

How to Do Legal Interpretation with Comparative Law: A Methodological Reflection and Reconstruction

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Abstract

Comparative law is a prevalent legal method. While it is subject to constant critiques, perhaps because no standard operating procedure or new theoretical foundation has been offered, comparative law studies are still conducted in the usual way. Using jurisprudential analytical tools, this article divides comparative law into two parts: borrowing normative values and borrowing positive outcomes. This article argues that, at least for academics whose jobs are to promote understanding of the legal system, the process of borrowing normative values should involve three steps: (1) distilling a normative theory from foreign law and jurisprudence; (2) explaining why the value judgments in the normative theory is desirable, and, if not, how to adjust; and (3) finally applying the (revised) normative theory in the interpretation of domestic laws, via the teleological interpretation approach. The third step includes analyzing the means-ends relationship and thus how best to achieve the normative goals. In short, the first step is abstraction, the second step is reasoning at the same abstract level, and the third step is concretization. Academics should no longer consider foreign law and jurisprudence as epistemic authority and accept them at face value. In addition, when borrowing positive outcomes, academics should use social-scientific methods in conducting double causal reasoning, rather than relying on their intuition. More specifically, the first causal reasoning is ideally empirical, whereas

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the second causal reasoning is positive and theoretical. The mainstream comparative law studies are accustomed to look at laws and jurisprudences from specific civil-law countries such as Germany, Japan, and France, while this article reveals that membership of legal families does not necessary matter when borrowing normative values and positive outcomes. Whether a foreign country's legal system is subject to a proper research design for causal reasoning and whether a foreign country's jurisprudence advances helpful normative discussions are more important for comparative purposes.

Keywords: statutory interpretation methods, teleological interpretation, persuasive authority, causal reasoning, functional comparative law, value preemption thesis, reconstruction thesis