

SEZIONE 7.

DIRITTO E DIRITTO INTERNAZIONALE

DOI 10.36074/logos-19.12.2025.012

CULTURAL COMMUNICATION CHALLENGES IN THE CONTEXT OF USING FOREIGN JUDICIAL RULINGS BY NATIONAL COURTS: COMPARATIVE ANALYSIS

Tetiana Bordiuh¹

1. Dr., PhD in Law, LL.M. in Compliance,
Fellow and Advisory Committee Member
European Law Institute (ELI), SWITZERLAND
ORCID ID: 0000-0002-3300-8653

The question of using foreign judicial practice by national courts is highly debated in different jurisdictions. In this dialogue, it is very important to understand existing challenges and the fact that each foreign practice must be implemented with an understanding of foreign and national cultural special features. In this article, I will analyze the communication challenges in this regard based on the example of this dialogue in the USA, as they developed important arguments in this conversation between scholars and judges, and legal practitioners, comparing their approach with some European experience and theoretical works of European scholars.

Making references to the decisions of foreign courts in the judgments of the national courts was and is highly debated in the USA. This phenomenon is also present in other countries. For example, I have seen some references to the court decisions of France, Austria, and Germany in some court rulings of the Swiss Federal Supreme Court. Meanwhile, having worked in the Ukrainian Supreme Court, I can say that Ukrainian judges have never included any other references in their decisions, except for the European Court of Human Rights, as this is mandatory by law in Ukraine. Therefore, for some practitioners with a similar background, the practice of citing foreign decisions by national courts may even look a bit strange, which confirms the fact that our cultural background defines, to a great extent, our understanding in general as such, and understanding of law in particular.

Starting to analyze the communicative challenges that US Supreme Court Justices may encounter when engaging with foreign law in US constitutional adjudication, I would like to start from the first issue of prejudice. Gadamer, sharing

Heidegger's views, argues that a person's understanding is already placed within the context of that person's culture, experience, and history, and this is what is called by Gadamer "prejudice" in understanding [2, pp. 61-81]. For him, understanding is an event that happens within the "hermeneutical circle", where the interpreter moves in the cycle of tradition [2, p. 71]. Dr. Glanert also supports this position, saying, "Any understanding is therefore inscribed in finitude, and no method, no matter how sophisticated, can overcome this fact by lifting understanding out of its existential condition into a transcendental realm that would feature something like objectivity" [2, p. 71].

I fully agree with this position. We are all different, and our differences define our understanding. And as Gadamer also argued, "understanding cannot be instrumentalized... Rather, it depends on the work of tradition (and its prejudices), which is never fully conscious, exceeds efforts to fix its meaning, and eludes method" [7, p. 617]. An example of this we can also find in the research about the influence of language on the way we think, as psychologists argue that people who speak different languages also have different thinking and perception of reality [1]. A cultural and historical background shapes the worldview of a person and even "determines his existentiality", as also argued by Heidegger [8, p. 700]. And this leads us to the second problem – language and tradition do not belong [2].

Therefore, when US judges refer to the decisions of foreign courts, they will still understand them according to their context and from their perspective. Moreover, there is a selectivity in the choice of foreign decisions to refer to. For this reason, Posner argues that citing foreign legal decisions in US courts is a form of hypocrisy. He also proves that judges are already influenced by various factors, including their personal experiences, values, and public opinion, rather than relying on foreign legal decisions. Additionally, he points out that foreign countries have diverse legal systems, some criminalizing certain acts while others do not. Therefore, he questions, "...should we assume that the justices in Lawrence weighed the arguments made in other states for the criminalization of sodomy?" [10, p. 42] – doubting the relevance and impact of citing foreign decisions in US cases like *Lawrence v. Texas*, where domestic factors played a more significant role in the decision-making process.

Posner also explains other reasons why references to foreign decisions should not be made. He highlights three main concerns: the overwhelming number of potential sources, the lack of understanding of foreign legal systems by US judges, and the potential democratic legitimacy issues associated with relying on foreign law, as US judges will still perceive even the foreign judgments from their democratic perspective, which may not be the case in other countries [10].

Engaging in the dispute on the topic, Jackson contradicts Posner and defends the position of citing the foreign court decisions, emphasizing that the references

SEZIONE 7.

DIRITTO E DIRITTO INTERNAZIONALE

to the decisions of foreign courts are not treated as binding, that there is nothing wrong for the judge to show that there are other courts that agree with his/her position, that it extends the worldview, etc. [5, p. 44]. However, I find her arguments unpersuasive. In my opinion, it is fine to do the research, compare legal practice, and be open to the lessons learned from other countries and jurisdictions; meanwhile, no foreign practice may be implemented without the research and argumentation that this will also fit the national legal system, culture, and tradition. And the court's decisions are not scientific articles or monographs to engage in such dialogues.

Because of this, I fully agree with the position of Prof. Legrand that there can be no legal transplants. He argues that the meaning of a rule is not inherent to the rule itself, but rather emerges from its interpretation. He suggests that the meaning is influenced by various factors, including the context in which the rule is applied and the interpreter's personal beliefs and worldview. Prof. Legrand concludes that the meaning of a rule is dynamic and shaped by both the rule itself and the interpreter's understanding [6, p. 114]. And in law, interpretation is everything. Interpretation is crucial for applying the law, as no legal provision can be applied without its interpretation in the context of each case. Based on how the law will be interpreted, the case will be decided, or even the course of cases. And because of the differences in understanding and interpretation, the phenomenon of changing the legal position by courts also exists.

Another important issue I would like to emphasize is translation. Posner raises this issue also by asking the rhetorical questions, "Do any of the Supreme Court justices know any foreign languages well enough to read a judicial opinion not written in English? And if they use translations, to what extent are they reliable?" [10, p. 41] Moreover, sometimes issues may arise even within one language, as it was pointed out by Dr. Glanert and Dr. Legrand, "Anglophone comparatists may need to translate English – thus, 'privacy' in the UK is not 'privacy' in the USA." [3, p. 516]

Discussing further the challenges of the translation, I agree with the position of Dr. Glanert and Dr. Legrand, who prove that the greatest challenge is to translate the foreign text without losing its unique qualities and allowing it to be absorbed by the target language [3, p. 517]. Schleiermacher also argues that translation is a ubiquitous phenomenon – it allows for intercultural communication and the preservation of historical languages; however, even within a single language, differences in dialects, social classes, and education levels can necessitate translation [11, p. 36]. This highlights the inherent complexity of language and the constant need for interpretation and translation, even within the same linguistic community.

Dr. Glanert, in her research, also emphasizes the inherent instability and open-endedness of language. She proves that words and sentences are not fixed entities

with definitive meanings, but rather possess a potential for endless interpretation and reinterpretation. Each repetition of a word or sentence introduces a new layer of meaning, making it unique and distinct from previous uses. This idea challenges the notion of authorial intent, suggesting that the meaning of a text is not solely determined by the author but is continuously shaped by its readers and interpreters. For example, Dr. Glanert says, “No matter what the French legislator ... wanted to totalize or stabilize or fixate meaning, these words are inherently iterable such that the author’s conferment of meaning can be infinitely supplemented by its interpreters – which is to say that neither the author nor any interpreter can ever saturate meaning, that no one can never completely and systematically occupy fully the ‘space’ of meaning so that no room would be left for anything to be added by another interpreter intervening subsequently.” [4, p. 195]

As also emphasized by the scholars, the role of the interpreter's perspective in shaping understanding is crucial. Each interpreter, situated in a specific historical and cultural context, brings their own unique understanding to the text. This subjective element in interpretation further contributes to the fluidity and multiplicity of meaning. This leads to the conclusion that the text underscores the dynamic nature of language and the impossibility of definitive interpretation. Words and sentences are constantly evolving, and their meanings are shaped by the ongoing interplay between the text, the interpreter, and the broader cultural and historical context [4, p. 195].

Therefore, a translator plays a crucial role in interpreting the text to the readers. As noted by Messud, “Each translation is, perforce, a reenvisioning of the novel: a translator will determine which Meursault we encounter, and in what light we understand him.” [9]

Having in mind this important role of the translator, Schleiermacher proposes two primary methods of translation: ethical (or authentic) translation and ethnocentric (or inauthentic) translation. The first method is also a translator-oriented translation, where the translator prioritizes the original text and seeks to convey its meaning and style as accurately as possible to the reader. This approach requires the translator to have a deep understanding of the source language and culture. In the second method, which is a reader-oriented translation, the translator prioritizes the reader's understanding and adapts the text to their needs and expectations. This approach may involve making changes to the style or content of the original text. Schleiermacher argues that translators are often faced with a choice between these two methods. However, he also recognizes that the decision can be complex and influenced by various factors, such as the nature of the text, the purpose of the translation, and the translator's own cultural background [1, p. 42].

SEZIONE 7.

DIRITTO E DIRITTO INTERNAZIONALE

So, making references to the decisions of foreign courts in the judgments of the national courts in the USA (as well as in other countries) faces a lot of challenges of cross-cultural communication in understanding (prejudice), differences of cultural background, tradition, and translation. These are the factors that influence the interpretation and application of the legal positions of foreign courts. And although it is useful to research and analyze foreign legal practices in the process of the search for the best solution to our problems, we must be aware of existing challenges and use the right approaches, methods, and tools to be able to comprehend the foreign law as objectively as possible, although this still remains an unreachable goal.

REFERENCES:

- [1] Boroditsky, L. *HOW DOES OUR LANGUAGE SHAPE THE WAY WE THINK?* Retrieved from: https://www.edge.org/conversation/lera_boroditsky-how-does-our-language-shape-the-way-we-think (accessed 30.10.24).
- [2] Glanert, S. (2012). *Method?* In P. G. Monateri (Ed.), *Methods of comparative law* (pp. 61-81). Edward Elgar. At 71. Retrieved from <https://pierre-legrand.com/ewExternalFiles/glanert-on-method.pdf> (accessed 29.10.24) with reference to Gadamer, H.-G. (2004). *Truth and Method* (2nd rev. ed., J. Weinsheimer & D. G. Marshall, Trans.). Continuum. At 278-306.
- [3] Glanert, S., & Legrand, P. (2013). *Foreign law in translation: If truth be told...* In M. Freeman & F. Smith (Eds.), *Law and Language* (pp. 513-532). Oxford University Press.
- [4] Glanert, S., Mercescu, A., & Samuel, G. (2023). *Rethinking comparative law*. Edward Elgar Publishing. At 195.
- [5] Jackson, V. (2004). *Yes Please, I'd Love to Talk with You*. *Legal Affairs*, July/August, 44.
- [6] Legrand, P. (1997). The Impossibility of 'Legal Transplants'. *Maastricht Journal of European and Comparative Law*, 111-124.
- [7] Legrand, P. (2007). *Gadamer*. In D. S. Clark (Ed.), *Encyclopedia of law and society* (Vol. 2, p. 617). Sage. Retrieved from: <https://www.pierre-legrand.com/ewExternalFiles/Legrand%20on%20Gadamer.pdf> (accessed 29.10.24).
- [8] Legrand, P. (2007). *Heidegger*. In D. S. Clark (Ed.), *Encyclopedia of law and society* (Vol. 2, p. 700). Sage. Retrieved from: <https://www.pierre-legrand.com/ewExternalFiles/Legrand%20on%20Heidegger.pdf> (accessed 29.10.24).
- [9] Messud, C. (2014, June 5). A new L'Étranger. *The New York Review of Books*.
- [10] Posner, R. A. (2005). *No thanks, we already have our own laws*. *Harvard Law Review*, 119(1), 40-42.
- [11] Schleiermacher, F. (1813/2014). *From On the different methods of translating*. In W. Bartscht (Trans.), *Hermeneutics and Criticism* (pp. 36-54). University of Chicago Press.