult for the court to assess the quality of a given comparative study. While for scholarly writings on the domestic law a court will be able to evaluate a theoretical proposal, it need not to be familiar with foreign law. Judicial evaluation consequently shifts to more formal criteria and the court may look at what methods were used, whether the study is up-to-date, whether research was carried out on the spot or at specific institutions, etc.

Expert opinions render specific comparative advice in ongoing court proceedings. We can distinguish between foreign and domestic opinions and, as regards the domestic opinions, between internal and external opinions, depending on whether the

56 This point has been raised as to comparative law in general: it 'would be quite healthy for a comparative lawyer or comparative legal researcher to think about what she is methodologically equipped to do and what she is not' (Jaakko Husa, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?*, *Revue Internationale de Droit Comparé* 58 (2006), 1116).

57 For references as regards these categories see Coendet (note 10), 179–181.

58 Hein Kötz, *Der Bundesgerichtshof und die Rechtsvergleichung*, in: Andreas Heldrich, Klaus J. Hopt (eds): *50 Jahre Bundesgerichtshof*, vol. II, München 2000, 841 et seq.; Zweigert/Kötz (note 50), 20. Also Markesinis advocates an important role of the parties in the methodology of comparative legal reasoning, cf Markesinis (note 2), 35 et seq., 45 et seq.

court refers to specialists within the judicial system or an external institution. At first glance, expert opinions seem to be the perfect solution for all methodological problems: they promise up-to-date comparative expertise. Whether they live up to this promise is another question. Since opinions will be delivered in a specific case they share its time constraints. Moreover, if the court relies on domestic experts it is not guaranteed that they enjoy the sufficient methodological skills; as the judge in the dialogical position, the expert must critically assess what he is capable of. If the court appoints foreign experts, the problem is rather one of communication: as the initial context and the context of reference may be quite different, it is not certain whether the exchange of comparative questions and answers will yield a meaningful result.

International model rules such as the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) or the Draft Common Frame of Reference (DCFR) contribute the last option to facilitate judicial comparison. To this end, model rules can be used in two ways: dialogical, as an individual context of reference, or trialogical, as instruments to enquire the legal environment in the legal systems that underpin the model rules. We are concerned here with the *trialogical* mode, and I will limit my comments accordingly. In the trialogical mode it is clear that the model rules themselves will not mirror the legal situation in a certain legal system, simply because they combine the rules of different jurisdictions. On the other hand, model rules provide access to comparative material only as far as they are supplemented by comparative notes. Usually those notes are, however, very brief and cursory. Thus, they may provide some insight into the comparative material, but they cannot significantly reduce the methodological risks of judicial comparisons.

The one and only category which could solve all methodological problems in the trialogical situation thus does not exist. Parties, legal scholarship, expert opinions, and model rules all have their drawbacks. Nevertheless, the review allows us to give some direction: parties and model rules can supply the court with a first access to comparative material in a given case, yet this will not safeguard the process methodologically. Scholarly and expert opinions will also not guarantee methodological accuracy, but generally their comparative capacities may go much further. If the court carefully examines a specific comparative contribution, the methodological risks of a comparative argumentation may therefore turn into a *calculated* methodological risk.

3) From Linking to Comparing

From linking to comparing contexts is the final step to be taken for the methodological structures of comparative reasoning. As to the question of why such a step should be relevant, we can conveniently rely on the example given in the very beginning of this text. There the court adopted a single argument from a foreign court decision. We may wonder: does such a straightforward transplant have anything to do with a *comparative* argumentation? Within the theoretical framework developed so far, one

might be tempted to think so, for the court *links* its initial context (English law) with a context of reference (German law) as regards a theoretical argument (self-determination). Yet this result is clearly not beyond doubt, if one thinks of comparison as analysing similarities and differences. Simply adopting an argument from another legal system obviously does not entail looking for similarities and differences. In the following, I will take the view that comparison asks for more than merely transplanting a foreign argument. Yet, this poses a structural problem for the present theory:

The theory developed so far allows us to frame a mere transplant within the concept of linking on the one hand, and places the latter within a concept of *comparative* legal reasoning on the other. Yet, if one wants to distinguish between transplants and comparisons, speaking of comparative legal reasoning in the first situation amounts to a category mistake: the transplant is allocated into a comparative category though not being comparative. To be consistent, the concept of comparative legal reasoning must therefore be refined. First, we need to define a category to include those situations where nothing but a mere transplant occurs, and secondly, I should point out that the concept of linking is just an intermediary step within the theory of comparative legal reasoning set out here; the linking of different legal contexts may thus lead either to a comparative argumentation or a mere transplant. Therefore, the notion of comparison takes the concept of linking an important step further.

I call the new category, to denominate simple transplants, ‘legal receptions’. Legal receptions involve crossing the borders of one’s own legal system as comparisons do. Yet legal receptions accomplish this crossing in a trivial way: they merely look into a foreign legal system to pick some arguments. They may well *link* an initial with a context of reference as regards a historic, systematic, teleological, grammatical, or extra-legal aspect. However, this is all that they require. For a legal reception it is *sufficient* to pick those arguments from a foreign legal system which the domestic lawyer considers to be *useful* or *inspiring*. Thus, legal receptions entertain an intimate relationship with the pragmatic eclecticism I discussed earlier. Against this background, a notion of comparison that differs from a legal reception becomes of utmost importance: since legal receptions and comparative argumentations are structurally similar (as the concept of linking reveals), one must be very cautious not to conflate them. Many ‘comparative argumentations’ will, on closer inspection, prove to be nothing more than a variation of eclecticism and a legal reception, respectively.

The notion of comparison therefore is a critical concept in avoiding superficial ‘crossing overs’ between legal systems. But when do we start to compare? At which point do we move from linking to comparing? This may be illustrated by the following passage on the theory of comparative reasoning: the foreign ‘argument itself, however, is not specifically “foreign”: it has persuasive authority because of its inherent quality, not because it is used in another country.’⁵⁹ There are several interesting points about this passage; the authority (or the power) of the comparative argument has been already dealt with. For the notion of comparison, however, I would like to emphasise

59 Smits (note 7), 536

that the foreign ‘argument itself, however, is not specifically “foreign”’. Are foreign arguments no longer specifically foreign arguments once we include them in a comparative argumentation? Not quite. *Comparing* legal systems in order to address a legal problem in the domestic law means to reflect that foreign arguments are *specifically* foreign: they derive from another legal context and therefore will always be contextualised differently. As a matter of principle, this becomes especially important where the differences in the contexts under comparison seem to be small – for this might be an illusion.

Thus, comparative legal reasoning starts where we consciously try to understand the other law as another law. This is the minimal methodological requirement a *comparative* argumentation must meet. To advance this basic notion of comparison, we may again rely on the concept of transsubjectivity: comparative reasoning is about enriching the domestic law by the knowledge and the perspective of other laws. More generally speaking, it is about learning from others by taking distance from oneself. Yet taking distance does not start with engaging with foreign law, and studying the foreign legal system exhaustively is not sufficient. This is because the comparatist must understand that in the process of comparison she never stops walking in her own shoes, and may therefore only understand the foreign law in her own terms. This danger on the comparative path, this methodological risk, haunts the comparatist. A notion of comparison needs to account for this, and it might therefore be appropriate to understand comparison at least as taking a distance from one’s own law that is reflected time and again so that the other law may be understood in its own terms.

E. In the End – the Beginning

This article started with a rather simple case, and a remark which might usually pass unnoticed: what is a ‘powerful’ (comparative) argument? It requires quite a lot of theoretical groundwork to unpack the complexity following on from this. Wrestling with our persistent and passionate sceptic against the idea of comparative legal reasoning, this article set out to at first establish a space for the comparative approach: the aim was to build a theory of comparative reasoning on ‘positivistic’ ground and to ensure a level playing field for such a theory to take off. Quite detailed structures of argumentation were then necessary to elucidate that (the power of) the comparative argument does not, as a matter of principle, threaten the identity and stability of the domestic law, but rather provides a good way of rationalising its legal reasoning. A rational comparative argument is, however, not to be expected without a clear methodological structure, and it was therefore for the last part to propose some institutional and intellectual ground rules for a useful methodological framework.

After this, the story of a theoretical analysis of comparative legal reasoning is, of course, not over. It seems rather like a beginning. We might wish to enquire into how comparative reasoning works in situations where different legal systems are vertically integrated (for instance, in the European Union). Further, we could ask how the the-

oretical tools developed here allow us to understand transnational normative processes, such as the emergence of a new *lex mercatoria* or the harmonisation of European private law, and their effects on national jurisdictions. For in these situations too, we are challenged to reconcile the idea of a domestic, national legal order with normative processes beyond its traditional reach. Finally, we may explore in more detail how the theories used here to interpret comparative legal reasoning contribute to our understanding of legal reasoning and legal theory in general. What seems to me to be particularly intriguing is the idea that deconstruction and the theory of argumentative validity may be merged into a powerful concept of 'legal pragmatology': a concept that combines the critical potential of Derrida's *grammatology* with the latest insights from a *pragmatic* theory of argumentation.⁶⁰ Perhaps, such a *pra-grammatology* could not only help to elucidate comparative legal reasoning, it could also provide some fresh starting points for legal theory.

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60 For an outline of this concept see Coendet (note 10), 128–132.