

# Watch Out for the Under Toad

## Role and Method of Interdisciplinary Contextualisation in Comparative Legal Research

Elaine Mak\*

### Abstract

This article studies the significance of insights from non-legal disciplines (such as political science, economics, and sociology) for comparative legal research and the methodology connected with such 'interdisciplinary contextualisation'. Based on a theoretical analysis concerning the nature and methodology of comparative law, the article demonstrates that contextualisation of the analysis of legal rules and case law is required for a meaningful comparison between legal systems. The challenges relating to this contextualisation are illustrated on the basis of a study of the judicial use of comparative legal analysis as a source of inspiration in the judgment of difficult cases. The insights obtained from the theoretical analysis and the example are combined in a final analysis concerning the role and method of interdisciplinary contextualisation in comparative legal analysis conducted by legal scholars and legal practitioners.

**Keywords:** comparative law, legal methodology, interdisciplinary incorporation, judicial use of comparative law

## 1 Introduction

In John Irving's novel, *The World According to Garp*,<sup>1</sup> the protagonist warns his son for the undertow when going for a swim in the sea. The boy mistakenly understands there to be an 'under toad' and imagines a scary creature lurking in the water to catch him. The incorporation of interdisciplinary insights in comparative legal analysis holds a risk similar to the misunderstanding between Garp and his son.<sup>2</sup> The meaning of a foreign legal concept can be hard to grasp for someone who is just getting acquainted with the system to which this concept is connected. Obstacles exist in the form of the unfamiliar sound of foreign legal terminology and the absence of knowledge of the foreign system's character-

istics, history, and political and societal context. To overcome these obstacles, comparative legal analysis requires the development of an understanding of the examined foreign law and the society in which this law operates.<sup>3</sup> In other words, comparative legal analysis requires contextualisation.

However, the collection of relevant contextual insights and the incorporation of these insights in legal analysis are not self-evident. Indeed, methodological choices are required concerning the scope of contextual research that is required in order to produce an adequate comparative legal analysis and concerning the appropriate concepts, theories, and methods to be 'borrowed' from non-legal disciplines.<sup>4</sup> Furthermore, the comparative researcher will need to consider how and to what extent the obtained contextual insights can be translated into the language of legal doctrine. Which disciplines should be consulted and how should these be used in a comparative analysis concerning debated legal issues in national societies, such as the acknowledgement of 'wrongful life' claims or the extradition of citizens suspected of criminal acts to a legal system which still applies the death penalty?<sup>5</sup>

This article analyses the need for and the challenges of contextualisation in comparative legal research. The starting point of this contribution is the idea that the demand of a contextual understanding of compared legal rules implies an interdisciplinary research approach. I will argue that comparative legal analysis should refer to background information on foreign legal systems obtained through studies from the perspective of non-legal disciplines, such as history, economics, political science, and sociology. Furthermore, I will analyse how relevant insights from research in these other disciplines can be collected and integrated in the legal analysis of foreign law and in the comparison of selected laws from different jurisdictions. In this regard, the arti-

\* Endowed Professor of Empirical Study of Public Law, in particular of Rule-of-Law Institutions, at Erasmus School of Law. Contact: mak@law.eur.nl.

1. J. Irving, *The World According to Garp* (1978).

2. Comparative law can be considered as a method, consisting of the comparative study of law. It can also be seen as a body of knowledge concerning the substantive laws of different legal systems. Concerning this distinction, see M. Siems, *Comparative Law* (2014), at 5-6. This article focuses on comparative law as a method, which will be referred to hereafter as 'comparative legal analysis'.

3. M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International and Comparative Law Quarterly* 495, at 498 (1998). See further below, Section 2.1. The terms 'research' and 'analysis' are used in this article with a similar meaning. However, the term 'research' is generally more strongly connected with scholarship, whereas the term 'analysis' is more neutral with regard to the work of academics and legal professionals.

4. Concerning types of interdisciplinary legal research, see S. Taekema and B. van Klink, 'On the Border: Limits and Possibilities of Interdisciplinary Research', in B. van Klink and S. Taekema (eds.), *Law and Method: Interdisciplinary Research into Law* (2011) 7, at 10-13.

5. See further below, Section 3.2.

cle's central research question is: *To what extent is it needed and possible to include interdisciplinary insights regarding foreign law and societies in comparative legal research?*

In order to illustrate the methodological possibilities and limitations of contextualised comparative legal analysis, furthermore, the article addresses a specific area in which this type of analysis has become more prominent and debated in recent years. This area concerns the judicial recourse to foreign law in deliberations and in the reasoning of judgments, in particular at the level of national highest courts. In the globalised legal context, national supreme courts and constitutional courts increasingly refer to legal sources from other jurisdictions (statutory provisions, case law) when deciding domestic cases.<sup>6</sup> Sometimes, this practice consists of a mere citation of foreign law, but in other instances, a comparison is conducted between domestic and foreign legal sources.<sup>7</sup> However, judges struggle to find an adequate methodological approach regarding this use of foreign law.<sup>8</sup> Starting out from this observation, a sub-question addressed in this article is: *How is the incorporation problem handled in comparative legal analysis conducted in the framework of judicial decision-making?*

This article presents a legal-theoretical analysis and uses an illustration from comparative legal and socio-legal analysis. The legal-theoretical analysis, firstly, is based on academic literature concerning the nature and particularities of comparative legal research. The input from comparative legal and socio-legal analysis, secondly, is connected with the example regarding the use of foreign law in judicial decision-making.<sup>9</sup> In connecting the two strands of the analysis, differences between the methodology of legal research and judicial decision-making are taken into account. It seems that the step of interpretation of the law is mostly identical for researchers and judges, although carried out with a different aim.<sup>10</sup> However, when considering the justification of used sources, judicial reasoning is often less elaborate and sometimes different from academic legal reasoning.<sup>11</sup> The article will address these similarities and differences and discuss their implications for different types of comparative legal analysis.

As a preliminary step, Section 2 sets out in more detail what the incorporation problem in comparative legal research consists of. Attention is paid to the inherent interdisciplinary nature of this type of research and the particularities of the research approach relating to spe-

cific types of comparative legal analysis. Next, Section 3 illustrates this incorporation problem with regard to the contextualisation of foreign law in the judicial use of comparative law. This analysis addresses theoretical views and examples from case law regarding the use of comparative law in judgments of highest national courts in Western jurisdictions. Section 4 connects the findings of the analysis in Section 3 with the broader topic of comparative legal research. This section outlines methodological considerations relating to judicial comparisons, including the relevance of contextual aspects, and distinguishes similarities and differences with comparative legal scholarship. Section 5 contains some concluding remarks.

## 2 The Incorporation Problem in Comparative Legal Analysis

Comparative legal scholars recognise the significance of a contextual understanding of the social and cultural setting in which the law operates in different legal systems. In this respect, it can be said that there is an inherent interdisciplinary aspect in comparative legal analysis (Section 2.1). However, this aspect raises some specific issues of research methodology regarding the required degree of interdisciplinary contextualisation in comparative legal analysis (Section 2.2).

### 2.1 An Inherent Interdisciplinary Aspect

Traditional legal scholarship regarding national systems concerns the construction, evaluation, and reform of legal doctrine.<sup>12</sup> Comparative legal analysis shares this perspective and in this sense represents 'an instance of the more general form of legal research'.<sup>13</sup> Nonetheless, comparative law has a distinct feature when compared to traditional legal research. Scholars in the field of comparative law have argued that comparative legal research should focus on 'law as culture' rather than 'law as rules', indicating 'that law, and the understanding of law, involves much more than the mere reading of statutory rules and judicial decisions'.<sup>14</sup> In this regard, Van Hoecke and Warrington have stated that 'law and legal practice are one aspect of the culture to which they belong'.<sup>15</sup> The understanding of the context in which law operates then becomes significant for a fruitful comparison between legal systems. Considered from this perspective, a comparison of the laws of different legal systems requires that the analysis takes into account legal culture, meaning the 'specific way in which values,

6. See inter alia B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law* (2006); T. Groppi and M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (2013).

7. See below, Section 3.

8. This is illustrated very clearly by the debate in the United States, where Supreme Court Justices disagree about the legitimacy and usefulness of citations to foreign law. See N. Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer', 3 *International Journal of Constitutional Law* 519 (2005).

9. E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013).

10. J. Vranken, *Asser Algemeen Deel\*\*\*\** (2014), at nr. 184.

11. *Ibid.* See further below, Section 2.2.

12. S. Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law', in van Klink and Taekema (eds.), above n. 4, 33, at 35.

13. J. Bell, 'Legal Research and the Distinctiveness of Comparative Law', in M. Van Hoecke (ed.), *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?* (2011), at 175.

14. Van Hoecke and Warrington, above n. 3, at 496.

15. *Ibid.*, at 498.

practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts'.<sup>16</sup> Another characteristic of comparative legal research is that the construction of a legal analysis based on comparative knowledge requires an explicit justification of methodological choices. Such a justification is often more implicit in the analysis of a single legal system. The comparative legal researcher needs to consider which systems are taken into account in the research, for which reasons, and in which way. In this sense, comparative legal methodology might be distinguishable from legal methodology generally, which often focuses on research of the 'law in the books'.<sup>17</sup> Comparative legal methodology then also provides lessons for traditional legal research, as 'it makes us aware of the elements which are influencing the law at all levels, it confronts us with our hidden conceptual, ideological framework'.<sup>18</sup> Still, the extent to which interdisciplinary elements are taken into account in comparative legal analysis is dependent on the focus and aim of the comparative research.

## 2.2 The Degree of Interdisciplinary Contextualisation

When considering the methodology of comparative legal analysis, some further observations can be made. Indeed, the extent to which interdisciplinary insights are needed in comparative legal analysis varies based on a number of factors. These factors concern the research focus (Section 2.2.1), the object of the comparative analysis (Section 2.2.2), and the aim of the analysis (Section 2.2.3).

### 2.2.1 Research Focus: Functionalism versus Contextualism

In terms of research methodology, insights produced by research in non-legal disciplines can assist in obtaining historical, political, economic, and other explanations regarding the law and the way it operates in a specific jurisdiction. However, comparative legal analysis which makes use of interdisciplinary insights is still legal-dogmatic analysis, in the sense that the comparative legal researcher does not conduct research using the methods of other disciplines.<sup>19</sup> Two main approaches to comparative legal research can be identified. The first one focuses on similarities between legal systems, primarily

with regard to legal rules, and the second one on differences between legal systems, in particular relating to context.<sup>20</sup>

Traditional comparative legal analysis, firstly, generally starts out from an existing socio-economic problem, taking a so-called 'functionalist' approach.<sup>21</sup> A first step in the research is to describe the situation selected for analysis, *that is*, to 'construct comparables' or system-neutral descriptions.<sup>22</sup> Next, the selected legal orders are described. Thirdly, the actual comparison takes place, resulting in an overview of similarities and differences, and an explanation is provided for the identified similarities and differences.<sup>23</sup> Concerning this explanation, arguments can only be speculative unless other disciplines are used to obtain insight into the context in which the examined legal rules have been developed and operate.<sup>24</sup>

Postmodern comparative legal analysis, by contrast, emphasises the complexity of legal systems and focus on differences rather than on similarities between systems.<sup>25</sup> Postmodern approaches start out from the idea that comparative legal analysis is never neutral, as the researcher's reasoning and assessment take place within specific epistemic, linguistic, cultural, and moral frameworks.<sup>26</sup> In this field, the stream of 'deep-level comparative law' claims that the traditional approach cannot yield more than a shallow understanding of the similarities and differences between legal systems.<sup>27</sup> The stream of critical comparative law questions the validity of the outcomes of traditional comparative analysis altogether.<sup>28</sup>

Both approaches are vulnerable to criticism. Functionalist approaches can be accused of focusing too much on black-letter law, thereby ignoring relevant differences between the contexts of legal systems. Postmodern approaches can be criticised for not fully supporting certain premises with a solid argumentation, for example, concerning the alleged fundamental differences between legal systems.<sup>29</sup>

When comparing the role of interdisciplinary contextualisation in the two approaches, it appears that the incorporation of interdisciplinary insights in comparative legal analysis has a more prominent place in postmodern approaches than in the traditional approach to comparative legal analysis. A 'deep-level' understanding of legal systems requires the study of the context in which legal rules function. This study might include, *inter alia*, the use of insights from the perspective of

16. J. Bell, 'English Law and French Law – Not So Different?', 48 *Current Legal Problems* 63, at 70 (1995). Cited by Van Hoecke and Warrington, above n. 3, at 498.

17. K. Lemmens, 'Comparative Law as an Act of Modesty: A Pragmatic and Realistic Approach to Comparative Legal Scholarship', in M. Adams and J. Bomhoff (eds.), *Practice and Theory in Comparative Law* (2012) 302, at 312-13.

18. Van Hoecke and Warrington, above n. 3, at 497. See also Lemmens, above n. 17, at 313.

19. This approach could be called multidisciplinary rather than interdisciplinary. It concerns the combination of methods, not an integrated research approach. Compare Taekema and van Klink, above n. 4, at 10. An approach which takes a step further is 'socio-legal comparative research'. This type of comparative research concerns the study of legal culture as such. It uses empirical methods to describe the context in which law operates and to establish relations of causality between the development of law and society. See Siems, above n. 2, at 121-22.

20. Compare J. Husa, 'About the Methodology of Comparative Law: Some Comments concerning the Wonderland...', *Maastricht Faculty of Law Working Paper* 2007/5.

21. Siems, above n. 2, at 13; Van Hoecke and Warrington, above n. 3, at 495; Lemmens, above n. 17, at 321.

22. Lemmens, above n. 17, at 320.

23. *Ibid.*, at 321-22.

24. *Ibid.*, at 322.

25. Siems, above n. 2, at 97.

26. *Ibid.*, at 98.

27. *Ibid.*

28. *Ibid.*, at 108.

29. *Ibid.*, at 117.

economics, political science, or sociology. Critical awareness demands the study of the cultural and other aspects of the researcher's framework of analysis, possibly by referring to insights from linguistic and cultural research.<sup>30</sup> Still, the differences between these two approaches should not be exaggerated. Indeed, comparative legal research might combine the analysis of rules and contexts and then requires 'a *sliding scale of methods* fitted to the purpose of present comparative study'.<sup>31</sup> In this regard, the methodology of a specific comparative study should be adapted to the object of the research and to the aim of the research.

### 2.2.2 Research Object

Concerning the object of the analysis, the interdisciplinary aspect of comparative legal analysis is subject to variation on the basis of the examined field of law, the research question, and the research methods.

Firstly, the relevant discipline to be taken into account can differ depending on the examined field of law. In this regard, an economic perspective might be more useful in the field of private law, where this perspective can provide relevant insights into human behaviour and in this way contribute to the development of effective rules concerning the regulation of private legal interactions. By contrast, political science might offer more valuable insights for the field of constitutional and administrative law.<sup>32</sup> Indeed, constitutional law and political theory are closely connected and are combined, for example, in research regarding political practices and constitutional history.<sup>33</sup>

Secondly, the particularities of the research question should be considered. Vranken has argued that interdisciplinary insights are required when arguments with an empirical connotation play a role in legal reasoning.<sup>34</sup> Empirical data are not always required, for example, if a legal research question is purely theoretical or concerns a question of systemising. However, when questions with an empirical connotation occur, fact-checking is generally recommended.<sup>35</sup> Examples of research questions with an empirical aspect are those involving arguments concerning: reasonable and context-oriented interpretation; feasibility; effective legal protection; the efficiency of laws; preventive effect; and the demands of society or of the parties. Interdisciplinary research is also required to verify the validity of statements about the consequences of specific points of view in legal reasoning; for example, the argument that accepting a spe-

cific claim will prompt a stream of further court cases ('floodgates argument').<sup>36</sup> Research questions addressing such issues will demand an interdisciplinary approach, whether or not a legal comparison between different jurisdictions forms part of the research.

Finally, the selection of legal systems for the comparison is of significance. In this regard, an important limitation to the possibilities of comparative legal analysis relates to the differences between specific legal cultures in terms of opposing basic values of rationalism-irrationalism and individualism-collectivism, in particular between Western legal culture, Asian legal culture, Islamic legal culture, and African legal culture.<sup>37</sup> Van Hoecke and Warrington have argued that in their approach, which they call 'law as culture', comparative legal analysis can take place at three levels, concerning the comparison between: (i) legal cultures at a global scale; (ii) legal families, sharing a similar historic and socio-economic basis; and (iii) legal systems, sharing the same legal culture, concepts, and legal language.<sup>38</sup> Each of these three levels requires a different methodology, taking account the degree of shared elements between the compared cultures, traditions, or systems.<sup>39</sup>

Besides these factors relating to the object of the analysis, the role of interdisciplinary contextualisation further depends on the aim of the comparative research.

### 2.2.3 Research Aim

Comparative legal analysis can serve different purposes. Depending on the aim of the analysis, interdisciplinary insights concerning the social and cultural setting in which the law operates are of lesser or greater relevance. This can be clarified by considering three different general aims of comparative legal analysis. These aims are: (i) the collection of knowledge regarding legal rules and their functioning in context; (ii) the search of guidance for legal practice; and (iii) the search of guidance for the harmonisation of laws.<sup>40</sup>

Firstly, an aim of comparative legal analysis can be to obtain knowledge of foreign legal rules or an understanding of how legal rules work in context. Comparative law then enables a reflection on the laws of one's own system or the identification of historical origins, current trends, and political, cultural, and socio-economic reasons explaining similarities and differences between the rules of different legal systems.<sup>41</sup> Legal scholarship offers countless examples of this type of comparative legal research. Indeed, Jan Vranken has observed that the incorporation of a comparative analysis has become fairly usual in Dutch PhD theses in the field of private law.<sup>42</sup>

30. *Ibid.*

31. Husa, above n. 20, at 16, citing V.V. Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology', 4 *Global Jurist Frontiers* (2004), nr. 2.

32. Siems, above n. 2, at 9, citing D. Nelken, 'Comparative Law and Comparative Legal Studies', in E. Özücü and D. Nelkin (eds.), *Comparative Law: A Handbook* (2007) 3, at 17.

33. S. Halliday, 'Public Law', in C. Hunter (ed.), *Integrating Socio-Legal Studies into the Law Curriculum* (2012), at 141.

34. J. Vranken, "'Wij weten wel wat we doen". Over juridisch-dogmatisch onderzoek in het privaatrecht, maar wel een slag anders', 89 *Nederlands Juristenblad* 1728, at 1733 (2014). See also Vranken, above n. 10.

35. *Ibid.*

36. *Ibid.*

37. Van Hoecke and Warrington, above n. 3, at 503-8.

38. *Ibid.*, at 519-20 and 532-33.

39. *Ibid.*, at 510.

40. Siems, above n. 2, at 2-5.

41. *Ibid.*, at 2-3.

42. Vranken, above n. 10, at nr. 18. Vranken argues that when setting up research on a specific question of private law, a check should be done on whether the research requires a comparative analysis, an analysis of European law, and/or a multidisciplinary analysis. *Ibid.*, chapter 6.

Research conducted with this general aim of knowledge building or the study of the ‘law in action’ will pay equal attention to the contextual understanding of all legal systems included in the analysis. Moreover, this analysis will be thorough and include perspectives from non-legal disciplines in order to sketch a complete picture. It is generally connected with legal scholarship. However, a distinction can be made between comparisons of different ‘weight’, defined by Husa as the degree of systematic and interdisciplinary analysis in comparative legal research.<sup>43</sup> Comparative legal analysis aimed at knowledge building concerns the research of the field-of-law academic, who uses a ‘middleweight comparison’ for the analysis of laws within a specific conceptual framework. It also concerns the comparative law academic, who uses a ‘heavyweight comparison’ to explain similarities and differences between legal systems.<sup>44</sup>

Secondly, comparative law can be of practical assistance to legislators, judges, and other practising lawyers in national legal systems. Comparative law needs to be considered in cases of conflicts of law, and it can serve as an inspirational source in law reforms or the deciding of difficult cases.<sup>45</sup> Examples in the field of conflicts of law concern the comparison between the legal rules of two different jurisdictions regarding a specific legal issue, such as marriage or parental authority.<sup>46</sup> An example of inspiration drawn from comparative law in the field of constitutional reform concerns the Bill submitted to the Dutch Parliament by Member of Parliament Femke Halsema in 2002 regarding the amendment of Article 120 of the Dutch Constitution. This provision prohibits judicial review of Acts of Parliament in light of the Constitution. Halsema presented systems of review in European countries and in the United States to justify allowing the judicial review of statutory acts in light of fundamental rights provisions contained in the Constitution.<sup>47</sup> Comparative law was also used by the State Committee chaired by Wilhelmina Thomassen, which advised the Dutch Government on possible reforms of the Constitution. In its Report, issued in 2010, this Committee referred to the Constitutions of other European countries to support its suggestions concerning the revision of the Dutch Constitution.<sup>48</sup>

In this type of comparative legal analysis, the main aim is to present a persuasive argument concerning the applicable law in the domestic jurisdiction or to defend an argument in favour of a reform of the law. Contextual elements of the law will be studied in order to assess the possibilities of interpreting legal rules in conformity with each other or to assess the usefulness of foreign legal arguments for the reasoning in domestic cases.

Husa has argued that the interest in obtaining inspiration from foreign law might be satisfied through a ‘feather weight comparison’, which is functionalist and non-systematic.<sup>49</sup>

Finally, comparative law can have a practical role at the international and supranational level in the context of formal unification of law or gradual convergence of legal systems.<sup>50</sup> Vranken has argued that comparative law is required for successful internationalisation, because of comparative law’s contribution to a better understanding of the domestic law as well as the insight it provides into the differences between legal systems.<sup>51</sup> From a bottom-up perspective, comparative law can guide the development of national legal systems. In this regard, comparative law is used in order to realise the harmonisation of laws in the European Union. An example concerns the development of harmonised contract law, which has resulted in the Principles of European Contract Law (PECL), drafted by the Lando Commission,<sup>52</sup> and the Draft Common Frame of Reference (DCFR), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law.<sup>53</sup> From a top-down perspective, comparative law can guide the development of international and supranational law by institutions at these levels. In this regard, comparative law plays a role with regard to the application of the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) considers the existence of consensus amongst the contracting states when interpreting provisions of the ECHR. In this way, the Court aims to provide effective protection of fundamental rights and to ensure that states follow its judgments.<sup>54</sup>

In this type of comparative legal analysis, contextual aspects regarding the law and its functioning in member states of the EU and contracting states of the ECHR will be taken into account in order to determine the limits of unification or convergence of legal systems. Husa has connected the harmoniser’s interest in comparative law with the method of a ‘lightweight comparison’, in which the search for the ‘most fitting’ model is central.<sup>55</sup>

When comparing these three possible aims of comparative legal analysis, the first aim is most neutral in its scope and its inclusion of contextual elements. The second and third aims entail the use of the outcomes of the comparative research for the support of a specific legal argument. In this respect, the comparative analysis might lack a systematic approach or the presented work (e.g. a judgment or proposal of law reform) might only present a selection of the outcomes. Also, there might be

43. Husa, above n. 20, at 17-18.

44. *Ibid.*, at 18.

45. Siems, above n. 2, at 3-4. See also N. Lupo and L. Scaffardi (eds.), *Comparative Law in Legislative Drafting: The Increasing Importance of Dialogue amongst Parliaments* (2014).

46. See M. Reimann, ‘Comparative Law and Private International Law’, in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (2006).

47. Kamerstukken II, 2001/2002, 28 331, nr. 3.

48. State Committee on the Constitution, *Report State Committee* (2010).

49. Husa, above n. 20, at 17.

50. Siems, above n. 2, at 4-5.

51. Vranken, above n. 10, at nr. 23.

52. O. Lando et al., *Principles of European Contract Law* (2000).

53. C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009).

54. K. Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’, 12 *German Law Journal* 1730 (2011).

55. Husa, above n. 20, at 18.

more emphasis on similarities between legal rules and contextual aspects, based on a functionalist approach. With regard to the interest in interdisciplinary contextualisation, a practical concern should be mentioned here as well. Some non-legal research methods are easier for legal scholars to master or to understand than others. In this regard, a difficulty is that legal researchers are not trained to conduct empirical research or to assess the outcomes of research in non-legal disciplines. Moreover, from a practical point of view, it is possible that no empirical data can be obtained or not at short notice, in particular concerning the consequences of specific views on the law.<sup>56</sup> In practice, the availability of time and resources for interdisciplinary research can therefore constrain the possibility of contextualisation of comparative legal research.

Keeping these particularities in mind, we will consider an example in order to clarify the role of interdisciplinary insights in comparative legal analysis and the challenges of interdisciplinary incorporation. This example concerns the developing trend of the judicial use of comparative law.

### 3 An Assessment of Interdisciplinary Incorporation: The Example of Judicial Dialogue

The need and challenge of contextualisation in comparative legal analysis has manifested itself in a poignant manner in legal practice, in particular with regard to the judicial use of comparative law. This practice of judicial citation to foreign law is considered to form part of the broader phenomenon of ‘transjudicial communication’.<sup>57</sup> This section focuses on the question of the incorporation of interdisciplinary insights in judicial reasoning which makes use of comparative legal analysis. Firstly, two different accounts regarding the theoretical understanding of interdisciplinary incorporation in comparative judicial reasoning are presented (Section 3.1). Secondly, an analysis of examples from case law in light of these theoretical accounts clarifies how courts have dealt with the use of interdisciplinary insights in comparative analyses conducted in specific difficult cases (Section 3.2). Based on this analysis, an intermediary conclusion is presented (Section 3.3).

#### 3.1 Interdisciplinary Incorporation: Two Accounts of the Judicial Use of Foreign Law<sup>58</sup>

The use of contextualised comparative information in the legal reasoning of courts entails two general aspects. Firstly, comparative law should be used in a legitimate manner in judicial reasoning. With regard to Western legal systems, this means that the reasoning of judgments should meet the demands of the liberal-democratic normative framework for legal interpretation and judicial decision-making.<sup>59</sup> Secondly, limitations to the possibility of legal transplants should be acknowledged in comparative legal reasoning.<sup>60</sup> These requirements form part of the methodology regarding the use of comparative law in judicial decision-making. Still, there is no general agreement in legal scholarship concerning the exact methodology used by courts. This section investigates two different views which legal theorists have presented regarding the role and method of contextualisation in comparative judicial reasoning. These views can be considered as complementing one another. However, they choose different points of focus. One view emphasises the comparison of legal arguments in the judicial use of comparative law (Section 3.1.1). Another view presents the comparison of policy choices as most significant (Section 3.1.2).

##### 3.1.1 Bell: Focus on the Comparison of Legal Arguments

John Bell has constructed an explanation of judicial citations of foreign law from the perspective of legal argumentation. He argues that arguments based on foreign legal ideas are used as supporting reasons for judicial decisions, which add weight to a justification based on a combination of arguments.<sup>61</sup> According to Bell, comparative legal analysis is useful for decisions on legal issues on which the domestic law provides competing statements. Arguments from comparative law then have a certain weight in the accumulation of arguments. In this regard, Bell explains:

The model of legal reasoning I have in mind is one that depends on a combination of reasons, each of which may be insufficient to justify the decision in its own right, but, taken together, they provide support for the decision. The analogy is with individual threads of fibre. On its own, a single thread cannot hold up a weight, but twisted in combination with other threads, it forms a cord which can carry a substantial weight.<sup>62</sup>

Bell argues that an argument from foreign law functions as a thread in the rope of legal reasoning. It ‘adds lustre

56. Vranken, above n. 34, at 1733.

57. A.M. Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review* 99 (1994).

58. With thanks to Bald de Vries and Kees Quist for bringing the divergence between these views to my attention.

59. Compare F. Schauer, ‘Authority and Authorities’, 94 *Virginia Law Review* 1931 (2008).

60. See *inter alia* A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd edn. (1993); P. Legrand, ‘The Impossibility of “Legal Transplants”’, 4 *Maastricht Journal of European and Comparative Law* 111 (1997).

61. J. Bell, ‘The Argumentative Status of Foreign Legal Arguments’, 8 *Utrecht Law Review* 8, at 10 (2012, nr. 2).

62. *Ibid.*

to an argument already available in the host legal system'.<sup>63</sup> He describes the incorporation of the foreign legal argument as a process of 'cross-fertilisation', meaning that:

an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.<sup>64</sup>

This cross-fertilisation is possible if three criteria are met. Firstly, the legal problem in the domestic system must have an equivalent in the foreign legal system. The legal position of children in context of same-sex marriages, for example, can only be studied in legal systems which allow same-sex marriages. Secondly, the argument from foreign law can only have weight in the legal reasoning of a domestic case if it is consistent with the legal principles of the domestic legal system. Finally, the prestige of the foreign legal system, in the eyes of the domestic judges and in the domestic society, influences the weight which is given to arguments from foreign law.<sup>65</sup>

Bell's analysis seems to corroborate with the ideas of 'featherweight comparison' but also with those of 'lightweight comparison', described above.<sup>66</sup> His analysis highlights the non-systematic nature of judicial comparisons and the relatively limited concern with interdisciplinary contextualisation. Firstly, Bell focuses on the transplanting of legal arguments from one legal system into another. In this regard, non-legal aspects, for example, concerning the political or societal values of the compared legal systems, provide the background to the comparison of legal concepts. However, the comparison focuses on the use of arguments relating to foreign legal concepts in judicial reasoning concerning similar domestic concepts. In this respect, the main focus of judges concerns the construction of a legal argument which 'fits' with the domestic legal system. Secondly, Bell emphasises the inspirational nature of judicial comparisons, in which foreign legal sources 'help us to explore solutions that are out of the box from a domestic law point of view'.<sup>67</sup> Corresponding with the aims of law reform and transnational harmonisation, judges can be expected to look for comparative solutions where foreign laws might provide 'better' arguments or where it is desirable for the domestic law to be in line with transnational legal development. In this respect, Bell argues that comparative law adds force to arguments based on domestic law '(t)o the extent that the social and political situation of the foreign jurisdiction are similar to that of the domestic law, *i.e.* are in some sense engaged in a

common enterprise at some level of generality'.<sup>68</sup> In this view, it appears that the judicial use of comparative law should focus on reaching more similar results between legal systems and that general similarities between national contexts are sufficient to make the comparative analysis worthwhile.

### 3.1.2 *Adams and Mak: Focus on the Comparison of Policy Choices*

In another analysis, non-legal aspects take a more prominent place in the judicial use of foreign law. Maurice Adams and I have argued that judicial reasoning based on comparative law primarily addresses policy choices, involving ethical principles, societal interests, and politics.<sup>69</sup> In this view, comparative legal analysis by courts will generally focus on the legal interpretation of a specific legal concept in connection with the policy choices which underlie this legal interpretation.<sup>70</sup> This perspective corroborates with my research regarding the views and approaches of judges regarding the use of comparative law in judicial decision-making. This research has clarified that judges in national highest courts consider 'that the guiding influence of comparative legal materials does not push them to follow the legal solutions developed in another legal system'.<sup>71</sup> They consider that the particularities of national legal systems and individual cases require that a solution is developed which fits these particularities. An interviewed Canadian Supreme Court Justice observed that in the framework of comparative legal analysis, it is useful to learn about the social values which formed the context of the decision-making of foreign courts.<sup>72</sup>

The necessity of studying policy choices related to foreign law is underlined by a judgment in which a contextual study of this kind was absent. The English case of *White v. Jones* concerned the question whether a solicitor could be held liable in tort law for neglecting to change a will in time, as a result of which the intended beneficiaries suffered the loss of not receiving the inheritance.<sup>73</sup> In this case, Lord Goff presented a legal analysis based on German law to support the argumentation that the claim of the beneficiaries should be accepted. However, this argument based on the analogy with German law stands in a difficult relation to the English law of obligations, which aims to limit the amount of claims in tort law. The incongruence between the policy choices underlying the English and German legal systems could explain the criticism and incomprehension of *White v. Jones* voiced by English legal experts. The judgment is considered an exception, and the transplant

63. *Ibid.*, at 11.

64. J. Bell, 'Mechanisms for Cross-fertilisation of Administrative Law in Europe', in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (1998) 147, at 147.

65. Bell, above n. 61, at 17.

66. See above, Section 2.2.3.

67. Bell, above n. 61, at 17.

68. *Ibid.*, at 18, citing J. Waldron, 'Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity', in S. Muller and S. Richards (eds.), *Highest Courts and Globalisation* (2010), at 99.

69. M. Adams and E. Mak, 'Buitenlands recht in nationale rechtspleging: onder welke voorwaarden is dat feitelijk nuttig en mogelijk?', 86 *Nederlands Juristenblad* 2912, at 2916 (2011).

70. *Ibid.*

71. Mak, above n. 9, at 202.

72. *Ibid.*, at 186.

73. *White and another v. Jones and others* [1995] UKHL 5.

from German law could turn out to be a ‘legal irritant’ which does not stand the test of time.<sup>74</sup>

In accordance with the theoretical analysis made by Jane Stapleton, Maurice Adams and I argue that the use of foreign law is most useful with regard to the weighing of arguments related to policy choices.<sup>75</sup> Stapleton’s analysis concerning tort law holds that (i) the motive underlying legislation or a judgment usually can be traced back to a policy choice; (ii) this policy choice is translated into a legally relevant duty of care; and (iii) this legal norm needs to be incorporated into the system of existing legal rules.<sup>76</sup> In this view, the use of comparative legal analysis has the potential to provide useful insights in fields of law in which policy choices fulfil a more significant role than arguments related to the system of the law. Examples are economic law, human rights law, and legal issues concerning bio-ethics.<sup>77</sup> The weight given to the insights from the comparative analysis remains dependent on its relation to the local context.

This view meets the ideas of ‘featherweight comparison’ and ‘lightweight comparison’, in the sense that the comparative legal analysis will most often not be systematic. However, the attention given to the political and social background of foreign legal systems, as expressed in policy choices and interdisciplinary studies informing these choices, takes a dimension which corresponds more with the ‘heavier’ types of comparative legal analysis.<sup>78</sup> The analysis of case law in the next section aims to bring further clarification regarding the actual practices of national highest courts.

### 3.2 Examples from Case Law

This section explores the judicial use of comparative law in light of the two theoretical views presented in the previous section and the methodological considerations outlined in Section 2. The use of interdisciplinary insights in comparative legal analysis by courts is investigated here in relation to three examples, regarding the acknowledgement of ‘wrongful life’ claims, the extradition of citizens to a legal system which applies the death penalty, and the assessment of criminal responsibility in case of wilful transmission of HIV infection. All three examples were mentioned in interviews with judges conducted for my research on the changing role of highest national courts in the globalised legal context.<sup>79</sup> The interviewed judges considered that the judgments in these cases provided emblematic examples of judicial approaches to the use of comparative law. Moreover, the selected cases concern legal issues which are closely connected with contextual aspects regarding moral and societal views in national legal systems as well as with empirical questions. Although the analysis in this section does not allow for drawing general conclusions, the

selection of these specific examples makes it possible to obtain a better understanding of the role of contextual aspects in the legal reasoning and methodological choices of highest courts regarding the use of comparative law.

#### 3.2.1 ‘Wrongful Life’

A first clear example of the context-dependent nature of judgments of courts in different countries is provided by an overview of judgments in ‘wrongful life’ claims. These cases concern the claims for damages in the name of a severely handicapped child born as a result of an incorrect diagnosis during the mother’s pregnancy, based on which the pregnancy has not been terminated. Research by Ivo Giesen clarifies how courts in different jurisdictions have examined foreign case law in their process of decision-making in this type of case.<sup>80</sup>

The case law of the Dutch Supreme Court (Hoge Raad) provides a pertinent example in this regard. This Court is one of the few courts in the world which has allowed a claim for damages on the basis of wrongful life. The Hoge Raad’s deliberations in the case of *Baby Kelly* were informed by an extensive comparative legal analysis presented by Advocate-General Hartkamp in his advisory opinion to the Court.<sup>81</sup> Although the Court as a convention does not refer to comparative legal sources in its judgments, it is certain that the judges have taken the Advocate General’s analysis into account in their deliberations.<sup>82</sup> This analysis extensively discussed available case law from Germany, France, and the United Kingdom and mentioned further examples from Belgium, Australia, the United States, and Israel.<sup>83</sup> The comparative legal study seems to have been informed by the Advocate General’s knowledge of and access to foreign case law as well as by academic literature and the materials presented by counsel.<sup>84</sup> The overview of foreign case law focussed on the interpretation of the relevant provisions of tort law, mentioning the considerations given by foreign courts to moral arguments and national policies of tort law.<sup>85</sup> However, the Advocate-General did not discuss differences between legal concepts, such as the meaning of ‘duty of care’ in the common law system of the United Kingdom. Also, political and societal debate in the examined jurisdictions was only taken into account to a limited extent.<sup>86</sup> Moreover, the Advocate-General did not refer to the outcomes of the comparative legal analysis in his advice regarding the adequate solution of the case of *Baby Kelly* on the basis of Dutch tort law.<sup>87</sup>

74. Adams and Mak, above n. 69, at 2917.

75. J. Stapleton, ‘Benefits of Comparative Tort Reasoning: Lost in Translation’, 1 *Journal of Tort Law*, at 2 and 44 (2007, nr. 3, article 6).

76. *Ibid.*

77. Adams and Mak, above n. 69, at 2918.

78. See above, Section 2.2.3.

79. Mak, above n. 9.

80. I. Giesen, ‘The Use and Influence of Comparative Law in “Wrongful Life” Cases’, 8 *Utrecht Law Review* 35 (2012, nr. 2).

81. *Baby Kelly* HR 18 March 2005, NJ 206, 606.

82. Giesen, above n. 80, at 46.

83. HR 18 March 2005, NJ 206, 606, conclusion of Advocate-General Hartkamp, at 23-32.

84. *Ibid.*, at 24.

85. See for example *ibid.*, at 30 (concerning English case law).

86. See for example *ibid.*, at 31 (reference to the adoption of the ‘Anti-Peruche Act’ in France, which formed a legislative response to the awarding of damages by the Cour de cassation in a ‘wrongful life’ case).

87. *Ibid.*, at 33-58.

Giesen has observed that the ‘wrongful life’ judgments of courts around the world diverge. As an explanation for this divergence between judicial decisions, he offers the following argument:

that comparative law is not capable of providing a definite answer to the question of which arguments are the most valid, most convincing and decisive, at least not in tort law issues of the magnitude of wrongful life claims. It is instead the weight which a certain argument receives in a certain *cultural setting* or *background*, in a certain environment drenched in ages of promoting specific legal policies that seems to decide the matter. Hence, it is what I call the *politics of a tort law system* that governs the outcomes and the solutions reached in these sorts of cases.<sup>88</sup>

Seen from this perspective, differences between judgments of national highest courts in different jurisdictions on similar legal issues relate to differences between national policies. However, the tort law policies of other jurisdictions are not necessarily studied in the judicial analysis of foreign legal arguments. Indeed, the methodology of comparative legal analysis used by highest courts in wrongful life cases seems to consist mostly of a ‘featherweight comparison’, in which foreign case law is studied in a non-systematic way as a source of legal arguments which can be used either for or against the judgment in the domestic case. The domestic perspective is central to this analysis. In this respect, practices of highest courts in wrongful life cases correspond with Bell’s view in their emphasis on the relative weight of comparative legal arguments. However, the use of comparative law in these cases seems less aimed at the development of ‘universal’ solutions than Bell supposes.

The example of wrongful life cases clarifies that policies, as well as other contextual elements, are not always explicitly referred to in comparative legal analysis for the benefit of judicial decision-making. A second example provides a different view with regard to case law addressing fundamental principles of criminal and constitutional law.

### 3.2.2 Extradition and Possible Capital Punishment

In this example, the Supreme Court of Canada considered facts and policies connected to foreign legal systems, in particular the United States, in order to construct a point of reference for the interpretation of the domestic law. The case *United States v. Burns* concerned the requested extradition of two Canadians to the United States, where these persons could be sentenced to death. In this case, the Supreme Court of Canada looked at international opinion and at the experiences of other states.<sup>89</sup> The Canadian court eventually decided that it was unconstitutional under the Charter of Rights and Freedoms to extradite the persons in question if no assurances were given that the death sentence would not

be imposed or carried out.<sup>90</sup> This decision was reached partly on the basis of international sources. It overturned earlier judgments of the Canadian Supreme Court, in which the extradition of US residents was not prevented.<sup>91</sup>

The *Burns* judgment cites international experience and the policies in other countries, which have also abolished the death penalty. It appears that these references to like-minded systems are used to strengthen the Court’s decision to overturn its previous case law. In order to support its judgment even more, the Court emphasises the isolated position of the US states in which the death penalty is still imposed. In this respect, an empirical connotation can be identified in this quantitative assessment concerning the legal systems which apply the death penalty. The Court’s reasoning is as follows:

International experience, particularly in the past decade, has shown the death penalty to raise many complex problems of both a philosophical and pragmatic nature. While there remains the fundamental issue of whether the state can ever be justified in taking the life of a human being within its power, the present debate goes beyond arguments over the effectiveness of deterrence and the appropriateness of vengeance and retribution. It strikes at the very ability of the criminal justice system to obtain a uniformly correct result even where death hangs in the balance.

International experience thus confirms the validity of concerns expressed in the Canadian Parliament about capital punishment. It also shows that a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with Canada’s principled advocacy on the international level, but is also consistent with the practice of other countries with whom Canada generally invites comparison, apart from the retentionist jurisdictions in the United States.<sup>92</sup>

Interestingly, foreign factual experience concerning potential wrongful convictions was invoked in the *Burns* judgment as one of the arguments justifying the Court’s reversal of its *Kindler* and *Ng* jurisprudence, in which extradition to the United States had been allowed. In this respect, the judgment not only relied on a comparative analysis of legal rules and underlying policies. It also took into account arguments with an empirical connotation, which require a non-legal approach.<sup>93</sup> The Supreme Court of Canada reasoned:

The outcome of this appeal turns on an appreciation of the principles of fundamental justice, which in turn are derived from the basic tenets of our legal system. These basic tenets have not changed since 1991 when *Kindler* and *Ng* were decided, but their

88. Giesen, above n. 80, at 37.

89. *United States v. Burns* [2001] 1 SCR 283.

90. *Ibid.*, at 143-44.

91. *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779; *Reference re Ng Extradition (Canada)* [1991] 2 SCR 858.

92. [2001] 1 SCR 283, at 127-28.

93. See above, Section 2.2.2.

application in particular cases (the ‘balancing process’) must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler* and *Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed.<sup>94</sup>

Three observations can be made with regard to this judgment. Firstly, the approach of the Supreme Court of Canada in this case seems to align more with the view of Adams and me than with the view of Bell concerning the use of comparative law in judicial reasoning. Indeed, the comparative aspect of the case did not so much concern the judicial interpretation of a legal concept in different systems, but rather the developed practices (or policies) of governments concerning extradition. Secondly, the empirical elements included in the Court’s considerations were not backed up with references to available studies from non-legal disciplines (for example, studies in sociology or political science). In this sense, the Court’s approach qualifies as a ‘featherweight comparison’, lacking both a systematic analysis of foreign law and a thorough contextual analysis of foreign systems on the basis of interdisciplinary insights. Finally, the comparison between the legal systems of Canada and the United States concerns an intra-cultural comparison of legal systems belonging to the common law family, which implies that a firm common ground for legal comparison existed.

### 3.2.3 Criminal Responsibility for HIV Infection

A third example of comparative legal research in judicial decision-making can be found in the Hoge Raad’s case law regarding the doctrine of conditional intent (*voorwaardelijke opzet*). Legal questions about the interpretation of this doctrine arose in cases concerning the alleged attempt to commit manslaughter through the wilful transmission of HIV infection.<sup>95</sup> Concerning the application of this doctrine in new circumstances, the judges of the Criminal Law Chamber have sought inspiration in German law, and in the HIV cases also French, Austrian, Canadian, and Australian sources were brought to the attention of the judges by the Advocate-General.<sup>96</sup> Regarding the HIV cases, a balancing act was required between the policy preference to keep these cases outside of the criminal law process, on the one hand, and the legal acceptance of a broader conception of ‘conditional intent’, on the other hand. The judgment

indicates that the German approach to this question was influential on the decision-making of the Hoge Raad, but in the end, a different solution was chosen for the Netherlands.

Indeed, the judgment in *HIV-IV* reveals that the Hoge Raad gave weight to the policy preferences expressed by the Dutch government. The Hoge Raad took into account the reserve which needs to be adopted in accepting criminal liability for endangering behaviour like that which had occurred in this case. As a reason for this reserve, the Court mentioned public health interests regarding the particular situation of the danger of HIV contamination. The Court explicitly referred to the views of the involved ministers.<sup>97</sup>

Again, some observations can be made. Firstly, the comparative legal analysis focused on national policies underlying a similar legal concept. Also, the German interpretation of ‘conditional intent’ was not cited by the Hoge Raad and therefore was not used to strengthen the judicial reasoning. In this sense, the judicial use of comparative law seems to fit better with the view of Adams and me than with the view of Bell. Secondly, the Court referred to statistical analyses concerning the probability of HIV infection in circumstances similar to those of the case. Here, the legal question’s empirical connotation required that such information was consulted, regardless of the inclusion of a comparative analysis in the Court’s reasoning.<sup>98</sup> Finally, the example of the HIV cases clarifies that the Hoge Raad focuses on comparisons with the legal sources of other Continental European legal systems, in particular its neighbour Germany, although some sources from common law systems are considered as well. These examples indicate that the Court prefers intra-cultural comparisons. The prominence of German law in comparative legal analysis suggests that the judges of the Hoge Raad favour comparisons at the third level identified by Van Hoecke and Warrington, where ‘concrete comparison of statutory and judicial rules of behaviour can be fruitful, because the context, the legal culture, is very similar ... whereas the conceptual framework and legal language are also to a large extent the same’.<sup>99</sup>

### 3.3 Intermediary Conclusion

The presented examples of comparative legal analysis in judicial decision-making connect with the second aim, identified above,<sup>100</sup> for conducting comparative legal research, that is, the use of comparative legal analysis as a source of inspiration for national legal practice. Fitting with this aim, the courts in the examined cases primarily use the methodological approach of ‘featherweight comparison’. However, in some instances, the study of foreign case law is somewhat more contextualised and includes consideration of the legal cultures of other jurisdictions and of relevant factual information. Inter-

94. [2001] 1 SCR 283, at 144.

95. *HIV-I* HR 25 March 2003, NJ 2003, 552; *HIV-II* HR 24 June 2003, NJ 2003, 555; *HIV-III* HR 18 January 2005, NJ 2005, 154; *HIV-IV* HR 20 February 2007, NJ 2007, 313.

96. See for example *HIV-IV* HR 20 February 2007, NJ 2007, 313, conclusion of Advocate-General Bleichrodt, at 3.7.7, in which German and Swiss law are analysed.

97. See HR 20 February 2007, NJ 2007, 313, at 4.4, which cites Kamerstukken II 2004-2005, 29 800 VI, nr. 157, at 5-9.

98. See above, Section 2.2.2.

99. Van Hoecke and Warrington, above n. 3, at 533.

100. See above, Section 2.2.3.

disciplinary insights are sometimes taken into account regarding legal questions with an empirical connotation, but this type of analysis is not necessarily connected with a comparative approach. The examples corroborate the idea that courts will not transplant foreign legal solutions into the domestic law. Finally, the courts seem to focus primarily on comparisons with legal systems belonging to the same legal family or legal culture. The examples discussed in this section have provided insight into the judicial use of comparative law and the characteristics of comparative legal reasoning. Based on this analysis, some further observations can be made concerning the role and method of interdisciplinary incorporation in all types of comparative legal research.

## 4 Comparative Legal Methodology: Lessons from Judicial Decision-Making

Which lessons does the judicial use of comparative law hold for comparative legal research generally, in particular concerning the incorporation of interdisciplinary insights in legal analysis? In order to answer this question, this section will first address the conditions relating to the aim and role of comparative legal analysis in judging (Section 4.1) and next to the methodology of comparative legal analysis in this context (Section 4.2).

### 4.1 Aim and Role of Comparative Legal Analysis

The analysis in the previous section has confirmed that comparative legal analysis in judicial decision-making is conducted with a particular aim, *that is*, the search for inspiration from foreign legal arguments for the deciding of domestic cases. The analysis has further clarified that the approach of judges, mostly a ‘featherweight comparison’, is geared to this aim. The aim of comparative legal scholarship was described above as the obtaining of knowledge through a thorough and contextual comparison of two or more legal systems. The methodology of comparative legal analysis is essentially similar for both judging and scholarship, to the extent that legal interpretation and the better understanding of domestic legal concepts are involved. However, a relevant point to consider is that choices made regarding the use of comparative legal analysis differ on the basis of underlying motives and approaches of judges when compared to legal scholars.

Judges have several motives for conducting comparative research and for selecting specific foreign legal systems in this research. These motives concern the search for inspiration for the deciding of a difficult legal question, often combined with the public importance of the case. Furthermore, judges are interested in learning about ‘best practices’ developed by their foreign peers and they want to coordinate the development of domestic case law with legal development at the transnational lev-

el.<sup>101</sup> Still, judges do not form a homogeneous group. Indeed, judges in national supreme courts and constitutional courts hold different views concerning the legitimacy and usefulness of the use of comparative law in judicial decision-making.<sup>102</sup> Some judges have reservations regarding the use of comparative law in judicial decision-making, whereas other judges have a more open attitude.<sup>103</sup> Reservations can concern the authoritative value of foreign legal arguments or scepticism regarding the guidance which can be derived from comparative law. Judges with a more open attitude are not necessarily in favour of striving for convergence with the laws of other countries or with international law. Indeed, and befitting the balanced nature of the judicial function, the majority of the judges have a nuanced approach regarding the use of non-binding foreign law in judicial decision-making. These judges are of the opinion that it is sometimes useful to engage with foreign law.<sup>104</sup> For all judges, the time-consuming nature of comparative legal research might be a reason for abstaining from an inquiry into foreign legal sources.<sup>105</sup> In sum, factors taken into account in judicial choices include the perceived usefulness of comparative law in the deciding of a specific case and the available time and resources for comparative legal analysis.

The judicial use of comparative law might come to resemble legal scholarship more if a ‘heavier’ method of comparison were developed. In this respect, Jeremy Waldron has presented a more principled argument for the judicial study of foreign law. He has advanced a principle of equal treatment of parties in similar cases occurring in different jurisdictions.<sup>106</sup> John Bell has correctly pointed out that the acceptance of such a principle implies agreement on ‘a more substantial function’ of the law, such as the protection of human rights or the promotion of human well-being.<sup>107</sup> In Waldron’s analysis, the achievement of equal treatment demands of courts to do two things: (i) to compare their methods of decision-making with those of courts in foreign jurisdictions and draw lessons from this comparison and (ii) to compare the content of judgments and draw insights for the deciding of domestic cases.<sup>108</sup> However, available studies of judicial practices, as well as the examples from case law discussed in this article, suggest that courts currently do not apply this more thorough method of legal comparison.

### 4.2 Methodology of Comparative Legal Analysis

Regarding the incorporation of non-legal insights, comparative legal analysis in judicial decision-making encounters the ‘common’ incorporation problems of legal scholarship, including arbitrariness of the selection

101. Mak, above n. 9, at 201.

102. *Ibid.*, at 227-30.

103. Compare V. Jackson, *Constitutional Engagement in a Transnational Era* (2009).

104. Mak, above n. 9, at 229-30.

105. *Ibid.*, at 232-33.

106. Waldron, above n. 68.

107. Bell, above n. 61, at 14.

108. *Ibid.*

and interpretation of court cases, possibly related to implicit ideological or political views; incorrect ideas about social reality and human psychology; or subjective reasoning.<sup>109</sup> Lessons transpire, in this regard, from an analysis of the methodological considerations of judges concerning the inclusion of comparative legal sources in the reasoning of judgments and concerning the selection of sources.

Firstly, a relevant difference exists between common law courts and Continental European courts with regard to the style of judicial reasoning. For reasons of tradition and the requirement of a unanimous decision, judgments in civil law systems, such as The Netherlands and France, tend to be relatively short. In this light, the citation of foreign law would be exceptional. Indeed, some judges are of the opinion that the citation of foreign law might weaken the reasoning of a judgment because of possible criticism of the highest court's choices, for example, with regard to the selection of examined jurisdictions and the authority of arguments found through the legal comparison.<sup>110</sup> The citation of foreign legal materials is more easily accepted in common law courts, which stand in the tradition of law development through case law and which permit individual judges to issue their own opinion on cases. Judges in common law systems will cite all arguments which they consider to be persuasive, based on the idea that the judge owes a duty to counsel to explain why their arguments are not accepted.<sup>111</sup> A question of concern amongst judges in these courts is the question of whether a presentation of comparative legal arguments in the court's reasoning should consist of a 'full' discussion of all materials found or whether the court is allowed to mention only those foreign references which support its own decision. British judges have indicated that they do not find the latter approach problematic, while some American judges have criticised the use of foreign law if it consists of 'cherry picking'.<sup>112</sup> Still, these judges seem to agree on the point that the discussion of foreign law in the judicial deliberations should be as comprehensive as possible.

Concerning methodology, secondly, the selection of legal systems for the comparison is also significant. Selection is inherent to comparative law, since 'nobody can compare everything in the world of laws'.<sup>113</sup> In this regard, considerations of judges are similar to those of legal scholars. Firstly, legal tradition plays a role. The genealogical relation between common law systems makes it more natural for the highest courts in these systems, for example, in Canada and the United States, to look to each other for inspiration than to legal systems which do not share this background. The exchange

between courts in these jurisdictions, furthermore, is made easier by their shared language. Highest courts in Continental European civil law systems, by contrast, most often study foreign sources which originated in other civil law jurisdictions. The Dutch courts, for example, consider that the French and German influences in the Dutch legal system provide reasons for looking to these systems first when engaging in a comparative legal study. Besides legal tradition and language, judges also take into account the prestige of specific foreign courts when selecting case law for a legal comparison.<sup>114</sup> Finally, practical constraints, such as knowledge of foreign systems and their background and the time available for comparative research, are significant. Concerning knowledge of foreign law, legal scholars have more opportunities to develop a body of knowledge. However, a considerable number of judges in supreme courts and constitutional courts have a background in academia and can build on knowledge obtained during this previous career. Regarding time constraints, judges are under greater pressure than legal scholars.

In sum, this analysis of judicial views and methodological choices clarifies that judges relate their approaches regarding the use of foreign law mostly to the requirements and methods of legal research generally. Non-legal aspects, such as historical connections and the political and societal context of foreign legal systems, are considered in order to collect materials which can form the basis for a useful comparative analysis. However, the attention given to the analysis of foreign law and non-legal aspects in the deciding of cases is limited, because of the nature of the comparative legal analysis and time constraints affecting the judicial work.

## 5 Concluding Remarks

This article has analysed how contextual aspects of foreign law can be taken into account in comparative legal research. A theoretical analysis of the inherent interdisciplinary nature of comparative law was followed by an illustration of the role and method of interdisciplinary incorporation in comparative legal analysis conducted by Western highest courts. This analysis provides a clarification with regard to three aspects of comparative legal methodology encompassing interdisciplinary elements:

1. What is compared in comparative legal research and to what extent do similarities and differences exist in this regard between legal scholars and judges? The analysis in this article revealed that a meaningful comparison of legal rules and case law from different jurisdictions can only be achieved if relevant aspects of the historical, political, economic, and social context of the compared legal systems are taken into account. In this regard, comparative legal analysis

109. See other contributions to this special issue.

110. Mak, above n. 9, at 231.

111. A. Touffait and A. Tunc, 'Pour une motivation plus explicite des décisions de justice notamment de celles de la Cour de cassation', 72 *Revue trimestrielle de droit civil* 491 (1974).

112. See for example 'Judge John Roberts Confirmation Hearings', available at <[www.gpo.gov](http://www.gpo.gov)>, last accessed 4 November 2015.

113. Siems, above n. 2, at 6.

114. Mak, above n. 9, at 206.

requires the study of contextual insights provided by non-legal academic disciplines. The relevance of context is illustrated clearly by the developed practices of courts regarding the use of comparative law. In these judicial practices, the study of policy choices underlying foreign case law plays a significant role. For legal scholars, this experience from legal practice underlines the importance of sufficient contextualisation of comparative research in order to draw conclusions for the benefit of concrete cases as well as broader political and societal debate. Indeed, there is a connection here between legal scholarship and judging. Legal scholars can assist judicial decision-making by providing judges with information about the laws and case law of foreign jurisdictions. In this respect, comparative legal research conducted by scholars contributes to the soundness of comparative legal analysis in judicial decision-making.

2. Why do legal scholars and judges use comparative legal analysis? Comparative legal analysis can have different aims, connected with a 'scale' of methods ranging from 'featherweight' to 'heavyweight' legal comparison. Along this scale, interdisciplinary incorporation becomes increasingly important in the comparative legal analysis. The article clarified that knowledge building in legal scholarship generally provides most reason and opportunity for the discussion of insights from non-legal disciplines. At the other end of the spectrum, comparative legal analysis as a source of inspiration for judicial decision-making or law reform is connected with a smaller basis of legitimacy and with fewer resources for the conducting of a systematic and contextualised analysis. When considering the use of comparative law in legal practice, it is important to take into account the individual approaches of those involved in the application or reform of laws. In this respect, the article clarified that the individual approaches of judges have an influence on the extent to which comparative legal analysis, and interdisciplinary aspects connected with this analysis, play a role in judicial deliberations and the reasoning of judgments. Judges with an 'open' attitude concerning the use of comparative legal analysis emphasise the usefulness in finding inspiration for domestic decision-making, even though the study of foreign law cannot provide solutions for domestic cases. These judges will engage in comparative legal analysis more often than judges with a 'closed' attitude, even if this analysis is time-consuming and not absolutely necessary for the solution of the domestic case.
3. In which ways can legal scholarship make sense of the use of interdisciplinary elements in comparative legal analysis, in particular: how can legal scholars analyse the use of comparative law by judges? The analysis in this article used legal theory and referred to research in the fields of comparative law and socio-legal studies to provide answers to the research question and sub-question. The analysis suggests that scholars have an important role in the further contextualisa-

tion of comparative legal research regarding specific legal issues, both through legal-doctrinal analysis and through socio-legal comparative analysis.<sup>115</sup> Regarding the study of the judicial use of comparative legal analysis, the method of qualitative interviewing seems suitable for an analysis of the societal and psychological background of the examined judicial practices. In particular, this approach enables the collection of information on the use of comparative legal analysis even in courts where explicit citations of foreign judgments are rare. Moreover, interviews can give insight into the motives of judges regarding the use of comparative legal analysis. Future comparative and socio-legal research will contribute to a growing body of academic literature, which includes comparative legal research of judicial citations to foreign law in jurisdictions in Central and Eastern Europe,<sup>116</sup> analyses of the exchange of legal ideas and experiences in transnational judicial networks,<sup>117</sup> and quantitative research, revealing patterns of judicial citations to foreign law.<sup>118</sup> The further development of interdisciplinary research on judicial citations serves a broad aim, as it could provide valuable results for a better understanding of the development of the law under the effects of globalisation.<sup>119</sup>

In sum, awareness of the interdisciplinary aspect of comparative legal analysis, as well as further debate and research on legal methodology, can help scholars and judges to avoid being pulled down by the 'under toad' of incorrect use of the comparative legal method.

115. Compare the distinction made above, n. 19.

116. M. Bobek, *Comparative Reasoning in European Supreme Courts* (2013).

117. M. Claes and M. de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks', 8 *Utrecht Law Review* 100 (2012, nr. 2); E. Lazega, 'Mapping Judicial Dialogue across National Borders: An Exploratory Network Study of Learning from Lobbying among European Intellectual Property Judges', 8 *Utrecht Law Review* 115 (2012, nr. 2).

118. M. Gelter and M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts', 8 *Utrecht Law Review* 88 (2012, nr. 2); Groppi and Ponthoreau, above n. 6.

119. J. Bell, 'Researching Globalisation: Lessons from Judicial Citations', 3 *Cambridge Journal of International and Comparative Law* 961 (2014).