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Citations to Foreign Courts – Illegitimate and Superfluous, or Unavoidable? Evidence from Europe

MARTIN GELTER* & MATHIAS M. SIEMS**

Abstract: The theoretical arguments in favour and against citations to foreign courts have reached a high degree of sophistication. Yet, this debate is often based on merely anecdotal assumptions about the actual use of cross-citations. This article aims to fill this gap. It provides quantitative evidence from ten European supreme courts in order to assess the desirability of such cross-citations. In addition, it examines individual cases qualitatively, developing a taxonomy of cross-citations based on the degree to which courts engage with foreign law. Overall, this article highlights the often superficial nature of cross-citations in the some courts; yet, it also concludes that, by and large, our analysis supports the use of cross-citations: it does not have the pernicious effects sometimes suggested by critics of the practices, such as undercutting national sovereignty and the legitimacy of the legal system. At best, cross-citations provide a source of inspiration how to interpret national law. At worst, they are largely ornamental and marginally help to make a particular policy argument appear more persuasive.

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1. Introduction

In the United States it is highly controversial whether courts are allowed, or even encouraged, to refer to precedents from foreign courts. This is not a purely academic debate. The US Supreme Court itself is divided on whether it is legitimate to rely on foreign law in the interpretation of the US Constitution,¹ and the occasional reference to foreign sources by some judges has been the subject of congressional hearings and debates in the Blogosphere as well as in legal scholarship.² Justice Kennedy has actually been called “the most dangerous man in America”, *inter alia*, because of his endorsement of citations to foreign cases.³ In addition, the state of Oklahoma attracted considerable attention by explicitly prohibiting state courts from looking “to the legal precepts of other nations or cultures” specifically mentioning international law and Sharia Law; other states have passed or are debating measures with similar intentions.⁴

In Europe the discussion about the desirability of cross-citations is less politically contentious. A possible explanation could be that due to EU law (as well as the European Convention on Human Rights) it may just be natural for national courts to consider the case law of other Member States. But the EU is not (yet) akin to a federal state. A study comparing the EU with twenty federal states found that the EU provides significantly less legal uniformity than these states.⁵ Thus, for many topics largely uninfluenced by EU law it may be more irregular if, say, an English court cites a Spanish one. In particular, such reluctance may be related to the diversity of European countries, for example, in terms of legal traditions, languages and cultures. Thus, Europe can be seen as an interesting test ground to assess the frequency and desirability of cross-citations.

A project by the authors of this article has collected empirical data on cross-citations between the supreme courts of Austria, Belgium, England and Wales, France, Germany, Ireland, Italy, the Netherlands, Spain, and Switzerland. We found 1,430 instances in which these courts have cited the supreme courts of the other nine countries in a period of eight years. Two previous articles, deriving from this project, explored in which circumstances these cross-citations take place: the first one analyzed how the cross-citations are structured,⁶ and the second one undertook

¹ The most contentious cases were *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Lawrence v. Texas* 123 Ct. 2472 (2003); *Aktins v Virginia* 536 US 304 (2002); *Foster v. Florida*, 537 US 990 (2002); *Thompson v. Oklahoma*, 487 US 815 (1988). *See, e.g.* Joan Larsen, *Importing Constitutional Norms from a Wider Civilization*, 65 *Ohio St. L.J.* 1283, 1286 (2004); *see also* the transcript of a debate between Justices Scalia and Breyer on foreign law, available at <http://www.freerepublic.com/focus/news/1352357/posts>.

² *See* the references in the next sections.

³ This is attributed to Dr. James Dobson, the founder of evangelical organization Focus on the Family, *see* <http://www.albertmohler.com/2003/09/22/the-most-dangerous-man-in-america/>.

⁴ OK CONST. ART. 7, § 1 (2010); *but see* *Awad v. Ziriach*, 670 F.3d 1111, 1132-33 (10th Cir. 2012) (affirming an injunction against Oklahoma’s constitutional ban). For an overview, *see, e.g.* Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ and Other Provisions Like it that Bar State Courts from Considering International Law*, 59 *CLEV. ST. L. REV.* 189, 194-198 (2011).

⁵ DANIEL HALBERSTAM, MATHIAS REIMANN AND JORGE SANCHEZ-CORDERO (eds.), *FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS* (2012) (finding that on an index from 0 to 10: the EU scores 2.7 whereas the average is 4.4 for the federal states).

⁶ Martin Gelter & Mathias Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts*, 8 *UTRECHT L. REV.* 88 (2012).

regression analysis in order to understand the differences between them.⁷ The present article has a different focus: here, our main interest is not in the positive question why cross-citations occur, but in the normative one whether it should be possible to cite foreign courts. For this purpose, we will use our data on cross-citations in order to confirm or refute some of the assumptions of the arguments in favor or against cross-citations.

This article is structured as follows: To set the scene, Section 2 develops a conceptual scheme in order to structure the arguments about the benefits and risks of cross-citations. Sections 3 and 4 analyze our general data on cross-citations with descriptive and inferential statistics; in addition, the subsequent Section 5 distinguishes cross-citations between areas of law. But, while the focus of this article in our quantitative dataset, it is also rewarding to examine individual cases in a qualitative way: thus, based on representative cases, Section 6 develops a taxonomy of different types of cross-citations. The final Section 7 returns to our conceptual scheme in order to re-assess the normative case for citations to foreign courts.

2. The debate on the benefits and risks of cross-citations

The extensive literature on cross-citations offers a wide range of reasons why those should or should not occur.⁸ These arguments can be classified into three categories, namely whether they relate to the character of law, the quality of the decision or procedural reasons. Figure 1 provides an overview of the patterns of argument with details being explained in the following.

⁷ Martin Gelter & Mathias Siems, *Language, Legal Origins, and Culture before the Courts: Cross-Citations between Supreme Courts in Europe*, forthcoming in 21 SUP. CT. ECON. REV. (2013).

⁸ See the following notes, and, e.g., MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* (2013); Thomas Kadner Graziano, *Is It Legitimate and Beneficial for Judges to Use Comparative Law?* 21 EUR. REV. PRIV. L. 687 (2013); Ton M. Hol, *Internationalisation and Legitimacy of Decisions by the Highest Courts*, in HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW: CHALLENGES AND CHANGES 77 (Sam Muller & Marc Loth eds. 2009); Katharine G. Young, *The World, through the Judge's Eye*, 28 AUSTRALIAN YEAR BOOK OF INT'L LAW 27 (2009); Lord Steyn, *The Challenge of Comparative Law*, 8 EUR. J. L. REFORM 3 (2007); Rebecca R. Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLA L. REV. 1413 (2007); Jacob J. Zehnder, *Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker*, 41 VAL. U. L. REV. 1739 (2007); Donald Earl Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L. J. 193 (2003).

Figure 1: The patterns of argument of foreign court citations

	A. Character of law	B. Quality of decision	C. Procedural reasons
1. Pro	<i>common core</i>	<i>useful information</i>	<i>transparency</i>
	⇕	⇕	⇕
2. Contra	<i>national character</i>	<i>“cherry picking” and misapplications</i>	<i>costs and lack of benefits</i>
	⇕	⇕	⇕
3. Reply	<i>foreign case law not authoritative</i>	<i>develop criteria for using foreign case law</i>	<i>make foreign case law more easily accessible</i>

Starting with the “pro-reasons”, the first one is that cross-citations are justified by a common core of legal systems. Such a statement may be limited to the countries of the same legal family,⁹ but one can also go further. For example, in a keynote speech Justice Breyer observed that “cross-country results (...) resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas”.¹⁰ Such similarities may reflect deep moral universalism,¹¹ or it could also simply be a matter of fact that many, if not all, modern legal systems have close connections and a long history of judicial borrowings.¹²

A variation of this argument is that the common core is something which is more aspirational, but that there are good reasons that legal systems should aim for it. The desire for harmonization and convergence has been a frequent topic of modern comparative law, and it may also be supported by law-and-economics thinking, given the costs of legal diversity.¹³ Another version of this argument is that economic, social and cultural globalization has led to a shift that judges cannot ignore lest your legal system becomes “legal backwater”;¹⁴ thus, it is frequently also suggested that we should aim for “judicial dialogue”, “judicial comity”, or even “a global community of courts”.¹⁵

The second reason suggests that foreign case law can provide useful information to improve the quality of judgments. For example, it may be the case that foreign courts had more opportunities to deal with certain difficult legal problems, and therefore, considering their experi-

⁹ See, e.g., *Donoghue v. Stevenson* [1932] AC 576 (per Lord Atkin) [House of Lords]: “It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States.”

¹⁰ Stephen Breyer, *Keynote Address*, 97 AMERICAN SOCIETY OF INT’L L. PROCEEDINGS 265, 268 (2003).

¹¹ Cf. Lisa Sofio, *Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation*, 30 HASTINGS INT’L & COMP. L. REV. 131, 143 (2006).

¹² Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 668.

¹³ E.g., UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 94, 219 (1997).

¹⁴ Cf. Daniel J. Frank, *Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign law in American Jurisprudence*, 92 IOWA L. REV. 1037, 1069 (2007).

¹⁵ E.g., Olga Frishman, *Transnational Judicial Dialogue as an Organisational Field*, EUR. L. J. (forthcoming); Frank, *id.*, at 1065; Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191 (2003).

ence may be beneficial to fill a temporary gap in the current law.¹⁶ Thus, here, it is precisely the initial legal diversity that is helpful as it provides a laboratory to find the best solutions. Foreign experience can also provide useful empirical data on the effect of the law: for example, knowing about the effect of a foreign court decision on a controversial issue can help domestic courts to decide on whether or not such an approach is worth following.¹⁷

Third, it can be suggested that cross-citations to foreign cases make transparent what may have influenced the judge's reasoning anyway. Thus, the argument is that, if cross-citations were prohibited, judges would still read and consider foreign case law, but just do not admit it openly. This point can also be illustrated by the French tradition of judicial drafting: here, judgments are written in a very condensed and formal style but it has been shown that, behind the scenes, French courts also use considerably more comprehensive arguments.¹⁸

The three "contra-reasons" correspond to these categories. First, a frequent objection is based on the national character of legal systems. From an internal perspective the counter-argument is that, even today, law is not universal,¹⁹ with the US literature often saying that US law is exceptional or even unique.²⁰ In particular, there could still be deep differences between common and civil law countries, though critics may also refer to differences within legal families, to quote a famous English judgment: "for though the source of the law in the two countries may be the same, its current may well flow in different channels".²¹

A main substantive reason behind this counter-argument is that the influence of foreign case law is said to undermine national sovereignty and democracy: a judge has the duty to apply the law of his or her country (unless told otherwise),²² and if there are useful legal ideas abroad, it is only for the legislator to consider adopting such rules.²³ If it were otherwise, it is also suggested that this may threaten the legitimacy and acceptance of courts.²⁴ A further substantive reason is that, taking an external perspective, law is seen as a mirror of a particular culture and society.²⁵ Using foreign case law would therefore disrespect that law can only be understood in its economic, social, cultural and political context.²⁶ Most obviously this could be the case for questions that have a moral dimension since morality is typically location-specific.²⁷

¹⁶ Jacob Foster, *The Use of Foreign Case Law in Constitutional Interpretation: Lessons From South-Africa*, 45 U.S.F. L. REV. 79 (for post-Apartheid South-Africa).

¹⁷ Osmar J. Benvenuto, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 38 FORDHAM L. REV. 2596, 2726 (2006).

¹⁸ See MITCHEL DE S.-O.-L'E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2006).

¹⁹ E.g., Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT'L L. J. 517 (2006).

²⁰ Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 NYU L. REV. 1971 (2004).

²¹ *Donoghue v. Stevenson* [1932] AC 576 per Lord Buckmaster (dissenting) [House of Lords].

²² Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2005). *But see* the South African Constitution, s. 39(1)(a) (explicitly allowing "to consider foreign law"); Kadner Graziano, *supra* note 8, at 698 (for the situation in Swiss law, at least, where there is a "gap").

²³ Richard A. Posner, *Foreword: A Political Court*, 199 HARV. L. REV. 31 (2005); Richard A. Posner, *No Thanks: We Already Have our Own Laws*, LEGAL AFFAIRS (2004), available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp; Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004).

²⁴ J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB.POL'Y 423, 425-26 (2004); Cheryl Saunders, *Judicial engagement with comparative law*, in RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW 571, 583-6 (Tom Ginsburg & Rosalind Dixon eds. 2011).

²⁵ See the discussion in MATHIAS SIEMS, *COMPARATIVE LAW* ch. 6 (2014, forthcoming).

²⁶ Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1 J. COMP. L. 371, 419 (2006).

²⁷ Larsen, *supra* note 1, at 1283.

The second counter-argument is that cross-citations harm the quality of judgments. The most frequent variant of this argument is that the possibility of referring to foreign cases provides judges with too much discretion since it enables “result-driven cherry picking” and “haphazard comparativism”.²⁸ In the words of Chief Justice Roberts: “if you don’t find it in the decisions of France or Italy, it’s in the decisions of Somalia or Japan or Indonesia, or wherever”.²⁹ Moreover, allowing references to foreign courts is said to undermine the consistency of the law.³⁰ Finally, it is said to be impossible for a judge to adequately understand foreign law, in particular in its legal but also its socio-cultural context:³¹ thus, since “a little learning can be dangerous”,³² even considering foreign law with the best intentions may be counter-productive for the quality of judgments.

Third, the costs of cross-citations also play a role for the procedural counter-arguments. Here, the view is that, while adequate research on foreign law may be possible, it is often too costly and time-consuming. It can also be suggested that producing a judgment with many references to foreign courts is not an effort worth spending anyway since, instead of following an “aristocratic mode” of citing authorities,³³ it would be more important to be transparent about the actual policy-arguments underlying the decision in question.

The final line of Table 1 summarizes possible replies to these counter-arguments, also pointing towards intermediate positions. First, defenders of cross-citations may respond that democracy and judicial legitimacy are not at risk since foreign case law is not seen as a binding authority. This is clear if one takes the realist position that the text of judgments is largely irrelevant because, then, cross-citations would be mainly rhetorical.³⁴ But, it may also be said that cross-citations have (merely) an “informational value” in order to communicate a good idea about the way others have dealt with a particular problem.³⁵ This may be legitimate given that legal rules are often not entirely clear and therefore it is normal for judges to solve these ambiguities, employing any information that is relevant and useful, be it academic writings, common sense, or foreign case law.³⁶

Second, selective or inappropriate use of foreign case law invites the response that one should therefore develop criteria for selecting the appropriate foreign judgments in question. In the case law of the US Supreme Court, the reference is often to the majority view of the international community,³⁷ which would already exclude the risk of relying on outliers. In the US literature further criteria have been developed, for example, considering whether the countries, the courts and the specific cases in question are sufficiently similar.³⁸ To be sure, these may not lead

²⁸ Alford, *supra* note 23.

²⁹ Chief Justice Roberts at his confirmation hearings, transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/13/se.04.html>.

³⁰ Sanchez, *supra* note 22, at 219.

³¹ *Cf.* Foster, *supra* note 16.

³² Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB.POLY 653, 661 (2009).

³³ John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 329 (2006).

³⁴ *Cf.* Benvenuto, *supra* note 17, at 2697.

³⁵ McGinnis, *supra* note 33, at 310.

³⁶ *See also* John Bell, *The Argumentative Status of Foreign Legal Arguments* 8 UTRECHT L. REV. 8, 11 (2012) (“In a national legal argument, there may be previous judicial decisions, analogy with legislation, arguments of fairness or justice, arguments of legal policy and the like. (...) To my mind, the argument from a foreign legal system typically adds lustre to an argument already available in the host legal system”).

³⁷ *E.g.*, *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (per Justice Kennedy).

³⁸ *See* Benvenuto, *supra* note 17, at 2731.

to absolute certainty, but this is not fundamentally different from purely domestic judicial decision-making, where it is often equally unclear why a court picked a particular policy reason or interpretation method over others.

Third, the time and effort it takes to learn about foreign case law may only show the need to improve communication about foreign case law, for instance, through electronic databases and the legal literature. This reply also addresses the counter-argument that citing an obscure foreign judgment may be a way to disguise an inconvenient policy argument: if case law is made available in a sensible way, citing a foreign judgment may not impede an understanding of the court's reasoning more than citing a domestic one.

This concludes the overview of the debate about the pros and cons of foreign court citations. The following will use data collected from cross-citations between supreme courts in Europe in order to evaluate these claims. This procedure may invite the response that one cannot infer from "is" to "ought" statements.³⁹ Yet, in the present case, many of the normative arguments on why cross-citations should or should not be allowed are based on assumptions about the way cross-citations operate in reality. Thus, challenging those assumptions can contribute to an assessment of these normative arguments. In addition, the conclusion of this article will return to the patterns of argument of Table 1 in order to show which of these points could be confirmed or refuted.

3. Empirical data on cross-citations in Europe

3.1. Introduction

Some previous studies have examined cross-citations between supreme courts, yet, usually not in a quantitative and empirical way. To the best of our knowledge, there is only one empirical study on how often US courts make use of foreign decisions.⁴⁰ In Europe the positive debate about the prevalence of cross-citations has been more extensive: some say that at least some courts fairly frequently refer to the case law of other countries' supreme courts,⁴¹ while other studies claim that courts look across the border only rarely.⁴² But only few studies provide actual data on the

³⁹ The "is /ought problem" goes back to DAVID HUME, A TREATISE OF HUMAN NATURE 335 (1739).

⁴⁰ David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006).

⁴¹ E.g., Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?* 38 TEX. INT'L L. J. 505 (2003); LORD BINGHAM OF CORNHILL, WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW (2010); cautiously also Elaine Mak, *Why Do Dutch and UK Judges Cite Foreign Law?* 70 CAMBRIDGE L J 420 (2011); Elaine Mak, *Globalisation of the National Judiciary and the Dutch Constitution*, 9 UTRECHT L. REV. 36 (2013).

⁴² E.g., Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 70 TUL. L. REV. 11 (2005); SIR BASIL MARKESINIS & JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW (2006); Sir Basil Markesinis, *Judicial Mentality: Mental Disposition or Outlook as a Factor. Impeding Recourse to Foreign Law*, 80 TUL. L. REV. 1325 (2006); GUY CANIVET, MADS ANDENAS & DUNCAN FAIRGRIEVE, COMPARATIVE LAW BEFORE THE COURTS (2004); ULRICH DROBNIG & SJEF VAN ERP (1999), THE USE OF COMPARATIVE LAW BY COURTS (1999); specifically for Germany Ulrich Drobnig, *Rechtsvergleichung in der deutschen Rechtsprechung*, 50 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 610 (1986); Hein Kötz, *Der Bundesgerichtshof und die Rechtsvergleichung*, in 2 FESTGABE 50 JAHRE BUNDESGERICHTSHOF 825 (ANDREAS HELDRICH & KLAUS J. HOPT eds. 2000); for Italy Guido Smorto, *L'uso giurisprudenziale della comparazione*, 2010 EUROPA E DIRITTO PRIVATO 223; for the House of Lords M. Nounkele, *Aux frontières de la comparaison*, 2012 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARE 393, 394-403.

number of cross-citations and those data are also limited to decisions published in particular reports or journals.⁴³ The project on which this article is based wants to fill this gap as it considers almost all decisions of ten European supreme courts over a period of eight years. It is the aim of this section to introduce our empirical data. This will make reference to two of our previous articles which examined different aspects of this dataset.⁴⁴ However, this section is the first one that includes the full matrix of cross-citations. Moreover, in line with the general aim of this article, we address the normative question of whether these data may show that cross-citations should or should not take place.

3.2. Population and search method

The data of this project are based on cross-citations in matters of civil and criminal law between the supreme courts of ten European countries – in contrast to many of the previous studies that have focussed on constitutional law.⁴⁵ We aimed to include a good mix of countries: according to the frequent distinction into legal origins, we have two English legal origin countries (England⁴⁶ and Ireland), three German legal origin countries (Germany, Austria, Switzerland), four French legal origin countries (France, Belgium, Italy, and Spain) plus the Netherlands, which is some studies classified as French and others as German legal origin.⁴⁷

Usually, it was straight-forward to identify the main courts of last resort in matters of civil and criminal law. For example, as far as a country has both a supreme court and a constitutional court, we analysed the supreme court since only some constitutional questions relate to matters of civil and criminal law. We applied a similar line of reasoning to the English and Irish courts: for example, the English equivalent to the supreme courts of the civil law countries is the Court of Appeal of England and Wales, which is responsible for appeals in civil and criminal matters. Although these matters may then be appealed to the UK Supreme Court, this does not make it to *the main* appeal court in matters of civil and criminal law since only very few of such cases reach the Supreme Court. This can also be illustrated by the number of judges and decisions of these two types of courts: the constitutional courts and the UK Supreme Court have a relatively small number of judges (typically between 10 and 20) and they tend to deliver less than 100 judgments per year, whereas the main supreme courts in matters of civil and criminal law typically have more than 40 judges, deciding several hundreds (or even thousands) of cases per year..⁴⁸

⁴³ Esin Öricü, *Comparative Law in Practice: The Courts and the Legislator*, in *COMPARATIVE LAW: A HANDBOOK* 411 (Esin Öricü & David Nelken eds. 2007); Mathias Siems, *Citation Patterns of the German Federal Supreme Court and of the Court of Appeal of England and Wales*, 21 *KING'S L. J.* 152 (2010). See also Gelter & Siems, *supra* note 7.

⁴⁴ See *supra* notes 6 and 7.

⁴⁵ See, e.g., TANIA GROPPI & MARIE-CLAIRE PONTHEUREAU (eds.), *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* (2013); Cheryl Saunders, *Comparative Constitutional Law in the Courts: Is There a Problem?*, 59 *CURRENT LEGAL PROBLEMS* 91 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L. J.* 1225 (1999).

⁴⁶ In the following the term “England” is always to be read as referring to “England and Wales”.

⁴⁷ See *infra* 4.3.

⁴⁸ For details see Gelter & Siems, *supra* note 7, section II.A.2.

Table 1: Countries and courts of our research

<i>Country</i>	<i>Population 2004</i> ⁴⁹	<i>Name of supreme court</i>	<i>Database used</i>	<i>Subject matter jurisdiction of court</i>	<i>Total number of reported decisions 2000-2007</i>	<i>Decisions per 1,000 inhabitants</i>
<i>Austria</i>	8,174,762	Oberster Gerichtshof	RIS ⁵⁰	Civil law (including employment and social law), criminal law	28,868	3.53
<i>Belgium</i>	10,348,276	Cour de cassation, Hof van Cassatie	Court website ⁵¹	Civil law (including employment, law), criminal law	24,053	2.42
<i>England and Wales</i>	53,057,000	Court of Appeal	Westlaw ⁵²	All areas of law	25,855	0.49
<i>France</i>	60,424,213	Cour de cassation	Legifrance ⁵³ and court website ⁵⁴	Civil law (including employment, law), criminal law	107,396	1.78
<i>Germany</i>	82,424,609	Bundesgerichtshof	Beck Online ⁵⁵	Civil Law (excluding employment and social security law), and Criminal Law	22,950	0.28
<i>Ireland</i>	3,969,558	High Court	Bailii ⁵⁶ and Court website ⁵⁷	All areas of law (but not criminal appeals)	2,357	0.59
<i>Italy</i>	58,057,477	Corte di cassazione, Corte Suprema di Cassazione	De Jure ⁵⁸	All areas of law (with the exception of constitutional matters)	196,876	3.39
<i>Netherlands</i>	16,318,199	Hoge Raad	Court website ⁵⁹	Civil (including employment law), crim-	9,073 [36,020] ⁶⁰	0.56 [2,20]

⁴⁹ Sources: CIA Factbook, 2004 data available at http://www.nationmaster.com/graph/peo_pop_cia_fac-people-population-cia-factbook&date=2004. For England and Wales: National Statistics website, available at <http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Population>.

⁵⁰ <http://www.ris.bka.gv.at> (public law database of the Federal Chancellery).

⁵¹ <http://jure.juridat.just.fgov.be/?lang=fr>. Source for the number of decisions: Rapport Annuel 2007, available at http://justice.belgium.be/fr/ordre_judiciaire/cours_et_tribunaux/cour_de_cassation/documents/rapports_annuels/, at pp. 220-221.

⁵² <http://www.westlaw.co.uk> (Law Reports and Official Transcripts).

⁵³ <http://www.legifrance.gouv.fr>.

⁵⁴ <http://www.courdecassation.fr/> (for selected opinions of the advocate general).

⁵⁵ <http://www.beck-online.de>.

⁵⁶ <http://www.bailii.org/ie/cases/IEHC/>.

⁵⁷ <http://www.courts.ie/Judgments.nsf/advancedsearch?openform&l=en>.

⁵⁸ <http://dejure.giuffre.it/> (commercial database used with University of Bologna subscription).

				inal and tax law		
<i>Spain</i>	40,280,780	Tribunal Supremo	Court website ⁶¹	All areas of law (with the exception of constitutional matters)	190,174	4.72
<i>Switzerland</i>	7,450,867	Bundesgericht	Court website ⁶²	All areas of law	27,570	3.70

Table 1 presents the list of countries and courts examined, the databases used, and the subject matter jurisdiction of the ten supreme courts. It also indicates how many decisions these courts have reported between 2000 and 2007 and how this translates into decisions per capita. It is not the aim of this article to explore why countries differ in the absolute number of cases and the decisions per capita. Rather, here, we are interested in the cross-citations between these ten courts, using the full text of (almost) all decisions of these courts for the period between 2000 and 2007.⁶³

In order to locate citations to foreign courts covered by our study, we compiled an extensive list of search terms.⁶⁴ In all countries, we first looked at the actual decisions. For France, the Netherlands and Belgium we also included the opinions of the advocate generals where available. In France, we also looked at the available opinions of the reporting judge (*conseiller rapporteur*). Inclusion of these documents was necessary because in some countries the legal justification of a decision that in other systems would be found in the decisions themselves will appear only in the opinions of the reporting judge or advocate general. For example, French decisions tend to be very short and written in a formulaic style. The legal justification of a decision, including citations, which in other systems would be found in the decisions themselves, will therefore often appear only in the opinions of the reporting judge or advocate general.⁶⁵

We checked all citations by hand. In doing so, we also coded two further pieces of information: we classified cases according to the reasons why foreign courts were cited, and we identified for each case the main area of law. Both will be discussed in the following.

3.3. Presentation of the main data on cross-citations

Based on the search method explained in the previous section, Table 2 contains the main results of our initial analysis. It can be seen that there are many relations with no or few single-digit cross-citations, but also two, Austria to Germany and Ireland to England, with more than 400 citations. This can be seen as an initial indication that courts do not randomly “cherry-pick” decisions from courts that suit their result, but that they turn to the case law of relatively similar legal systems.

⁵⁹ http://zoeken.rechtspraak.nl/default.aspx?searchtype=kenmerken&instantie_uz=Hoge%20Raad.

⁶⁰ Number of decisions according to the annual reports; see Jaarverslagen, available at <http://www.rechtspraak.nl/Organisatie/Publicaties-En-Brochures/Pages/Jaardocumenten.aspx>.

⁶¹ <http://www.poderjudicial.es/search/>.

⁶² <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm> and <http://www.polyreg.ch/d/informationen/bge.html>.

⁶³ Exception: the Netherlands, see Table 1.

⁶⁴ Usually, this was straightforward. However, for the citations of the High Court of Ireland to the Court of Appeal of England and Wales we had to rely on a random sample of decisions because citations to English courts do not always reveal whether the cited court is really the Court of Appeal (for details see Gelter & Siems, *supra* note 7, section II.B).

⁶⁵ See, e.g., JOHN BELL, JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW 75 (2006).

Table 2: Number of cross-citations per citing court⁶⁶

	<i>Cited courts</i>										<i>Total citations</i>
	<i>Austria</i>	<i>Belgium</i>	<i>England</i>	<i>France</i>	<i>Germany</i>	<i>Ireland</i>	<i>Italy</i>	<i>Netherlands</i>	<i>Spain</i>	<i>Switzerland</i>	
<i>Austria</i>	0	0	1	4	467	0	4	0	0	26	502
<i>Belgium</i>	0	0	0	42	7	0	1	11	0	2	63
<i>England</i>	2	4	0	23	11	10	1	13	4	1	69
<i>France</i>	0	2	0	0	6	0	3	0	0	7	18
<i>Germany</i>	34	0	1	2	0	0	1	1	1	6	46
<i>Ireland</i>	0	1	456	5	1	0	1	3	0	0	467
<i>Italy</i>	0	2	1	11	4	0	0	0	2	1	21
<i>Netherlands</i>	2	34	16	14	58	0	1	0	0	9	134
<i>Spain</i>	0	1	0	1	14	0	0	0	0	1	17
<i>Switzerland</i>	4	2	6	15	61	0	4	1	0	0	93
<i>Total cited</i>	42	46	481	117	629	10	16	29	7	53	1430

Examining the reasons why foreign courts have been cited, we distinguished between three categories.⁶⁷ First, the category “case history and jurisdiction“ refers to the situations where a prior decision by a foreign court is part of the fact pattern that led to the case pending by the citing court,⁶⁸ or where a court has to cite a foreign court if the latter had previously decided about jurisdictional issues in the same case. The second category is about cross-citations due to “international or European law”, be it EU law or the European Convention on Human Rights. The third one concerns cross-citations due to “*purely* comparative reasons”, i.e., comparisons not triggered by matters of international or European law.

⁶⁶ The full dataset is available at <http://cross-citations.blogspot.com/>.

⁶⁷ For a similar classification see J.M. Smits, *Comparative Law and Its Influence on National Legal Systems*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 513 (Mathias Reimann & Reinhard Zimmermann eds. 2006). See also BOBEK, *supra* note 8, at 21-34 (distinguishing between mandatory, advisable and voluntary use).

⁶⁸ For example, in a custody dispute a foreign court may already have issued a decision; or the court could simply mention that one of the parties had been ordered by a foreign court to take a particular action before the currently pending case arose.

Table 3: Number of types of cross-citations per citing court

	<i>case history or jurisdiction</i>	<i>international or European law</i>	<i>pure comparative</i>	<i>Total citations</i>
<i>Austria</i>	14	57	431	502
<i>Belgium</i>	4	14	45	63
<i>England</i>	9	51	9	69
<i>France</i>	11	2	5	18
<i>Germany</i>	5	16	25	46
<i>Ireland</i>	1	84	382	467
<i>Italy</i>	5	11	5	21
<i>Netherlands</i>	14	47	73	134
<i>Spain</i>	1	12	4	17
<i>Switzerland</i>	29	5	59	93
<i>Total cited</i>	93	299	1038	1430

Table 3 presents the results. It can be seen that the pure comparative category is the most frequent one. Yet, there are also a good number of cross-citations triggered by international or European law. In the normative debate, it is sometimes said that national sovereignty and the distinctness of national legal cultures are core arguments against cross-citations.⁶⁹ To this we can respond, that in Europe national legal systems are not entirely separate any more, and therefore some cross-citations are in any case to be expected.

Courts usually cannot avoid citations related to the case history and jurisdictional issues. But this type of citation is not exactly what we were looking for because such citations have no bearing on a possible influence of foreign legal arguments. Therefore, unless indicated otherwise, the quantitative parts of this article are based on the aggregates of the citations for the categories “international or European law” and “pure comparative law”.⁷⁰

In addition, we faced the problem that the subject matter jurisdiction of the ten courts is not identical. As Table 1 shows, the English, Irish, Swiss, Spanish, and Italian courts can decide about almost all areas of law, the Austrian, Belgium, French and Dutch ones, however, do not decide on administrative matters, whereas the jurisdiction of the German court is limited to matters of civil and criminal law. It was therefore crucial that we also identified the precise area of law of each decision that cites one of the other courts. Thus, we could limit our analysis to cross-citations in those areas of law for which all of the ten courts were competent, i.e. civil and criminal law and the corresponding procedural rules. Table 4 presents these results. In comparison to Table 2, it can be seen that, for example, the Ireland-to-England citations have been halved.

⁶⁹ See *supra* 2.

⁷⁰ In the qualitative taxonomy, *infra* 6., we differentiate between further types of cross-citations.

Table 4: Number of cross-citations per citing court for common areas of law

	Cited courts										Total citations
	Austria	Belgium	England	France	Germany	Ireland	Italy	Netherlands	Spain	Switzerland	
Austria	0	0	1	4	447	0	3	0	0	21	476
Belgium	0	0	0	37	6	0	0	6	0	1	50
England	2	1	0	9	10	7	0	6	2	0	37
France	0	2	0	0	3	0	1	0	0	1	7
Germany	34	0	1	2	0	0	1	1	0	2	41
Ireland	0	1	228	2	0	0	0	2	0	0	233
Italy	0	2	0	2	3	0	0	0	0	0	7
Netherlands	2	13	5	9	54	0	1	0	0	6	90
Spain	0	1	0	1	14	0	0	0	0	0	16
Switzerland	3	0	2	11	42	0	0	1	0	0	59
Total cited	41	20	237	77	579	7	6	16	2	31	1016

Even controlling for common areas of law, Table 4 shows that the total number of cross-citations per citing court is very diverse. Many reasons could account for those differences. It could be the case that some courts and judges are more open to foreign influences. Yet, it would be misleading to deduce from Table 4 that the courts with few cross-citations are just too parochial, because in some countries judges do not mention every argument that has influenced their decision-making. Notably this is the case in the French legal tradition. From a normative perspective this non-openness may be criticized: indeed it may be used to argue in favor of open cross-citations.⁷¹

More generally, citation style and legal reasoning differ widely between countries. This is also relevant for a normative evaluation of cross-citations since it may not be clear whether all cross-citations are embedded in a well-reasoned assessment of the foreign court's reasoning. This points towards the need for a qualitative examination of cross-citations, which we also present in this article.⁷² In addition, a good way to control for such differences between citing courts is to present the data according to the citations per all cross-citations of each particular court. Thus, Table 5 shows most clearly which of the cited courts each of the citing courts prefers to cite.⁷³

Table 5: Percentage distribution of cross-citations per citing court for common areas of law

	Cited courts										Total citations
	Austria	Belgium	England	France	Germany	Ireland	Italy	Netherlands	Spain	Switzerland	
Austria	0.00	0.00	0.21	0.84	93.91	0.00	0.63	0.00	0.00	4.41	100
Belgium	0.00	0.00	0.00	74.00	12.00	0.00	0.00	12.00	0.00	2.00	100
England	5.41	2.70	0.00	24.32	27.03	18.92	0.00	16.22	5.41	0.00	100
France	0.00	28.57	0.00	0.00	42.86	0.00	14.29	0.00	0.00	14.29	100
Germany	82.93	0.00	2.44	4.88	0.00	0.00	2.44	2.44	0.00	4.88	100
Ireland	0.00	0.43	97.85	0.86	0.00	0.00	0.00	0.86	0.00	0.00	100

⁷¹ See *supra* 2.

⁷² See *infra* 6.

⁷³ See also Gelter & Siems, *supra* note 6, for corresponding bar-charts and network pictures.

<i>Italy</i>	0.00	28.57	0.00	28.57	42.86	0.00	0.00	0.00	0.00	0.00	100
<i>Netherlands</i>	2.22	14.44	5.56	10.00	60.00	0.00	1.11	0.00	0.00	6.67	100
<i>Spain</i>	0.00	6.25	0.00	6.25	87.50	0.00	0.00	0.00	0.00	0.00	100
<i>Switzerland</i>	5.08	0.00	3.39	18.64	71.19	0.00	0.00	1.69	0.00	0.00	100
<i>Mean cited</i>	10.63	9.00	12.16	18.71	48.59	2.10	2.05	3.69	0.60	3.58	

Table 5 highlights in which instances a court has a favorite counter-part accounting for more than half of its cross-citations to the other nine courts. In four instances (Austria, Spain, Switzerland and the Netherlands) this most popular cited court is Germany, the most popular German court is the Austrian one,⁷⁴ the most popular Irish the English one, and the most popular Belgium the French one. By contrast, the citations of the English and French courts are more evenly split. Overall, the picture that emerges is that certain courts seem to be the most popular cited courts, but also that citations are not necessarily reciprocated by those cited court. Both of these observations may also be relevant for the normative debate about cross-citations. They may point towards high quality of decisions of the most cited courts. They also show that receiving many cross-citations does not require a strategic approach in also citing the courts of the other countries.⁷⁵

4. Exposing citation networks with quantitative methods

4.1. Introduction

The data presented in the previous section invites further analysis about the potential closeness of particular groups of countries, and how such similarities and differences relate to cultural, political and other factors. Such an analysis could start with certain theories why particular countries would be close to each other, for example, referring to legal traditions or language groups, and then test these theories by way of regression analysis. But it is also valuable to start without such *a priori* categories in order to find out whether particular countries seem to belong together. Several of such “structural equivalence measures” exist, but the most popular one is cluster analysis. Both cluster and regression analysis will be presented in the following.

4.2. Cluster analysis

As cluster analysis is barely used in legal research,⁷⁶ it is useful to start with a definition:

⁷⁴ Interestingly, the German court does not cite the Swiss court often in our study. It is sometimes suggested that Swiss civil law sources are more interesting for German courts than Austrian ones at least in the area of civil law, given that the Swiss codification is more modern. *E.g.* Georg E. Kodek, *Rechtsvergleichung als Auslegungsmethode im Privatrecht – akademischer Aufputz oder Bereicherung?* in RECHTSVERGLEICHUNG ALS JURISTISCHE AUSLEGUNGSMETHODE (Anna Gamper & Bea Verschraegen eds., forthcoming), section III. This observation is not supported by our data.

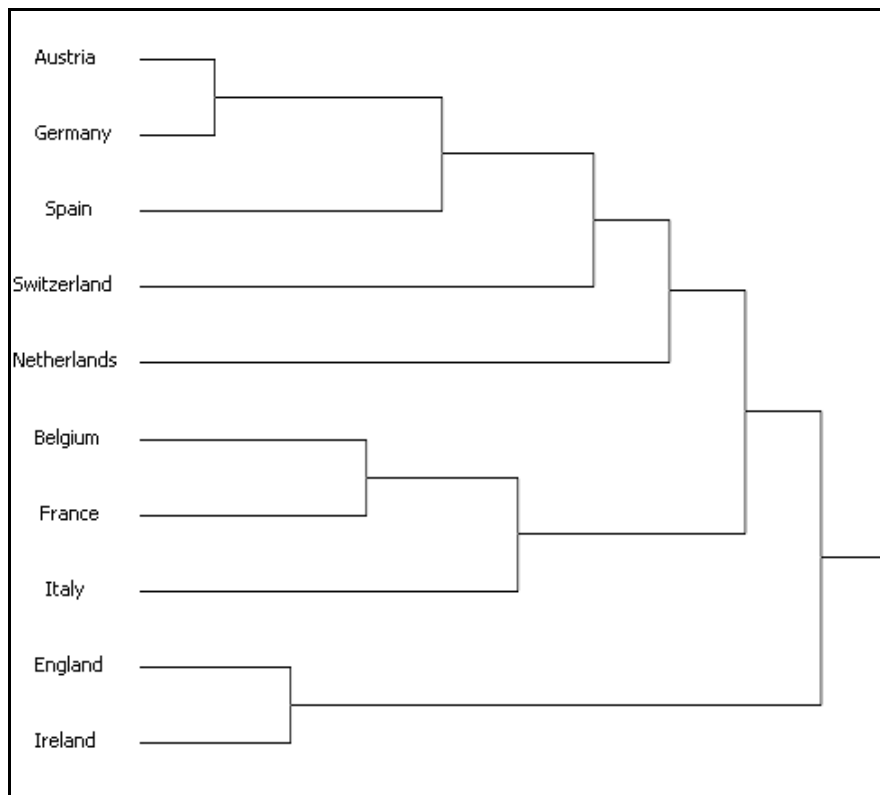
⁷⁵ See *supra* 2. (for the “legal backwater” argument).

⁷⁶ For rare examples see Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009); Frank B. Cross, Thomas A. Smith, & Anton Tomarchio, *The Reagan Revolution in the Network of Law*, 57 EMORY L.J. 1227 (2007-2008); Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309 (2007).

“Cluster analyses are multivariate procedures that divide a data-set into a number of subgroups (clusters). In general, they refer to measures of similarity or dissimilarity between observations with respect to a set of variables. These are then grouped into clusters of low within-cluster variance and high variance between clusters. In particular, this can be achieved by successively increasing the tolerated level of within-cluster dissimilarity. Starting with the lowest level of aggregation, where only identical observations are clustered together, observations and clusters are merged until the sample is allocated into two groups that constitute the top of the hierarchy”.⁷⁷

With the help of a network analysis program,⁷⁸ the data presented in Table 5 have been clustered using two methods. Figure 2 presents “hierarchical clusters”, “optimization clusters” follow in the subsequent Table 6.⁷⁹ These two approaches should not be thought of as opposing each other, as the broadly similar results illustrate.

Figure 2: Hierarchical clustering of cross-citations



The dendrogram of Figure 2 is “a graphic representation of the hierarchy of clusters”.⁸⁰ Moving from the left to the right, the clusters gain in members as the requirement to be part of a cluster

⁷⁷ Michael Graff, *Law and Finance: Common Law and Civil Law Countries Compared: an Empirical Critique*, 75 *ECONOMICA* 60, 72 (2008).

⁷⁸ UCINET, available at <https://sites.google.com/site/ucinetsoftware/home>.

⁷⁹ For the precise technical definitions of hierarchical and optimization clusters see

<http://www.analytictech.com/ucinet/help/2cvtid.htm> and <http://www.analytictech.com/ucinet/help/3j.x0e.htm>.

⁸⁰ Graff, *supra* note 77, at 74.

becomes less strict. To start with, there is just a cluster of Austria and Germany, then a cluster of England and Ireland, and then a cluster of Belgium and France. For comparative lawyers these groups of countries make immediate sense as they are part of the same legal families,⁸¹ while they may also confirm similarities in terms of geography and language. Then, more surprisingly, Spain joins the cluster of Austria and Germany, and Italy joins the one of Belgium and France. Subsequently, Switzerland and the Netherlands join the former cluster, and then these two clusters merge, with the result that all continental European countries are part of one cluster, whereas England and Ireland form another one.

This final division may point towards exceptionality of England and Ireland, but, in this respect, the optimization clusters of Table 6, below, do not fully confirm such a result. Optimization clusters require that the researcher specifies in advance how many clusters shall be created. In addition, Table 6 indicates how well the respective clusters explain the entire dataset (R^2) and how dense these clusters are.

Table 6: Optimization clustering of cross-citation

Number of clusters	R^2	Countries (density of clusters in brackets)				
		5	0.551	Italy (97.850)	Belgium, France (74.568)	England, Ireland (78.118)
4	0.484	Italy, Belgium, France (51.950)		England, Ireland (78.118)	Netherlands, Switzerland (51.015)	Austria, Germany, Spain (61.988)
3	0.369	Italy, Belgium, France (51.950)		England, Ireland, Netherlands (48.107)	Austria, Germany, Spain, Switzerland (46.331)	
2	0.189	Italy, Belgium, France, England, Ireland (32.333)			Austria, Germany, Spain, Netherlands, Switzerland (36.487)	

The options with five and four clusters in Table 6 confirm the results of the hierarchical clusters in Figure 1. However, in the variant with three clusters the Netherlands joins England and Ireland but then separates from them in the final variant, with England and Ireland joining the Italy-Belgium-France cluster. Re-visiting Table 5, the position of the Netherlands in the third variant seems to go against the frequent citations from the Netherlands to Germany, but it reflects that the Netherlands has been most frequently cited by England. With respect to the final variant, the data make clear that what hold England-Ireland and Italy-Belgium-France together are the relatively frequent citations from England to France.

As a result, the cluster analysis shows that cross-citations are not somehow random but clustered within smaller or larger groups of countries. This speaks against the argument that courts would just “cherry-pick” any foreign decision that suits their result;⁸² rather, it seems that within groups of countries cross-citations are relatively common and accepted. However, comparing the two types of cluster analysis, it has also been found that as connections become looser regularities become less clear. Applying regression analysis may provide a less ambiguous result.

⁸¹ See, e.g., Daphne Barak-Erez, *The Institutional Aspects of Comparative Law*, 15 COLUM. J. EUR. L. 477, 487 (2009) (“Courts find it easier to learn from precedents which have been formulated within their so-called ‘legal family’ (...) or their legal culture understood in the broad sense.”)

⁸² See *supra* 2.

4.3. Regression analysis

Regression analysis is a widely used method in empirical legal scholarship. On the most basic level, regression analysis seeks to establish a correlation between two (or more) factors within a statistically appreciable margin of certainty.

For a companion article, we performed a number of regression models in order to determine which factors correlate most strongly with a high propensity of the supreme court in the countries in our sample to cite the supreme court of another of these countries.⁸³ Under what circumstances would we *realistically* expect cross-citations, i.e. judicial openness to foreign influence could be driven by a number of indicators? The observations in our analysis are all possible combinations of pairs of a citing and cited country (in both directions). We thus identified explanatory variables that defined the relationship between the two countries. These factors broadly fall into four categories: characteristics of the cited country, language, legal origin, and geographic and cultural proximity.

First, population is one the main characteristic relevant for the cited country. Larger countries often influence smaller countries in a variety of ways, particularly when they are culturally relatively similar. The legal systems of a pair consisting of a larger and a smaller country often stand in an asymmetric relationship, with lawyers, judges, and legal scholars in the smaller country following legal developments in the larger one quite closely, while jurists from the larger country will generally ignore those in the smaller one. Moreover, since larger countries normally produce a larger number of cases, new legal problems often need to be addressed there first.

Besides population size, we included the natural logarithm of the GNP per capita. Richer countries might be cited more often because they are perceived as more successful, to which their legal system may have contributed. Moreover, we included an index of corruption as a control variable.⁸⁴ A corruption-free legal system might be perceived as providing better and possibly less biased legal innovations.

Second, legal ideas from abroad are much more accessible if they are expressed in language the reader can easily understand.⁸⁵ In our study, we approached the issue from two directions. First, we created a variable that looks at whether the citing and cited countries share the same major national language (defined as being spoken by 20% of the population or more). Second, we used Eurobarometer data what percentage of the population of the citing country speaks the language of the cited country.⁸⁶

Third, in traditional comparative law scholarship, European legal systems are typically divided into “common law” and “civil law” jurisdictions, which is said to be derived from Roman law on the other. Frequently, a distinction between French, German, and Scandinavian civil law is made.⁸⁷ This distinction has been picked up by economists during the past 20 years and has thus sparked a voluminous literature on the possible economic consequences of countries’ differ-

⁸³ Gelter & Siems, *supra* note 7.

⁸⁴ The data come from Simeon Djankov, Rafael La Porta Florencio Lopez-de-Silanes & Andrei Shleifer, *Courts*, 118 Q. J. ECON. 453 (2003) [data available at <http://faculty.tuck.dartmouth.edu/images/uploads/faculty/rafael-laporta/Courts-LuxMundi.xls>].

⁸⁵ See Mathias M. Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L.J. 55, 72-73 (2007) (discussing language as an explanatory factor for the cross-fertilization of legal ideas).

⁸⁶ EUROBAROMETER, EUROPEANS AND THEIR LANGUAGES 152-154 (2006), at http://ec.europa.eu/public_opinion/archives/ebs/ebs_243_en.pdf. For Switzerland we used the data collected by the Institut für Sprachwissenschaft at the University of Bern, *see* http://www.isw.unibe.ch/content/forschung/archiv_projekte/sprachkompetenzen/index_ger.html.

⁸⁷ KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (3rd ed. 1998).

ent “legal origins.”⁸⁸ While the mechanism for the persistence of these apparent effects is somewhat mysterious,⁸⁹ it is possible that shared legal origins are connected to common educational structures and the frequent migration of students from “recipient” countries to origin countries.⁹⁰ In Europe, this factor may be less significant than within a post-colonial relationship between two-countries. Arguably, a shared legal origin might induce cross-citations, which might be a factor driving the results reported in the legal origins literature.

However, some country classifications are controversial. In our sample, the Netherlands is most problematic; it is classified as belonging to the French group in the “legal origins” literature, while some comparative lawyers argue that Dutch law has gradually moved away from France and closer to German law.⁹¹ We therefore also use a separate “legal families” variable that classifies the Netherlands as part of the German group.

The fourth group of variables relates to non-legal factors that may bring countries closer to each other. Courts from countries that are more similar to each other in terms of culture, its economic policies, and geography may be more likely to cite each other. Two separate sets of variables are commonly used to measure culture, namely indexes developed by Hofstede⁹² and Schwartz.⁹³ Both indexes are based on qualitative survey among similar situated individuals in different countries. On the basis of each index, we created an index in an attempt to measure the cumulative cultural difference between the citing and cited countries.

Furthermore, we tried to measure whether there is an impact of the respective “variety of capitalism” dominating each country. Deferring to the “varieties of capitalism” literature in economic sociology, which suggests that the coordination of economic activities varies across countries along a number of dimensions, we hypothesized that a legal argument might be more persuasive if taken from a country following a similar approach toward economic organization. Thus, we created a variable based on a study⁹⁴ assigning countries a score between 0 to 1 depending on whether they prefer “strategic coordination” or “market coordination.”

Finally, we used data from the Centre d’Etudes Prospectives et d’Informations Internationales (CEPII)⁹⁵ to create an index of the geographical distance between each of the countries in our sample, assuming that legal arguments might travel more quickly to closer locations. We used a weighted measure that looks at the distance between the main economic hubs of the two countries weighted by its share of the country’s total population.

⁸⁸ See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) (providing an overview).

⁸⁹ See John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Legal Rules Evolve: Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579 (2009).

⁹⁰ Holger Spamann, *Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law*, 2010 BYU L. REV. 1813.

⁹¹ Jan Smits, *Netherlands* in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 620 (Jan Smits ed. 2nd ed. 2012).

⁹² GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980).

⁹³ E.g., Shalom H. Schwartz, *A Theory of Cultural Values and Some Implications for Work*, 48 APPLIED PSYCHOL. INT’L REV. 23 (1999); Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, 25 INT’L REV. L. & ECON. 229 (2005).

⁹⁴ Peter A. Hall & Daniel W. Gingerich, *Varieties of capitalism and institutional complementarities in the macroeconomy: An empirical analysis*, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES DISCUSSION PAPER 04/5, Table 2 (2004), available at http://www.mpifg.de/pu/dp_abstracts/dp04-5.asp.

⁹⁵ See <http://www.cepii.fr/anglaisgraph/bdd/distances.htm>.

Obviously, there are other factors that may be relevant but not captured by these variables, such as citation and legal writing styles⁹⁶ or staffing of the court, and the social composition and educational background of the judiciary.⁹⁷ We use country-level dummies for both citing and cited courts to capture these factors.

Table 7: Negative Binomial Regression

<i>INDEPENDENT VARIABLE</i>	(1)	(2)		
(constant)	-8.754***	-8.077***	<u>Dependent</u>	<i>number of cross-citations (standard</i>
Population of cited country	.0374***	.0389***	<u>variable:</u>	<i>errors clustered by citing court)</i>
Corruption score of cited country	.924***	.753***		
GNP of cited country			***	<i>significant at the 1% level</i>
Same language		1.122*		
Language skills	3.073***	2.106***	**	<i>significant at the 5% level</i>
Same legal origin	.629**			
Same legal family		.599***	*	<i>significant at the 10% level</i>
Cultural difference	-1.323***	-.956**		
Coordination difference	-1.692**	-1.475*	#	<i>significance denotes highest degree</i>
Geographic distance				<i>(individual parameter estimates not</i>
Dummies citing court	#***	#***		<i>displayed)</i>
Dummies cited court				
Log Pseudolikelihood	-142.820	-138.374		
N	90	90		

We used a “negative binomial regression model” looking at the absolute numbers of citations of one country to another one as dependent variables; consequently we have 90 observations that corresponded to the 90 possible relationships between cited and citing country.⁹⁸ Table 7, above, reports the regression results for the best two of our models.⁹⁹ As can be seen, these two regressions both omit GNP and geographic distance, which turned out not to be statistically significant in the regressions not reported here. Similarly, we eliminated the cultural variable based on the Hofstede survey, which turned out not to correlate with cross-citations in any regression model, contrary to the more recent survey by Schwartz.

In all of our regressions, cross-citations correlate positively with the population of the cited country, a low level of corruption, language skills. A greater distance in the “coordination index” inspired by the varieties of capitalism literature is associated with a smaller number. The legal origins variable is only significant when “same language” is not included in the model. Our other regressions also indicate that shared legal families and cultural difference overlap to some

⁹⁶ In some countries, notably France and Italy, there are legal or cultural constraints against citing anything beside the applicable codes and statutes. *See, e.g.,* Marquesinis & Fedtke, *supra* note 42, at 26-30.

⁹⁷ *See* BELL, *supra* note 65, at 13-24; CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 18-44 (2001).

⁹⁸ Since the dependent variable constitutes count data, a regular OLS regression model would not have provided a good fit. The acceptable options for count data (where many observations take low values or even zeros) are Poisson or negative binomial models. Since tests indicated overdispersion, a negative binomial model seemed preferable for our dataset. For further technical details, *see* Gelter & Siems, *supra* note 7, section III.B.1.

⁹⁹ In the original article these are models 3 and 6 in Gelter & Siems, *id.*, Table 8.

extent, given that the coefficient for each of them is reduced if the other variable is included.¹⁰⁰ Intuitively, the reason is likely the substantial overlap between culture and legal tradition.

In order to ensure that these results are “robust”, we performed a number of additional, modified regressions. Our results hold even when we eliminate the outliers, i.e. the large number of citations of England by the Irish court and of Germany by the Austrian court. Similarly, almost all of our results hold when all zeros are dropped from the regression.¹⁰¹ Thus, overall, the regression results show that there is a good deal of regularity in the way courts cite judgments from other countries. As already found in the preceding cluster analysis, this challenges the view that cross-citations are just subjective “cherry picking”.

We can also classify the reasons why a particular court’s decisions are cited across borders more often than others into three groups:

- (1) *Accessibility*: Citations will only be made if the decisions are available and comprehensible to an international audience. This is shown primarily by the language variables. If we had variables measuring the degree to which decisions of a particular court are available internationally (in print or online), we might discover a related effect. Geography could conceivably matter for accessibility, but our regression did not confirm this.
- (2) *Authoritativeness*: Some courts seem to be cited because their views carry a greater degree of (persuasive) authority than others. The absence of corruption may indicate that a court’s views are more likely than not the result of unbiased judicial deliberation, as it reflects a well-functioning judicial and administrative system. The two countries that do least well on the corruption index (Italy and Spain) are rarely (if ever) cited.

A large population in its jurisdiction may support a supreme court’s authority for two reasons. First, sheer numbers make the jurisdiction inherently more important. Second, in a larger jurisdiction, important and new legal questions are more likely to reach the highest court earlier than elsewhere, simply because the probability of a particular fact pattern arising is higher *ceteris paribus*. As we have seen above,¹⁰² a larger population (or GDP) does not necessarily correspond to an equivalent number of supreme court cases. However, new and innovative legal questions will rarely be cabinied with the lower courts and will reach the country’s highest court nonetheless.

- (3) *Similarity*: One court’s views may seem more persuasive to another country’s highest court because of similarities between the two countries and their legal systems. If two countries are close to each other in legal and cultural traditions, and if they occupy similar positions on the “varieties of capitalism” scale, the responses to legal and policy issues addressed by a court in one country may provide a better fit in the other because the effects will be similar.

In the companion article we present calculations showing which of these variables are the main ones that determine cross-citations. The main finding is that the first and second explanations carry more weight; in particular the variables on population of the cited country and a low level of corruption, native languages and language skills dominate our results. These variables outperform the two measures for different legal traditions, as well as culture and political economy.¹⁰³

¹⁰⁰ For a more thorough analysis, see Gelter & Siems, *id.*, section III.B.2.

¹⁰¹ Gelter & Siems, *id.*, section III.B.3.

¹⁰² *Supra* section 3.2.

¹⁰³ For more details, see Gelter & Siems, *supra* note 7, section III.B.2-4.

For the normative debate a number of lessons can be drawn. With respect to the first group of explanations, the relevance of languages is a factor that supports the use of cross-citations as it shows that judges want to be able to properly understand the decision of a foreign court. The second group also speaks in favor of cross-citations. The relevance of a low level of corruption and the potential model of larger jurisdictions lead us to suspect that the quality of a legal system tends to make it attractive for cross-citations. This may mitigate some of the concerns of critics since, for example, courts are not likely to cite countries with a less reputable legal system only to justify a particular result.¹⁰⁴

Finally, the statistical significance of the third set of explanations shows that courts are interested in the legal, economic and cultural “fit” of the foreign case law. However, we have also seen that these explanations play a more limited role than the other factors. This may cause concern as it may indicate a potential mismatch between the foreign law and the society in question. Legal origins also occupy a relatively subordinated spot compared to the other factors. If one takes the view that similarities between legal systems provide the best justification for citations of foreign law, one might be more inclined to side with skeptics as a result. However, the difference may not matter that much because both similarities in the law and in culture are also positively correlated with language, which is the one pragmatic criterion that turned out to be one of the most important factors.

Moreover, a possible explanation is that broad categories such as civil and common law are unsatisfactory since today legal similarities are often related to specific fields of law.¹⁰⁵ The following will therefore explore possible variations in further detail: in Section 5 as those relate to different areas of law, and in Section 6 for different types of cross-citations.

5. Citations by field of law

5.1. Division into fields of law

In our study, we also collected data on the fields of law in which cross-citations occur. One might expect more citations in a field where two countries’ laws are relatively similar, for example, because it is strongly permeated by EU directives, or because one country copied the other country’s law at some time. As in the previous sections, in general, we leave out citations relating to the case history and jurisdictional issues and continue to investigate cross-citations relating both to issues where the basis for the cross-citation is internationally or European harmonized law, and those that are met for purely comparative reasons without a specific international aspect to either the case or the underlying law.

¹⁰⁴ Compare Justice Robert’s concern about the law of Somalia noted above, *supra* note 29 and accompanying text.

¹⁰⁵ For example, given that international treaties and conventions play a different role in different areas of law, *see* Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 TUL. L. REV. 1103, 1114 (2001).

Table 8: Classification of cases by field of law

<i>Field</i>	<i>Subfields</i>
<i>Constitutional law</i>	<i>constitutional law (general), human rights (also in the context of criminal procedure), public international law</i>
<i>Administrative law</i>	<i>administrative law (general), data protection (privacy), food and drug law, immigration, social insurance, tax law, traffic law, public liability, public tender offers</i>
<i>Civil law</i>	matters typically addressed in civil codes, such as contracts, torts, family law and inheritance; consumer protection, landlord-tenant law.
<i>Criminal law</i>	substantive criminal law including sentencing
<i>Procedural law</i>	civil procedure including enforcement and foreclosure (excluding insolvency); conflict of laws (both private international law and issues of jurisdiction); arbitration; criminal procedure
<i>Commercial law</i>	core commercial law (typically included in commercial codes); corporate and partnership law; antitrust and unfair competition; banking, insurance and securities law (excluding regulatory aspects), insolvency law, international trade; intellectual property, <i>employment law</i> .

Initially we classified our citations in 31 categories. Given the limited number of cases in most fields, we regrouped them into six broader ones, as shown in Table 8. The categorization follows common practice in how the fields are divided up in much of Europe. Private law is split in “core” civil law and commercial law. In the public law area, we distinguish constitutional law and administrative law (which includes, e.g., public liability). Criminal and procedural law are kept separate. Obviously, the classification has a subjective element, but it also reflects European traditions how different areas are split up in legal codes, treatises, and teaching. The relatively broad civil law and commercial law fields may seem unusual to American readers. However, classic civil codes typically comprise the interwoven fields of contracts, torts, and property, as well as family and inheritance law. Consumer protection and landlord-tenant law, even though they are sometimes “outsourced” into separate statutes, are considered essentially subfields of contract law. The commercial law category includes all business law and intellectual property (IP) areas, which are traditionally thought of as commercial law areas. From a European perspective, the decision most strongly in need of justification was the lumping of civil and criminal procedure, which are sometimes categorized with the respective substantive areas. But here we decided to follow the more Anglo-American view that procedural rules are bound to share many common features.

One of the difficult issues in the data collection process was how to assign any specific case to a particular area. In real life, many, if not most cases touch upon various fields. Since our research question was to identify citations – and not cases – by field, we read the respective decision to determine the context of the particular citation and assigned the field based on what legal issue was discussed. When the citation concerned several issues, we tried to determine which of them dominated. In those rare cases where there were several citations to the same foreign court, we also had to make a judgment call which one was more important. When an opinion cited several foreign courts, we counted each of them as a separate citation.

Table 9: Classification of cases by field of law

<i>Field</i>	<i>Constitutional law</i>	<i>Administrative law</i>	<i>Core civil law</i>	<i>Criminal law</i>	<i>Procedural law</i>	<i>Commercial law</i>
<i>All citations</i>	89	201	311	55	244	437
<i>Core areas</i>	0	12	311	55	244	394

As explained in section 3.3, we ultimately eliminated cross-citations outside a certain “common core” of areas of law from our dataset to avoid a skew in favor of certain jurisdictions (these are the ones in *italics* in Table 8). Our analysis thus only covers those fields over which all ten courts retain jurisdiction. As shown in Table 9, this eliminates all constitutional law and eviscerates administrative law citations, most of which were between Ireland and England. The number of citations in the civil law, criminal law and procedural law areas remains the same. The number of commercial law citations is also slightly decreased, given that some countries have specialized high courts in the area of employment law.

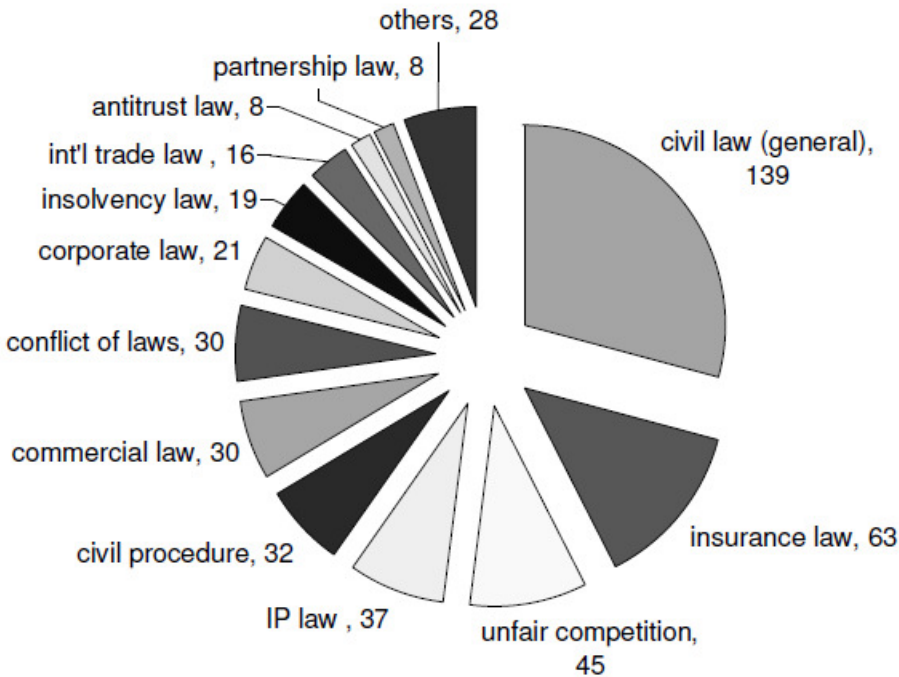
5.2. Empirical data per citing court

Table 10, below, shows the number of citations in the five main fields of law organized by the citing country, both in absolute numbers and percentage-wise. In addition, as the Austrian data account for almost half of our cross-citations, we can provide further details: thus, Figure 3, below, presents the cross-citations of the Austrian court for each subfield of law with more than five citations.

Table 10: Fields of law by country of citing court

	<i>Administrative law</i>	<i>Core civil law</i>	<i>Criminal law</i>	<i>Procedural law</i>	<i>Commercial law</i>	<i>Total</i>
<i>Austria</i>	8	142	5	67	254	476
	1.68%	29.83%	1.05%	14.08%	53.36%	100%
<i>Belgium</i>	0	25	5	11	9	50
	0.00%	50.00%	10.00%	22.00%	18.00%	100%
<i>England</i>	0	2	0	19	16	37
	0.00%	5.41%	0.00%	51.35%	43.24%	100%
<i>France</i>	0	1	0	5	1	7
	0.00%	14.29%	0.00%	71.43%	14.29%	100%
<i>Germany</i>	0	5	0	6	30	41
	0.00%	12.20%	0.00%	14.63%	73.17%	100%
<i>Ireland</i>	0	95	0	96	42	233
	0.00%	40.77%	0.00%	41.20%	18.03%	100%
<i>Italy</i>	0	4	0	2	1	7
	0.00%	57.14%	0.00%	28.57%	14.29%	100%
<i>Netherlands</i>	4	19	19	19	29	90
	4.44%	21.11%	21.11%	21.11%	32.22%	100%
<i>Spain</i>	0	0	15	1	0	16
	0.00%	0.00%	93.75%	6.25%	0.00%	100%
<i>Switzerland</i>	0	18	11	18	12	59
	0.00%	30.51%	18.64%	30.51%	20.34%	100%
<i>Total</i>	12	311	55	244	394	1016

Figure 3: Cross-citations of the Austrian Supreme Court by subfields of law



In Austria, more than half of the cross-citations are in commercial law, which is not surprising, given that the cited country in the vast majority of Austrian cross-citations cases is Germany. Historically, all the fields summarized under the “commercial law” heading have been very similar in those two countries, in particular since 1938, when the German Commercial Code and several other business law statutes were introduced in Austria.¹⁰⁶ Interestingly, the largest number of commercial cases in which the Austrian cites the German supreme court concern insurance law, i.e. the *Versicherungsvertragsgesetz* (Insurance Contract Act). The German Act was introduced in Austria in 1939, and a recodification that closely follows German law was enacted in 1958.¹⁰⁷ Even more than in other commercial law fields, the text was for a long time almost identical to the German one.¹⁰⁸ Only reforms in the 1990s and 2000s, particularly a large reform in Germany in 2008, led to substantive divergence.

The second largest group of commercial law cases concerns the law of unfair competition (*Gesetz gegen den unlauteren Wettbewerb*), where there are more significant differences between the statutes, but which is in the end largely case-based. The Austrian courts have generally adopted German models under what circumstances business policies are considered to violate public policy (*gute Sitten*).¹⁰⁹ IP law, which is in large parts harmonized through EU directives, follows

¹⁰⁶ E.g., Mathias M. Siems, *The Divergence of Austrian and German Commercial Law: What Kind of Commercial Law Do We Need in a Globalised Economy?* 2004 INT'L & COMP. COM. L. REV. 273 (discussing the introduction of German commercial law in Austria).

¹⁰⁷ Bundesgesetz vom 2. Dezember 1958 über den Versicherungsvertrag (Versicherungsvertragsgesetz 1958), BGBl (AUSTRIA) 1959/2, most recently modified by BGBl (AUSTRIA) I 2012/34.

¹⁰⁸ Gesetz zur Reform des Versicherungsvertragsrechts (VVRG) vom 23.11.2007, BGBl (GERMANY) I S. 2631.

¹⁰⁹ See, e.g., Christian Handig, *The Unfair Commercial Practices Directive – A Milestone in the European Unfair Competition Law?* 2007 EUR. BUS. L. REV. 1117, 1132 (“since 1923 Austria has had the same General Clause as Germany, until its recent reform in 2004”).

in the 3rd position. Generally commercial law, which includes, for example, compensation claims by commercial agents, bills of exchange, commercial contracts, and commercial firm names, also provides a relatively large number of cross-citations, followed by corporate, insolvency, international trade, partnership, and antitrust law.

Interestingly, the Austrian Supreme Court has also cited its German counterpart 138 times in general civil law cases (including consumer protection and landlord-tenant law), and three times in family and inheritance law cases. This is may be more than one might expect, given that the differences in civil law are far greater than in commercial law.¹¹⁰ It may in part reflect the larger number of civil law cases and also illustrate how legal ideas can diffuse between jurisdictions with similar language. The Austrian Civil Code is much older than the German one (the codes were enacted in 1812 and 1900 respectively), but its interpretation has been influenced by German law since the German Civil Code (BGB) came into existence. The same phenomenon may explain the cross-citations in procedural law: while 23 concern conflict of laws and jurisdictional issues, 21 relate to civil procedure in a more narrow sense, and two to criminal procedure. Overall, the influence of German law on Austrian law is hard to overestimate: Georg Kodek, a sitting justice of the Austrian Supreme Court, recently even suggested that recourse to German law has become so common that is almost necessary to explain when it is not appropriate (usually because of differences in the law).¹¹¹

In Ireland, the country with the second largest number of cross-citations (where the cited court is the UK in the vast number of cases), the pattern is relatively similar. Our data (based on an estimate)¹¹² indicate 76 cases where the UK court is cited relating to general civil law (such as tort law or land law) and 19 relating to family and inheritance law. The focus of civil procedure citations is different than in the relationship between Austria and Germany. We have no citations on conflict of laws, but 19 on arbitration. There are 57 citations on general civil, 38 on commercial law and 19 citations on criminal procedure. All of these are areas where the law of Ireland is fairly similar to England and other common law countries.

The Netherlands, Switzerland and, to a lesser extent, Belgium are often characterized as legal traditions that have been influenced by both the German and the French civil law tradition.¹¹³ This is also apparent in the cross-citations in different areas of law. In the Netherlands, the picture is fairly complex, as a variety of countries are cited.¹¹⁴ The most cited country, Germany, is referred to 10 times for civil law, 15 times for criminal law, and 7 times for criminal procedure, and 6 times for IP; most other citations address various commercial law issues. French civil law, by contrast, is cited only 4 times. The Dutch Supreme Court seems particularly eager to

¹¹⁰ Regarding commercial law (including business associations), *see*, among other laws, Erste Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich, RGBL (GERMANY) 1938, S. 385 (introducing the German *Aktiengesetz* in Austria); Zweite Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich, RGBL (GERMANY) 1938, S. 988 (introducing transitory rules for corporations in Austria); Dritte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich, RGBL (GERMANY) 1938, S. 1428 (introducing the German commercial code and rules regarding commercial papers in Austria); Verordnung zur Einführung des Gesetzes über die Verwahrung und Anschaffung von Wertpapieren im Lande Österreich, RGBL (GERMANY) 1938, S. 1848 (introducing German laws on depositing securities); Vierte Verordnung zur Einführung handelsrechtlicher Vorschriften im Lande Österreich, RGBL (GERMANY) 1938, S. 1999 (introducing the remaining provisions of the commercial code together with transitory provisions as well as laws relating to the commercial register in Austria).

¹¹¹ Kodek, *supra* note 74, section V.B.

¹¹² *See supra* note 64.

¹¹³ *See* Gelter & Siems, *supra* note 7, section III.A.3.

¹¹⁴ *See generally supra* Table 2.

look abroad in cases of criminal procedure (citing Germany 7 times, Belgium 5 times, Austria and Switzerland twice each, and Belgium, France, and Italy once each), and in IP (citing Germany 6 times, England 4 times, France twice and Belgium once). The Swiss pattern is similar, with Germany being cited 11 times for civil law and 10 times for criminal law, 8 times for criminal procedure. Interestingly, France is the only country cited for corporate law (3 times), while the same country is cited twice for civil law and civil procedure each. In Belgium, citations to French jurisprudence dominate, with 18 civil-law citations, 3 family and inheritance citations, which seems to show the lasting influence of the French civil law tradition in Belgium. Besides a few others, there are also 6 citations to the French courts on issues of civil procedure. Interestingly, Germany is also cited 3 times on civil law issues and once on a family/inheritance issue.

The German citation pattern seems to reaffirm the idea of legal families, since the target of the vast majority of the citations is Austria (the only country cited more than twice). Here we have 12 IP cases, 5 insurance law cases, and 5 cases on the law of unfair competition. As indicated earlier, the statutory and theoretical basis for which is very similar in both countries; moreover there are 4 citations on matters of international trade. But even in areas where the law is more different, namely civil law (3), family and inheritance law (1) and civil procedure (4), there are some citations of the Austrian Supreme Court.

England, another country that is rather an exporter than an importer of legal ideas, has a more balanced citation portfolio. The most interesting observation is that the court tends to look abroad most frequently in the field of conflict of laws, where France is cited 6 times, Germany and the Netherlands 4 times each, and Spain twice. There are also 5 IP citations to Germany, 3 to France, as well as one for Austria and the Netherlands each. This may reflect how IP law is heavily influenced by the EU.

In Spain, which is almost exclusively an “importer” country, all citations are in the field of criminal law, except for one relating to criminal procedure (citing Germany). Germany is cited 13 times for criminal law, France and Belgium once each. Apparently, this reflects that Spanish criminal law has been influenced by German law, whereas in other fields there are more pronounced similarities to the French legal tradition.¹¹⁵

In the two countries with the smallest number of cross-citations, France and Italy, the patterns are probably as far away from a representative sample as possible. A notable aspect is that in France (where almost all citations were made by the reporting judge)¹¹⁶ most seem to be on civil procedure, specifically regarding the question whether France has jurisdiction over foreign nationals (citing Belgium, Italy and Switzerland once). In one case, the reporting judge discusses the German Supreme Court’s propensity to judicial law-making. Besides that, there is only one case on IP, and a civil law case in which the court cites the European Court of Human Rights’ reference to the Belgian court’s jurisprudence.

Relating these findings to the normative debate, it can be seen that courts tend to refer to foreign judgments in areas of law where this is seen as helpful for this particular court. Thus, we do not observe “cherry-picking” for results but courts consider which other country’s law is relatively similar in a particular area of law – possibly leading to the emergence of a “common core” for groups of countries in these areas of law. It can also be suggested that a targeted use of foreign case law in particular areas helps to improve the quality of court decisions as such foreign law is compatible but also potentially more advanced than the domestic law in this specific area.

¹¹⁵ See ZWEIGERT & KÖTZ, *supra* note 87, at 104-109.

¹¹⁶ See *supra* 3.2.

5.3. Empirical data per cited court

It is also interesting to identify which courts are most frequently cited in particular areas of law. If one took just the absolute figures, however, such data would not be very revealing as they would be almost entirely dominated by the citations from Austria to Germany and Ireland to England. Thus, for the purposes of Table 11, we calculated how often the other courts would have been cited, if each court had the same number of cross-citations, and then presented these preferences in terms of percentages of all citations in the four main areas of law.¹¹⁷

Table 11: Most popular cited courts per areas of law (normalized)

	<i>Core civil law</i>	<i>Criminal law</i>	<i>Procedural law</i>	<i>Commercial law</i>
<i>Austria</i>	6.76%	0.00%	4.54%	28.86%
<i>Belgium</i>	8.37%	5.20%	13.97%	1.13%
<i>England</i>	11.13%	0.00%	10.45%	5.53%
<i>France</i>	25.34%	10.08%	15.34%	12.28%
<i>Germany</i>	42.69%	82.87%	33.90%	42.68%
<i>Ireland</i>	1.75%	0.00%	2.14%	1.39%
<i>Italy</i>	0.00%	0.00%	6.65%	1.10%
<i>Netherlands</i>	1.71%	1.24%	4.31%	4.00%
<i>Spain</i>	0.00%	0.00%	0.71%	0.70%
<i>Switzerland</i>	2.26%	0.61%	7.98%	2.32%
<i>Total</i>	100 %	100%	100%	100%

Table 11 shows that Germany is the most popular cited court in all four areas of law, in particular with an astonishing proportion of more than 80% in criminal law. French and England are the next most-popular cited courts, in particular in core civil law and procedural law. In addition, Belgium performs well in procedural law and Austria in commercial law.

These results confirm the regular nature of cross-citations. As eight of our ten countries are civil law countries, it was to be expected that German and French courts are the most popular courts to be cited. They also confirm that German law has been influential in some countries traditionally associated with the “French legal origin”, such as Italy and Spain, in particular in criminal law. With respect to the popularity of England, it is plausible that private and procedural law have a greater appeal to other countries than criminal law as the latter is very different from the laws of continental European countries. The relatively frequent citations of the Austrian court in commercial law seem to reflect that here Austrian law is more similar to the laws of other countries than in many other areas of law (including core civil law, as explained). And the relative popularity of the Belgium court in procedural law reflects similarities to the French and Dutch law in this area.

5.4. Empirical data per reasons to cite

Table 12, below, turns to the relationship between the areas of law and the reasons to cite foreign courts, using the complete dataset.¹¹⁸ It can be seen that in “case history or jurisdiction” criminal

¹¹⁷ We omitted administrative law, as the just 12 citations (see Table 10) do not enable a sufficient examination of the most popular cited courts.

¹¹⁸ See *supra* Table 2.

and procedural law perform above average, in “international or European law” this is the case for constitutional law, and for “pure comparative” it is core civil law.

Table 12: Areas of law and reasons to cite

	<i>case history or jurisdiction</i>	<i>international or European law</i>	<i>pure comparative</i>	<i>Total</i>
<i>Constitutional law</i>	4	82	7	93
	4.30%	88.17%	7.53%	100%
<i>Administrative law</i>	6	43	158	207
	2.90%	20.77%	76.33%	100%
<i>Core civil law</i>	16	27	284	327
	4.89%	8.26%	86.85%	100%
<i>Criminal law</i>	19	14	41	74
	25.68%	18.92%	55.41%	100%
<i>Procedural law</i>	34	55	189	278
	12.23%	19.78%	67.99%	100%
<i>Commercial law</i>	14	78	359	451
	3.10%	17.29%	79.60%	100%
<i>Total cited</i>	93	299	1038	1430
	6.50%	20.91%	72.59%	100%

Again we suggest that this confirms the fairly regular and non-arbitrary nature of cross-citations. It is plausible that “pure comparative” arguments are most pronounced in core civil law since here relatively general legal questions tend to be posed (e.g., when is a contract concluded? what constitutes a tort?) that make it potentially rewarding to look for inspiration from other legal systems. One possible explanation is that civil codes tend to be relatively generally formulated. A field of law that is not very “dense” in terms of the number and specificity of legal rules will likely invite more frequent recourse to more general legal principle, which creates space which can be more easily filled with cross-citation.¹¹⁹ With respect to “international or European law”, we observe, for example, the impact of international and European human rights law on matters of constitutional law, whereas core civil law is only affected in relatively few cases. In the category “case history and jurisdiction” it is notable that procedural law includes questions of conflict of laws (see Table 8, above), and that in some criminal law decisions it may be necessary to consider the sentences already imposed by foreign courts.

Another question interesting to explore would be whether cross-citations are, overall, disproportionately more frequent in particular areas of law. For example, one may expect that in relatively international fields, such as commercial law, courts feel more inclined to refer to court decisions from abroad than in those of family law. Unfortunately, in order to provide a comprehensive answer to this question, it would be necessary to have data on all domestic citations of the ten supreme courts in all areas of law. Still, some indications can be provided. For example, we can establish that only about 1% of our cross-citations (12 out of 1016 decision) concern family law – while it seems not unlikely that more than 1% of all supreme court cases concern matters of family law. Potentially, this may reflect cultural differences that exist even between European countries in this field. However, we do not claim that the supreme courts of our study do not

¹¹⁹ Kodek, *supra* note 74, section VII.

also use foreign precedents for topics where moral questions are at stake.¹²⁰ For example, researchers have found that in Europe a number of courts have considered foreign precedents in cases of “wrongful birth” and “wrongful life”, based on non-quantitative methods.¹²¹ While the focus of this article is on our quantitative dataset, we agree that it can be rewarding to examine individual cases of cross-citations in more detail. Thus, the subsequent section explains representative examples of foreign citations in a qualitative way, in particular with the aim to develop a taxonomy of types of cross-citations.

6. Taxonomy of types of cross-citations

6.1. Introduction

In our quantitative analysis, we excluded citations merely resulting from the history of the case and, then, only distinguished between citations due to international/European law and purely comparative citations.¹²² It is the aim of this section to provide a more nuanced qualitative picture of different types of cross-citations. It is structured according to the role a foreign citation plays to the court decision in question: it may be the case that the court refers to the result of a foreign decision (see 6.2); that it seeks inspiration from a foreign court’s judicial reasoning – which may, or may not, be relevant to the result (see 6.3); or that the citation is mainly “ornamental” – that is, irrelevant for the result (see 6.4). In addition, it will be indicated how detailed the respective analysis is, since in any of the aforementioned categories the court may either argue in a compact or in an elaborate way.¹²³

A variety of reasons may explain why a court prefers one or the other type of cross-citations. The comparative law literature often discusses general differences in judicial style, including the style of citations.¹²⁴ In particular, it may be expected that common law courts provide a more careful analysis of the facts in each cited case, given the doctrine of *stare decisis*. It has also been suggested that comparative law needs to consider “judicial audiences and reputation”, for example, as it may matter that civil law countries have a “career” and common law countries a “recognition” judiciary.¹²⁵ Such a perspective is also related to recent research on “legal realism” and the judiciary, for example, as scholars try to understand how incentives and extra-legal decisions determine judicial style, including the use of precedent.¹²⁶

¹²⁰ For this reasoning *see supra* 2. (as one of the normative arguments against cross-citations).

¹²¹ E.g., Ivo Giesen, *The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases*, 8 UTRECHT L. REV. 35 (2012); Barbara C. Steininger, *Wrongful Birth and Wrongful Life: Basic Questions*, 1 J. EUR. TORT L. 125 (2010).

¹²² *See supra* 3.3.

¹²³ Our typology differs from the one developed by Larsen (*supra* note 1, at 1287-1298) for the US Supreme Court. She distinguishes between expository, empirical and substantive uses of comparative law. All of the citations we discuss below are substantive. “Expository” citations that seek to provide a contrast to domestic law and empirical citations (which look at the social consequences of an alternative rule) may be less important before European judicial courts than in US constitutional adjudication.

¹²⁴ *See, e.g.*, ZWEIFERT & KÖTZ, *supra* note 87, at 71-72; Siems, *supra* note 43, at 161.

¹²⁵ Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSN’L L. 451 (2009).

¹²⁶ E.g., Matthew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSPECTIVES 191 (2009); Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions? A Statistical Examination*, 70 MD. L. REV. 101 (2010). *See also* LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOUR* (2006).

This section does not aim to explore all details that may influence the judicial style of the ten courts discussed in this article. Yet, it will show that some conventional views about judicial style do not always hold for cross-citations. Moreover, in line with the overall aim of this article, it will discuss what these types tell us about the desirability of cross-citations.

6.2. Result-oriented citations

The American public would probably think of citations of foreign law in the context of the US Supreme Court primarily as providing relatively general claims about what courts have decided in some other jurisdictions that are important enough for American judges to take notice. In cases of this type, courts look primarily at the result (e.g. whether executing minors is unconstitutional or not),¹²⁷ but not at the legal analysis in detail.

In the courts of our study, result-oriented citations seem to occur frequently in cases highly-politicized where the result is very important for ideological reasons. In cases of this type, the actual legal reasons are likely to be less interesting than the outcome of the case. A number of examples can be found in cases relating to the issue of “wrongful life.” These cases concern the question whether parents of a disabled child or even the child should be granted damages against a doctor who was at fault at failing to detect disabilities prenatal screening of the fetus.¹²⁸ Closely related “wrongful conception” cases relate to the question of whether doctors are liable for child support payments following an unsuccessful vasectomy or sterilization. For example, the Italian Court of Cassation states that:

“the French Court of Cassation (plenary assembly), in the famous *Perruche* decision of November 28, 2001, turning away from previous jurisprudence, declared, however, that ‘when the errors committed by a physician and the laboratory in executing the contract concluded with a pregnant women prevent the latter from exercising her own choice in terminating the pregnancy, in the end resulting in the birth of a handicapped child, the latter can demand compensation of damages consisting of the disability itself, caused by the aforementioned errors.’”¹²⁹

The court goes on to point out that the French legislator subsequently intervened to eliminate the possibility of damages in the absence of medical error that aggravated the child’s condition.¹³⁰ The court subsequently refers to the French case and subsequent legislation several times, but only to the outcome, not to the reasons for it. The detailed discussion of the Italian court turns primarily on the question whether there is a right “not to be born” under *Italian* law.

Our study also includes several decisions by the Austrian Supreme Court on the issue. The first one (actually the second in Austria addressing the issue)¹³¹ briefly cites the German Supreme Court in the last paragraph and states that it also recognizes damages for the parents, without looking deeply at the reasons for the decision. In a subsequent case,¹³² the court tackles the related issue of an unsuccessful vasectomy, following which the patient sued the doctor for alimony, the court briefly describes the laws of Germany, England, Belgium, the Netherlands, Spain, France, Italy, Scotland, Denmark, and the US. For all countries, the reference has the character of a list, i.e. the court seems to be interested only in *whether* such claims are admitted

¹²⁷ See *supra* notes 1, 37 (for the US case in *Roper v. Simmons*).

¹²⁸ The underlying assumption is that the parents would have aborted the child if they had known about the child’s condition. See also the literature cited *supra* note 121

¹²⁹ Cass., sez III, 29 July 2004, n.14488, (own translation).

¹³⁰ Regarding this development, see also Giesen, *supra* note 121, at 40.

¹³¹ Oberster Gerichtshof [OGH] [Supreme Court] March 7, 2006, 5 Ob 165/05h (Austria).

¹³² OGH September 14, 2006, 6 Ob 101/06f (Austria).

by the courts. Interestingly, and maybe tellingly, while the overview on the courts is limited to a single paragraph, the court subsequently discusses the views expressed in 13 law review articles, dedicating one paragraph to each; before moving to its own analysis, the court summarizes the German academic literature in another paragraph. The third case on the issue¹³³ does not provide such a detailed analysis, but refers to its prior jurisprudence, stating that it does not have to go into further detail regarding foreign case law again. Nevertheless, the court cites recent case law from Germany and Switzerland and concludes that the courts in both countries recognize damages.

We also found corresponding result-oriented cross-references in “wrongful life” cases in Switzerland, Ireland and the Netherlands. The Swiss decision refers, relatively briefly, to the results reached by the German, Dutch, British, and Austrian Courts,¹³⁴ and the Irish decision does the same for the British, French and German courts.¹³⁵ The Dutch cross-citation¹³⁶ is in the opinion of the advocate general. It provides a more extensive discussion of the case law of various countries, in particular France, Germany and the UK, yet, overall it is clear that it is mainly the results that are seen as decisive.

Another example of politicized cases are those of assisted suicide. Here too, we have a relatively extensive comparison in an opinion of the Dutch advocate general.¹³⁷ There is also an Italian case on this issue:¹³⁸ the court had to deal with a controversy relating to life-extending measures taken for a comatose patient and provides detailed citations to various courts, including some courts from the US (New Jersey), the UK House of Lords, and the German Supreme Court. While the court provides a detailed description of the principles the various courts apply to the decision-making process (e.g. that the decision should be taken as to conform to the hypothetical wishes of the patient), it does not analyze how the courts derived these principles.

Perhaps surprisingly,¹³⁹ we also find result-oriented cross-citations in more pedestrian cases, though here the references to foreign courts may be (even) more condensed. For example, in an Austrian case¹⁴⁰ the supreme court had to deal with the issue of whether creditors who had lent to a company *after* it became insolvent can recover their losses from directors who failed to file for bankruptcy upon insolvency and thus take the firm out of business. Diverging from its own previous decisions, but trailing newer German case law, the court recognized that “new” creditors are entitled to this kind of claim. Again, the Austrian court recites the results of the German court in a few paragraphs without directly engaging with its legal reasoning.¹⁴¹

Similarly, two Spanish decisions discuss limitations on the exercise of universal jurisdiction on criminal law matters imposed by international law.¹⁴² In one case, the court first describes limitations at great length and subsequently mentions that “both limitations have been expressly

¹³³ OGH July 11, 2007, 5 Ob 148/07m (Austria).

¹³⁴ Bundesgericht [BGer], December 20, 2005, 4C.178/2005 /ast (Switz.).

¹³⁵ Byrne v. Ryan [2007] IEHC 207. To be precise, the reference to the German and French courts is part of a quote of the UK House of Lords in *McFarlane v. Tayside Health Board* (2000) 2 A.C. 59.

¹³⁶ Advocate General Hartkamp, March 13, 2005, LJN: AR5213, Hoge Raad (Neth.).

¹³⁷ Advocate General Keijzer, October 15, 2002, LJN: AE8772, Hoge Raad (Neth.).

¹³⁸ Cass., sez un., 16 oct 2007, n.21748 (It.).

¹³⁹ Cf. Christian von Bar, *Comparative Law of Obligations: Methodology and Epistemology* in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 123, 127 (Mark Van Hoecke ed. 2004) (“courts apply comparative law techniques only in cases of great importance”).

¹⁴⁰ OGH 20.3.2007, 4 Ob 31/07y (Austria).

¹⁴¹ Yet, in the subsequent part, it discusses the view of a legal author who refers more explicitly to the reasoning of the German court.

¹⁴² STS 7376/2004, Nov. 15, 2004 (Spain); STS 1270/2003, Feb 25, 2003 (Spain).

accepted by the German courts” (after which the court cites three decisions of the German Supreme Court in brackets). The citation to the German jurisprudence apparently serves as a persuasive argument why the Spanish court’s view must be correct. In the other case, the court cites the German court in a similar fashion, and subsequently describes a view of the Belgian court for a limitation of the genocide convention. As a final example, in France, one of the few cases where we identified cross-citations falls into this category. In its opinion¹⁴³ the reporting judge describes the development of the doctrine of sovereign immunity, and lists the Belgian, Italian and Swiss courts as having abandoned the idea of its absoluteness in a single sentence.

From a normative perspective, is a results-oriented approach problematic? This would be the case if the foreign precedent were treated as a binding authority and its application seen as an evasion of domestic law. By contrast, if one takes a legal realist perspective and decides that only the outcome is important, then it does not really matter how the court arrives at its result. Regarding the outcome only, there are at least two possibilities. One the one hand, engagement with foreign cases could provide with useful information about empirical effects of particular policy decisions, which improve the quality of decision-making in terms of the outcome. On the other hand, looking only at the outcome may help the court to cherry-pick preferred foreign results.

One might argue that how a court arrives at its results matters. In part, the reason is that judicial decisions derive some of their legitimacy from their acceptance in the legal community (and beyond). However, the extent of a legal opinions decision depends very much on the norms prevailing in that community.¹⁴⁴ Very likely the differences we have observed depend on differences in the degree to which cross-citations are accepted in the respective legal system.

Our examples do not suggest that a pure results orientation is all that problematic. As we have seen, almost all of them involve purely referential citations. Thus, we do not find that courts try to evade domestic law and to impose foreign moral standards on the local population. Rather, the actual legal arguments seem to focus on the respective national law. It is, however, also possible that foreign law sometimes exerts influence without explicit attribution; a court may merely cite the result and then incorporate the legal argument into its subsequent domestic analysis without disclosing its origin.

6.3. Citations based on judicial reasoning

Cross-citations related to international or European law¹⁴⁵ are based on the rationale that the judicial reasoning of a foreign court can help for the legal interpretation of the provision in question. Many examples could be provided. For instance, an Irish case¹⁴⁶ dealt with the interpretation of the term “knowledge” under Article 25 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (“Warsaw Convention”). The court explains in brief sentences that the UK, Swiss and Belgian courts constructed this as a “subjective test”, whereas the French courts adopted an “objective one”; the Irish court then decides to apply a mixed test.

Examples of cross-citations dealing with the provision of a related convention, the Convention on the Contract for the International Carriage of Goods by Road (“CMR”), can be found in a decision of the German court¹⁴⁷ and an opinion of the Belgian advocate general.¹⁴⁸ Another

¹⁴³ Conseiller rapporteur Pluyette in Cass. ch. mixte, June 20, 2003, n.00-45629, 00-45630 (Fr.), at http://www.courdecassation.fr/jurisprudence_2/chambres_mixtes_2740/pluyette_conseiller_553.html.

¹⁴⁴ See generally Stephenson, *supra* note 126, at 200-203 (discussing how judges are constrained by legal materials in reaching the desired result in an opinion).

¹⁴⁵ For this category see *supra* 3.3.

¹⁴⁶ APH Manufacturing B.V. t/a Wyeth Medica Ireland v. DHL [2000] IEHC 131.

¹⁴⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] March 3, 2005, I ZR 134/02 (Germany).

German example is on the interpretation of a provision in the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”),¹⁴⁹ and an example from the UK deals with the EU law on trade marks.¹⁵⁰ In all of these instances, the references to foreign case law are fairly short. By contrast, opinions of the Dutch advocate general on issues of intellectual property law engage in a more extensive comparison of various judgments of German, French, Belgian and UK courts in order to interpret the underlying provisions of European and international law.¹⁵¹

Turning to pure comparative cases, there are also a number of instances where courts do not primarily look at the outcome of foreign cases, but the arguments used by the courts to achieve this result. Which form of reasoning the court adopts depends to a large extent on the argumentative style of the citing court. A judicial style that allows reference to policy should in theory be relatively open to consider policy arguments used by peer courts.

In the decisions of the High Court of Ireland we find frequent examples of such cross-citations, namely as far as they cite English courts. Sometimes these citations are written in a style that seems to indicate that it is beyond doubt that these precedents apply in Ireland.¹⁵² Other decisions are more reflective. For example, in one of them it is said that “(w)hile decisions in another Jurisdiction are in no way binding on me as is the practice in all Jurisdictions regard is had to decisions in other Jurisdictions and if they are found to be persuasive they are followed.”¹⁵³ But, then, it may also happen that, while the legal argument of the English courts is followed, the Irish court distinguishes the actual facts of the cases and therefore reaches a different result.¹⁵⁴

This form of judicial reasoning can be seen as typical for the common law. Comparative lawyers observe that common law countries often still perceive that their legal systems share the “common law as a whole”.¹⁵⁵ A recent survey of common law judges has also found that guidance in judicial interpretation is seen as the most plausible reason to refer to foreign court decisions.¹⁵⁶ With respect to the cross-citations identified in this article, reference can be made to a decision of the Court of Appeal of England and Wales that includes a very detailed section discussing recent developments in other common law jurisdictions.¹⁵⁷

With respect to civil law countries, the asymmetric Austrian-German relationship provides a number of examples. In one Austrian case¹⁵⁸ the analysis is largely based on German jurisprudence. The dispute is about a severance payment for a commercial representative, an area

¹⁴⁸ Advocate General Guy Durbulle in Cour de cassation, May 30, 2002, no. C990123N (Belgium).

¹⁴⁹ Bundesgerichtshof [BGH] [Federal Court of Justice], July 12, 2007, XI ZR 290/06 (Germany).

¹⁵⁰ Boehringer Ingelheim KG v Swingward Limited [2004] EWCA Civ 129. For the relatively “academic style” of the Dutch advocate generals see also the subsequent explanations.

¹⁵¹ Advocate General Huydecoper, March 24, 2006, LJN: AU6098, Hoge Raad (Neth.) (a patent dispute); Advocate General Verkade, June 16, 2006, LJN: AU8940, Hoge Raad (Neth.) and Advocate General Verkade, November 7, 2003, LJN: AN7830, Hoge Raad (Neth.) (both on copyright law).

¹⁵² See, e.g., Hannon v. Commissioners of Public Works [2001] IEHC 59; Kenny v. Dublin City Council [2004] IEHC 381; Crofter Properties Ltd. v. Genport Ltd. [2002] IEHC 26.

¹⁵³ Cooper-Flynn v. RTE & Ors [2001] IEHC 234.

¹⁵⁴ For such a case S. (P. A.) v. S. (A. F.) [2004] IEHC 323.

¹⁵⁵ See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 232-3 (2007).

¹⁵⁶ Brian Flanagan & Sinead Ahern, *Judicial Decision-Making and Transnational Law: A Survey of Common-Law Supreme Court Judges*, 60 INT’L COMP. L. Q. 1 (2011).

¹⁵⁷ R. (on the Application of Corner House Research) v The Secretary of State for Trade and Industry [2005] EWCA Civ 192 at paras 53-63 (referring to Australia, Canada and Ireland). But see also *infra* 6.4.

¹⁵⁸ OGH May 26, 2004, 9 ObA 2/04s (Austria).

where both laws are similar, but which also leave open ambiguities and questions that can be filled with case law. Almost all of the opinion of the Austrian court discusses German case law and literature; only in the last longer paragraph, the court looks at a specific section in the Austrian law that could be used as the basis for an analogy that would reach the same result.

There are, however, also cases displaying this kind of pattern even in areas of law where the law is less similar. A decision from 2005¹⁵⁹ concerns basic civil procedure and therefore does not have a specific reason for a comparative analysis, since both procedural codes have distinct histories. The Austrian court cites a decision of the German Imperial Court¹⁶⁰ for the proposition that even in a joint lawsuit (*einheitliche Streitgenossenschaft*), individual participants may lose their right to appeal separately. The court further cites a decision of the German Supreme Court and six commentaries on the German procedural code to back up the claim. In a 2003 decision¹⁶¹ on whether fees for telephone sex can be recovered by the phone company against the owner of the phone connection, the Austrian court analyzes the development of the German case law, disagreements between different panels of the German Supreme Court as to whether the enforceability of such claims would be against public policy, and various German articles at great length. Only in the second half of the opinion it moves on to Austrian literature, the basis for related contracts under Austrian law, and ultimately finds that such contracts can be enforced (the issue seems to be whether telephone fees have to be paid). The Austrian Supreme Court does not even always distinguish German cases from Austrian ones (even though the origin of the case will typically be apparent to experts from the citation style).¹⁶²

While overall, there are a large number of Austrian cases citing German ones, there are also some tools that enable the Austrian courts to “rationalize” these citations. Sometimes Austrian courts reuse arguments, which may include cross-citations. For example, in our search we found a series of cases relating to firms that were fined for not disclosing their financial statements at the court of registry, all of which argued that one of the deciding judges of the court of appeals was biased because he had written articles on the issue. Since the issue is essentially the same (in some cases the lawyers were the same as well), entire decisions are reused with minimal, if any modifications.¹⁶³ All of these decisions include the same citation to the German Supreme Court in the court’s analysis, as well as a blanket reference to the jurisprudence of the Swiss Federal Court in the part describing the appellant’s submission. In addition, the Austrian Supreme Court uses a further, idiosyncratic citation method that also falls under the present category. Generally, it has a tendency to “self-plagiarize”, in other words repeatedly use boilerplate texts taken from previous opinions for the same proposition. Some of these boilerplates are separately published as *Rechtssätze* (official maxims) in the database of the case law.¹⁶⁴ By searching for a *Rechtssatz* number, one can locate all cases that used it. Frequently, entire paragraphs are copied into new opinions. These copies also include the references, including citations of foreign courts made in

¹⁵⁹ OGH August 3, 2005, 9 Ob 36/05t (Austria).

¹⁶⁰ Reichsgericht [Imperial Court of Justice] January 31st, 1938, RGZ 157, 33 (Germany).

¹⁶¹ OGH May 27, 2003, 1 Ob 244/02t (Austria).

¹⁶² *E.g.*, OGH June 26, 2007, 10 Ob 50/07m (Austria) (providing a citation to previous Austrian case law, followed by a largely ornamental cite to the BGH and to an Austrian book); OGH Feb. 14, 2006, 4 Ob 165/05a (Austria) (citing the BGH for the question of the distinctiveness of generic domain names for purposes of the law of unfair competition, without disclosing that it is referring to the very similar, equally open-textured German law).

¹⁶³ OGH May 19, 2005, 6 Ob 92/05f (Austria); OGH May 19, 2005, 6 Ob 91/05h (Austria); OGH May 19, 2005, 6 Ob 112/05x (Austria); OGH May 19, 2005, 6 Ob 93/05b (Austria); OGH May 19, 2005, 6 Ob 89/05i (Austria).

¹⁶⁴ <http://www.ris.bka.gv.at/jus>.

that paragraph. For example, the cases on the recusal of judges just mentioned include a *Rechtsatz* with a *cross-citation* to the German Supreme Court.¹⁶⁵

The Swiss Supreme Court cites the German one not as frequently as the Austrian court does. Yet, as far as there are cross-citations, it can also be seen that these often concern brief confirmations of the legal reasoning of the German court. In three decisions, covered in this study, the Swiss court makes a statement about a particular point of legal reasoning and then simply adds a reference to the German court.¹⁶⁶ Somehow more cautious are two other cases, since those use the word “compare” (*vergleiche*) for the reference to the German court: yet, here, the German judgment is the only reference provided¹⁶⁷ – so the result is the same, namely that the legal reasoning of the German court is apparently regarded as persuasive.

Opinions of the Belgian and Dutch advocate generals¹⁶⁸ tend to be quite thorough with many citations to prior case law, scholarship, and occasionally foreign courts. Often, these citations fall in the “reasoning” category. For example, in a Belgian decision on tort law¹⁶⁹ the advocate general discusses the views of the French, Dutch and German courts going into detail particularly with respect to French law. Specific citations to individual decisions are given in footnotes (in total, the opinion has 46 footnotes, in which various courts and scholars are cited). In other cases the analysis of French law by the advocate general seems to go into the greatest level of detail.¹⁷⁰ The style of the Dutch advocate general is similar. In some examples only the case law of one foreign country is analyzed; however, this is then based on a careful and detailed assessment of the foreign court’s reasoning. For instance, two criminal law cases (on criminal capacity and HIV infection) analyzed the reasoning of the German case law in detail, also citing some of the text of the German decisions in the original language.¹⁷¹

The remaining three civil law countries have fewer cross-citations and only some of them may be of interest for the current category. In a rare Italian case¹⁷² the court cites a specific decision of the German Supreme Court for the proposition that a debtor can also effect payment to the creditor by bank transfer (even if not specifically stipulated). Even though the analysis is limited to a rather short paragraph, the court cites the applicable section of the German Civil Code and briefly describes how the German court derived the result from it. In France, an example may be an opinion of the reporting judge¹⁷³ that addresses the issue of judicial lawmaking and, based on secondary literature, describes the attitude towards it under the common law, EU law, as well as

¹⁶⁵ RS0045916.

¹⁶⁶ *E.g.*, Bundesgericht [BGer], Nov. 12, 2003, 1P.544/2003 /zga (Switz.); Bundesgericht [BGer], June 10, 2002, 1P.67/2002 /mks (Switz.); Bundesgericht [BGer], July 23, 2004, 6P.39/2004 (Switz.); Bundesgericht [BGer], December 19, 2006, 4C.298/2006 /ech (Switz.).

¹⁶⁷ *E.g.*, Bundesgericht [BGer], April 4, 2001, 4C.80/2000/sch; Bundesgericht [BGer], February 26, 2006, 4C.361/2005 /ast.

¹⁶⁸ Similar also the advocate generals of the European Court of Justice (ECJ): for a corresponding analysis *see* Lee Faircloth Peoples, *The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities*, 35 SYRACUSE J. INT’L L. & COMM. 219 (2008).

¹⁶⁹ Advocate General Jean Spreutels, Cour de Cassation, May 14, 2003, P021204F (Belgium).

¹⁷⁰ *E.g.*, Advocate General André Henkes, Cour de Cassation, Dec. 14, 2007, F.05.0098 (Belgium) (discussing the legal position of same-sex couples); Advocate General André Henkes, Cour de Cassation, Nov. 18, 2004, C.02.0264.F (Belgium).

¹⁷¹ Advocate General Machielse, November 13, 2001, LJN: AD6259, Hoge Raad (Neth.); Advocate General Bleichrodt, October 3, 2006, LJN: AY9659, Hoge Raad (Neth.).

¹⁷² Cass., sez. un., Dec. 18, 2007, n.26617 (It.).

¹⁷³ Conseiller rapporteur Lacabarats in Cass. ass. plen., Dec. 21, 2006, n. 00-20.493 (Fr.), reporter’s opinion at http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/lacabarats_conseiller_9797.html.

German law, for which he cites the jurisprudence of the not only the Federal Supreme Court, but also the Constitutional Court. With respect to the former, he spends two paragraphs describing the court's attitude (in two specific cases) toward judicial lawmaking and the effects of changes in jurisprudence on legal certainty. Finally, the Spanish Supreme Court is interesting here since – somehow akin to the Austrian court – there are examples where it economizes opinion-writing. In one decision the court mentions that the European Court of Human Rights favorably cites the jurisprudence of the German Supreme Court,¹⁷⁴ but then we found several further cases that use exactly the same paragraph¹⁷⁵, and some others that use similar text with the same citations.¹⁷⁶

What lessons can be drawn from all of this for the desirability of cross-citations? A skeptic may interpret some of the Irish and Austrian cross-citations as too unreflective (or even as defying national sovereignty) since they often seem to simply accept the legal reasoning of the English and German courts. It could also be criticized that none of the courts has developed clear criteria for the use of foreign case law: rather, these seem to be made in an ad-hoc fashion.

However, we would provide a more positive interpretation. The reason smaller jurisdictions refer relatively frequently to larger ones simply derives from the fact that the courts of the latter countries tend to have more opportunities to deal with certain legal problems; thus, the former courts can fill a temporary gap in the current law. In particular, it is plausible that in these situations courts may look for inspiration from relatively similar foreign countries, since here even some of the formal tools of legal reasoning may be transplantable.

We have also seen that courts and advocate generals sometimes engage in a wider comparative analysis referring to the case law of various other countries. We also regard this as broadly positive. It may show that, in Europe at least, there are sufficient commonalities of legal reasoning that enable judges to understand each other. In particular, this is necessary due to the growing volume of rules that derive from European and international law. To be sure, such comparisons are not always easy. Yet, therefore, it is also plausible that courts have not developed a blueprint for comparative reasoning but approach cross-citations based on judicial reasoning in a piecemeal manner.

6.4. Ornamental cross-citations

The previous section explained that the Irish court often cites the English one, and the Austrian often cites the German one, using the foreign case law to support the respective court's legal reasoning. However, as far as England and Germany “return the favor”, these citations tend to be of a more rhetorical (or ornamental) nature. For example, in an English case the court provides a statement and then just adds the words “see the later decision” with a reference to the Irish court.¹⁷⁷ Thus, the Irish decision is apparently just used to confirm a view already taken.¹⁷⁸

More examples can be provided from the German Supreme Court, citing the Austrian court, as well as other foreign supreme courts. For example in one of the decisions the court

¹⁷⁴ STS 904/2007, Feb 14, 2007 (Spain).

¹⁷⁵ STS 2525/2006, March 22, 2006 (Spain); STS 3471/2003, May 22, 2003 (Spain); ATS 7245/2002, April 3, 2002 (Spain); ATS 125/2002, April 3, 2002 (Spain).

¹⁷⁶ ATS 5613/2005, May 12, 2005 (Spain); STS 5177/2000, June 24, 2000 (Spain); STS 11/2003, January 2, 2003 (Spain); STS 7945, Dec. 10, 2003 (Spain).

¹⁷⁷ *Todd v Adams (t/a Trelawney Fishing Co) (The Maragetha Maria)*, [2002] EWCA Civ 509, para 60.

¹⁷⁸ See also Po-Jen Yap, *Transnational Constitutionalism in the United States: Toward a Worldwide Use of Interpretive Modes of Comparative Reasoning*, 39 U. S.F.L. REV. 999, 1029-34 (2005) (for “affirmative use of comparative law” in the case law of the US Supreme Court); Sitaram, *supra* note 32 (“reinforcement” as one nine types of foreign citations, suggested in this article).

makes the statement that a particular interpretation of trade mark law is widely accepted by lower courts (*Instanzgerichte*) and then provides the following list of references:

“vgl. OLG München WRP 2000, 775, 778; GRUR-RR 2005, 220; OLG Hamburg GRUR-RR 2005, 118, 119 [nicht rechtskräftig]; OLG Karlsruhe WRP 2004, 507, 508; LG Hamburg MMR 2000, 46; CR 2002, 136; CR 2002, 374; LG Frankfurt a.M. MMR 2000, 493, 494 f.; LG München I NJW-RR 2001, 550; MMR 2004, 689, 690; LG Köln CR 2006, 64; LG Braunschweig MMR 2006, 178; vgl. auch ÖOGH GRUR Int. 2001, 796, 797 - Numtec-Interstahl; LG Mannheim MMR 1998, 217, 218; a.A. OLG Düsseldorf GRUR-RR 2004, 353)”.¹⁷⁹

It can be seen that the court refers to ten German lower courts (the OLG and LG) and, close to the end of the citation, adds the words “vgl. auch ÖOGH” meaning “compare also the Austrian Supreme Court”. Thus, there seems to be a certain obsession of the German Supreme Court with references, and it is unlikely that the Austrian decision has been a decisive factor for the German court. Corresponding examples can be provided for cross-citations to the highest Swiss and Dutch courts.¹⁸⁰

In some decisions of the Swiss and Austrian Supreme Courts we can also see these ornamental cross-citations, since, here too, courts embellish their opinions with extensive references – also including references to the academic literature.¹⁸¹ For example, a Swiss decision, dealing with a question of criminal sentencing, first, refers to another decision of the Swiss Supreme Court, then to two books on Swiss criminal law and subsequently adds a “see also” reference to the German Supreme Court.¹⁸² Similarly, a decision of the Austrian Supreme Court already mentioned in the preceding section¹⁸³ deals with the question of whether a judge needs to recuse himself after having publicly expressed a legal opinion that might be relevant to the case. In translation, the court says:

“The fact that a judge advanced a legal view (even if it is rejected in the jurisprudence of the Supreme Court) by itself just as little creates the appearance of bias as the publication of particular legal view in a scientific treatise (Fasching *Zivilprozessrecht*² Rz 164; 4 Ob 36/89 = RZ 1989/110 page 282; RIS-Justiz RS0045916; BGH, NJW 2002, 2396; Münchener Kommentar zur ZPO² § 42 Rz 21).”

The citation in brackets is interesting as it illustrates several different types of citation: The Austrian legal literature is cited once (Fasching), as is the German literature (Münchener Kommentar). With “4 Ob 36/89 = RZ 1989/110 page 282”, the court cites one of its prior decision. “RIS-Justiz RS0045916” is the citation to the “Rechtssatz” described in the previous section. The citation to the German Supreme Court (BGH) seems to be purely ornamental and not to add any value.¹⁸⁴

There are also examples of such cross-citations in the opinions of the Dutch advocate general. While he or she often discusses some foreign case law in great detail (see the previous section), there are some instances where cross-citations are of a more academic nature. In particular, this can be seen in examples where, in a footnote, the main reference is to a Dutch decision or

¹⁷⁹ Bundesgerichtshof [BGH] [Federal Court of Justice], May 18, 2006, I ZR 183/03 (Germany).

¹⁸⁰ BGH, November 15, 2006, XII ZR 120/04 (Germany); BGH, November 08, 2005, KZR 37/03 (Germany).

¹⁸¹ For a similar point see Marc Forster, *Functions and Practice of Legal Citing: Towards a Uniform International Quotation System*, 23 INT’L J. L. INF. 149, 153-157 (1995) (identifying different groups of high courts based on the custom to cite, or not to cite, academic writings).

¹⁸² Bundesgericht [BGer], October 26, 2005, 6S.163/2005 /gnd (Switz.).

¹⁸³ OGH 19.5.2005, 6 Ob 92/05f (Austria).

¹⁸⁴ Regarding “RIS-Justiz” see *supra* notes 164-165 and accompanying text.

a reference in the Dutch literature, and only subsequently the words “for a similar point” (with reference to a foreign decision) have been added.¹⁸⁵

In the assessment of this type of cross-citations, it may initially be puzzling why courts provide these “see also” references without further discussing the content and how exactly it relates to the problem at hand. Citations of this type are, in the academic legal literature, used to provide the reader with a source for broader information about the topic discussed by the author. A legal author would thus facilitate further research by the reader, which helps him to better understand the field of law discussed. Opinions written by courts obviously do not have this function. The purpose, from the perspective of the judge or clerk drafting the opinion would then seem to be to strengthen the authority of the court in the legal community by showing how well researched the opinion is, and thus immunize the court against criticism, even if the result is fairly obvious.¹⁸⁶

A potential problem may be that these very brief cross-references are, by their very nature, not able to engage in a “proper” comparison of the domestic and foreign law that would take into account possible differences in the legal and non-legal context between the countries. However, as far as courts (or advocate generals) have considered these foreign decisions, it seems useful that they make this transparent in the decision. At a very modest level, these ornamental cross-citations can also be seen as beneficial as they may stimulate comparative legal discussions, be it at the level of courts, advocate generals or in the legal literature.

7. Conclusion

This article has analyzed cross-citations between ten European supreme courts in order to assess the normative case for or against this practice. To set the scene, in Figure 1,¹⁸⁷ we developed a conceptual scheme of the main arguments supporting or rejecting the use of citations of foreign courts. Based on the findings of the previous sections, Figure 4 returns to this scheme in order to re-assess this question.

¹⁸⁵ *E.g.*, Advocate General Keijzer, September 2, 2003, LJN: AJ0535, Hoge Raad (Neth.); Advocate General Huydecoper, November 14, 2003, LJN: AN8483, Hoge Raad (Neth.); Advocate General Bleichrodt, March 20, 2007, LJN: BA1764, Hoge Raad (Neth.).

¹⁸⁶ This was already observed by Hein Kötz, *Scholarship and the Courts: A Comparative Survey*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW. ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 194 (1990).

¹⁸⁷ *See supra* 2.

Figure 4: Re-visiting the patterns of argument of foreign citations

	A. Character of law	B. Quality of decision	C. Procedural reasons
1. Pro	<p><i>common core</i> (+) as far as relevance of international / EU law and legal families</p>	<p><i>useful information</i> (+/-) often superficial citations but smaller jurisdictions benefit from larger ones</p>	<p><i>transparency</i> (+) non-transparent style of some courts harmful for fruitful dialogue</p>
	⇕	⇕	⇕
2. Contra	<p><i>national character</i> (+/-) no uniqueness but other legal systems may be more or less remote</p>	<p><i>“cherry picking” and misapplications</i> (-) data do not show random “cherry picking” or desire to evade domestic laws</p>	<p><i>costs and lack of benefits</i> (+/-) problems of accessibility of foreign case law; but also positive examples</p>
	⇕	⇕	⇕
3. Reply	<p><i>foreign case law not authoritative</i> (+) yes, persuasive or even rhetorical</p>	<p><i>develop criteria for using foreign case law</i> (-) none of the courts has developed such criteria</p>	<p><i>make foreign case law more easily accessible</i> (+/-) some efforts to improve availability of foreign case law</p>

Starting with the line of reasoning related to the “character of law” (column A.), there is some support for the argument that cross-citations are justified by a “common core” shared by at least some legal systems. We found that a good number of cross-citations are the result of international and European laws,¹⁸⁸ and that the categories of legal families (or legal origins) can explain some of the variation of cross-citations.¹⁸⁹ However, the relevance of legal families can also speak against cross-citations as it may show that foreign courts only regard such other courts as worth citing with whom they are aligned with intellectually, culturally and ideologically anyway. But this point should not be overemphasized. Our regression analysis indicates that legal families are not the most important explanatory factor,¹⁹⁰ and the analysis of cross-citations for different areas of law has also shown that other factors play a crucial role.¹⁹¹ Moreover, according to our qualitative assessment of representative cases, the courts in our study use foreign case law mainly as persuasive argument – or even just as a purely ornamental one:¹⁹² thus, we did not find that citing a foreign court would undermine national sovereignty and democracy.

With respect to the line of reasoning related to the “quality of decision” (column B.), the facts that smaller jurisdictions tend to cite larger ones, and that less-corrupt countries receive

¹⁸⁸ See *supra* 3.3.

¹⁸⁹ See *supra* 4.2 (cluster analysis) and 4.3 (regression analysis).

¹⁹⁰ See *supra* 4.3 (regressions, final sections).

¹⁹¹ See *supra* 5.

¹⁹² See *supra* 6.

more citations¹⁹³ speak in favor of the argument that citing courts benefit from the experience and soundness of foreign case law. Of course, one should also not be too idealistic about this argument since we have also seen that the use of foreign citations is often fairly superficial, in particular, as far as courts just seem to be interested in the results of foreign cases.¹⁹⁴ But we also do not find evidence for the counter-argument that courts just “cherry pick” any decision they find convenient and try to evade provisions of domestic law. Throughout this article we have seen that cross-citations are not made randomly but that many factors rationally explain why cross-citations are more or less frequent in particular situations.¹⁹⁵ This also implies that it may be acceptable that none of our courts has developed precise criteria for the use of foreign case law.¹⁹⁶

With respect to procedural reasons (column C), we have seen that there is considerable diversity in the way courts cite, or do not cite, courts from other countries.¹⁹⁷ We would suggest that courts should make it transparent if they have relied on foreign legal ideas since this can contribute to a potentially fruitful dialogue between courts from various countries as they often have to deal with similar problems.¹⁹⁸ Of course, given the efforts to research foreign case law, it is not a surprise that only a small proportion of all cases cite foreign courts.¹⁹⁹ Yet, these problems should also not be exaggerated since in matters of policy importance courts and, even more so, advocate generals have shown to be able to go into the details of case law from various other countries.²⁰⁰ It also helps that most of our courts make their decisions freely available on the web.²⁰¹

It can be concluded that, by and large, our analysis supports the use of cross-citations. This raises the question how it may be possible to enhance the frequency of cross-citations if one believes that to be beneficial. One response could be that we need to change “how judges think”.²⁰² In particular, it would then be necessary to explore how at the level of individual judges citations reflect the personality of the judge and the network of social relations in which he or she is embedded.²⁰³ Such a “micro-approach” could also be an interesting extension for the data presented in the current article, though it would face the problem that in civil law countries courts typically do not write individual judgments but decide in panels.

Another response is to focus on the costs of making use of foreign case law. Here, our data provide some further insights. Most cross-citations are made by courts for which the cost is small. In countries such as Ireland and Austria, English and German law are readily accessible in the respective libraries and in the form of legal databases. Not unsurprisingly, the quantitative part of our study also found that common languages matter.²⁰⁴ Moreover, as some of our cases

¹⁹³ See *supra* 3.3 (data) and 4.3 (regression analysis)

¹⁹⁴ See *supra* 6., in particular 6.1.

¹⁹⁵ See the regularities identified with quantitative tools, *supra* 4. and 5., as well as the taxonomy of types of cross-citations, *supra* 6.

¹⁹⁶ See *supra* 6.3.

¹⁹⁷ See *supra* 3.3 (for the French model) and 6.

¹⁹⁸ For examples see the cases cited *supra* 6.2.

¹⁹⁹ See *supra* 3.2 and 3.3.

²⁰⁰ See *supra* 6.2.

²⁰¹ See *supra* 3.2 (internet references in Table 1).

²⁰² See the book by RICHARD POSNER, *HOW JUDGES THINK* (2008). See also BAUM, *supra* note 126.

²⁰³ E.g., see Daphne Barak-Erez, *Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries*, 47 TULSA L. REV. 405 (2011) (case study on the influence of the Israeli judge Aharon Barak); Jordi Blanes i Vidal & Clare Leaver, *Social interactions and the content of legal opinions* 29 J. L. ECON. & ORG. 78 (2013) (examining English appellate judges). See also the articles by Mak, *supra* note 41.

²⁰⁴ See *supra* 4.3 (regression results).

indicate, foreign case law is often discovered and explored through the comparative law literature, which reduces the cost.²⁰⁵

In the years following the period we studied, the cost has further decreased with the establishment of a transnational database of decisions of by the Network of the Presidents of the Supreme Judicial Courts of the European Union.²⁰⁶ In addition, global portals provide links to the court decision of many countries of the world.²⁰⁷ But there are limitations too. According to Anne-Marie Slaughter, a global community of judges must also “share the common values and principles that constitute the normative understandings of a community”.²⁰⁸ Our study also pointed to more pedestrian reasons such as differences in citation style and language barriers. Thus, while a fully global transnational dialogue between courts seems difficult to achieve, we would hope that our study may provide a model for a study that could be replicated in other parts of the world.

²⁰⁵ See *supra* 6.

²⁰⁶ <http://www.reseau-presidents.eu/rpcsje>.

²⁰⁷ E.g. <http://globalcourts.com/>, <http://www.worldlii.org/catalog/2172.html>.

²⁰⁸ Slaughter, *supra* note 15, at 215.