2012

Comparing Legal Argument

Jacco Bomhoff, *London School of Economics*

Comparing Legal Argument

Extract only - Full text in Adams & Bomhoff (eds.), *Practice and Theory in Comparative Law* (CUP, 2012)

Jacco Bomhoff*

Introduction

Legal reasoning in Western legal systems, to a large extent, turns on the use of a limited number of familiar forms of argument – reasoning by analogy, reasoning from legislative history, 'proportionality' reasoning, *etc.* In this contribution, a number of ideas on how to compare the use of such forms of legal argument as across different systems are presented. This discussion is based in part on methodological choices made in the course of a project that sought to compare the invocation of 'balancing' arguments – ubiquitous in many Western legal systems – in constitutional rights adjudication discourse in Europe and the United States. The ambition for this chapter, however, is to offer methodological suggestions useful also for the comparison of other forms of argument among other jurisdictions.

Legal argument and the internal perspective

Taking legal arguments as objects of comparison, by itself, suggests particular background views on what is important in comparative legal studies, and on how such studies should proceed. There is, in particular, a common divide in comparative legal scholarship between projects that focus on what foreign law *does* in terms of solving societal problems (often called studies in the 'functionalist' tradition) and those that try to understand what foreign law *means* to local participants in the foreign system (somewhat less often, but aptly, called 'expressivist' studies, or studies of culture). In relation to this divide, comparisons of legal argument, as studies of discourse, typically come down firmly on the side of meaning and expression. Expressivist approaches to comparative law, however, are exposed to real difficulties. One is that the fully 'internal perspective' that they aim for - the view of foreign law as experienced by local participants -, is extremely difficult, if not impossible, to achieve in practice.[1] These limitations, inherent in any outsider's perspective, can, however, be acknowledged and, at least to some extent, addressed. More serious, however, is the fact that expressivist approaches, despite the very real insights into the meaning of foreign law that they are able to generate, offer very little foundation for the *actual comparison* of these meanings. Rendering foreign legal institutions entirely in their own terms leaves no space for relating these terms to experiences elsewhere. Expressivist depictions of law risk being, quite simply, virtually *un*-comparable for

* Comments by Catherine Valcke and Neil Duxbury on earlier drafts of this chapter are gratefully acknowledged. The usual disclaimer applies.

[1] On the 'internal perspective', see further the contribution by Catherine Valcke in this collection.

lack of a common framework of precisely the kind that functionalist comparative law is devoted to.

This chapter discusses ideas to bridge this divide between function and culture in order to approximate the ideal of *comparable 'local meanings'* for legal arguments.[2] The fault line between what foreign law does and what it means can be overcome, it will be argued, by way of recalibrated reliance on basic assumptions as to what foreign law *is*. Whatever else may be going on in the foreign setting to be studied, the argument will be, comparative legal investigations can rely on the fact that at least some of the social practices, procedures, written materials, institutional structures *etc.* under observation are recognized by foreign local participants *as law*. To this extent, both the legal 'solutions' and 'meanings' sought by functionalists and expressivists will therefore always be conditioned by what sociologists of law, like Pierre Bourdieu, call the "internal logic of juridical functioning".[3] Comparative legal scholarship should aim to make strategic use of knowledge of this internal logic of 'the typically juridical'. This involves reliance on the basic idea that foreign judges and lawyers, *however foreign* they may be, will still be judges and lawyers *aiming to 'do law'*. Recognition of the specificities of the juridical field - of the specifically juridical nature of the 'solutions' and 'meanings' found in foreign jurisdictions - it is submitted, should make it possible for comparative legal scholars to come to understandings of foreign societies and their practices that are usefully different in focus and scope from those generated by other disciplines, such as anthropology, comparative intellectual history or political science. This approach, as will be argued below, should be informed by insights from these other disciplines. In the specific project on which this chapter is based, for example, inspiration was sought in the 'literary turn' characteristic of work in the humanities over the past decades. But alongside this very basic interdisciplinarity, the methodological steps described are also in an important sense '*disciplinary*' in nature That is to say: they are firmly grounded in law's distinctiveness – or more precisely: the belief engendered by law in its own distinctiveness – as a form of social organization and symbolic power. The idea is to study foreign law as jurisprudence – informed by, but not bound to, law's own goals, conventions and assumptions.[4]

Characteristics of legal discourse as the basis for comparative method

This chapter elaborates and defends the following four methodological choices based on this background understanding. The first is the idea that the meaning of all legal reasoning in a particular system will be informed by an overriding background *objective of legitimization*. The meaning of any specific form of argument in that system, in turn, can be defined and studied as the contribution this argument is locally understood to make to either the legitimization or the critique of the exercise of public authority in the name of law. The second is the basic assumption that the meaning of

---

[2] For a concise statement of the ideals of this kind of comparison and an elegant example of its implementation, see R. Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 *Michigan J. of Int'l Law* 1003.

[3] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings L.J.* 38 (1987), 814, 816. As Bourdieu himself notes, this "entry into the juridical field" involves recognition of an "essential tautology" (at 831).

[4] For a prominent general statement of the importance of incorporating both internal and external perspectives in the study of 'argumentative practice' in legal systems, see R. Dworkin, *Law's Empire* (Cambridge MA: Harvard University Press, 1986), pp. 13ff.

elements of legal discourse will always be relative to that of other elements. This means that an argument's contribution to legitimization, it's '*legitimizing force*', will always be *a relative contribution*, which can only be understood by comparing different argument forms within a particular system. Thirdly, the chapter discusses the suggestion that these relative contributions to legitimization can be framed in terms of a formal/substantive opposition. The assumption is that actors in every legal system are faced with the same basic dilemma of managing that system's relative autonomy and 'closedness' - its *relative formality* – according to local standards and using local means. The legitimizing force of any particular individual legal argument can be understood therefore, at least in part, through the contribution this argument is locally seen to make to the management of this relative formality. Finally, in order to further transcend, insofar as possible, the basic trade-off between internal perspective and comparability, the chapter suggests a dialectical process that switches between internal and external perspectives of comparison on different levels of abstraction. Taken together, it is submitted, these steps can ground a comparative method that is, beneficially and simultaneously, both 'minimally functionalist' and 'maximally internal' – that can compare 'local meanings' of different legal arguments systematically.

Before setting out these four steps in more detail, it is important to address the question of any potential benefits. What is it that this particular approach might allow comparatists to do that could otherwise be more difficult, and with what sorts of input and what kinds of results? One advantage claimed for the suggestions below is that they obviate the need for reliance on the kinds of detailed assumptions and specifications that functionalist approaches are often criticized for. It will not be necessary, for example, for scholars to posit in advance a particular 'logical structure' for the type of argument studied, or to define beforehand how a specific argument 'works'. All these issues can remain open as questions to be answered within the foreign system. A second benefit is that the kinds of questions asked about legal arguments can be tailored to those commonly asked in their respective settings. If lawyers in one setting tend to be interested in the logical-inferential structure of, say, reasoning by analogy, and in another setting rather in the question of whether this type of argument is sufficiently attentive to the 'real world consequences' of legal decisions, then the methodological steps outlined below can incorporate both these types of question, and, in fact, use the differences between them to inform comparative understandings.[5]

(…)

Concluding observations: promises and limitations

This chapter has approached the study of the meaning of legal argument as an investigation of the 'legitimizing force' of individual argument forms. The legitimizing force of any legal argument is the contribution this argument is locally understood to be able to make to the justification of judicial decisions and to the legitimization of the exercise of public authority under law. This force, it has been

[5] *Cf.* J. Bell, 'The Acceptability of Legal Argument' in N.D. MacCormick and P. Birks (eds.), *The Legal Mind. Essays for Tony Honoré* (Oxford: Clarendon Press, 1986), p. 45 (noting the fact that studies of legal argument in Europe tend to be concerned with "logic" while American studies tend to focus on "the practice of legal reasoning", and pointing to the significance of including both perspectives).

argued, is inherently relative, contingent and multi-dimensional. It is *relative* to that of alternative arguments and counter arguments; *contingent* because assessed on the basis of locally prevalent criteria; and *multi-dimensional* in the sense that there is a variety of reasons that legal actors may have in any given situation for using or rejecting a particular form of argument. The concept of legitimacy forms the linchpin in this analysis. Legitimacy, and its derivative 'legitimizing force', can fulfil this function because of its dual nature as a shared abstract ideal and a local set of specific demands. In both these guises, the 'legitimization problematic', it has been argued, could be translated into the terms of the co-existence of formal and substantive elements in legal reasoning. Taken together, these dimensions form the basis for a method of comparison that moves back and forth between generality to specificity, and between internal materials and external, systematized typologies.

While it is thought that these, or similar, methodological steps can bring real benefits, they also come with significant limitations. Three of these will be briefly mentioned here. The approach discussed above may, first of all, be faulted for not being sufficiently attentive to the *institutional dimension* of adjudicating. That is; to differences in the architecture of judicial systems, differences in judicial motivation practices, *etc.* The minimalist formulation of the working assumption – that judges will always be expected to provide *some form* of publicly stated reasoning, even if they may also rely on other sources of legitimization –, leaves these questions open, to be addressed through other methodological steps. The project may also be criticized for being overly focused on *courts* and on *legal elites.*[6] The reason for this focus is simply that these aspects of foreign legal systems are most easily accessible to foreign observers. It could be noted that many observers within Western legal systems feel that local scholarly or journalistic attention is unduly centred upon highest courts, so that this focus is already inherent in the 'internal' perspective itself. In addition, it may be assumed that some 'trickle down'-effect will emanate from these 'higher reaches of the law', but of course any picture gained of the local use of legal arguments in this way will necessarily be incomplete.

Finally, the approach set out above is intimately connected to, and in fact reliant on, characteristics of *Western* law. A first obvious and serious implication of this connection is that these methodological steps may prove of very limited use with regard to systems not part of the Western legal tradition. But there is further critical edge to this point. Because it could be argued that by aligning itself so clearly with Western law, the comparative method itself might become subject to some of the powerful critiques long levelled against this type of law and its classical methods of judicial argument and scholarly method. Prominent comparative legal scholars have in fact voiced very similar concerns. Comparatist are destined to remain "amateurs", Annelise Riles has written, for example, "as long as our discipline remains comparative *law* that is, a discipline grounded in the culture of legal formalism, rather than comparative politics, literature, aesthetics or anthropology".[7] And for Pierre Legrand, the goal for comparative scholars should be "to proceed beyond the

[6] In addition, one factor not dealt with in the approach outlined is the scope for difference with regard to the composition and breadth of the relevant local 'legal elites'. A working assumption could be that local variations on this factor are likely to decrease as a result of legal globalization, but this should be tested in practice.

[7] A. Riles, 'Encountering Amateurism: John Henry Wigmore and the uses of American Formalism', in A. Riles (ed.), *Rethinking the Masters of Comparative Law* (Oxford: Hart Publishing, 2001), p. 125.

discipline of law, that is, literally to become *indisciplined*".[8] The steps outlined above, it is submitted, show that there are two sides to these comments. On the one hand, to the extent that these calls exhort comparative legal scholars to *learn from* insights gained in other disciplines, for example in understanding difference or negotiating bias, they can only be applauded. But while comparative lawyers themselves should be careful not to be overly 'grounded' in law's formality, it is important to realize that it is precisely this *ubiquitous formality* – in all its many different shapes and shades, and with all its many negations and contrasts – that may provide a unique point of entry to the understanding of foreign legal cultures and systems.

[8] P. Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58 *Modern L. Rev.* 262, 272.