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Judicial Borrowing: International &(and) Comparative Law as Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia

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Judicial Borrowing: International & Comparative Law as Nonbinding Tools of Domestic Legal Adjudication with Particular Reference to Estonia[1]

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The article analyzes the pros and cons of judicial borrowing, explains the use of international as well as comparative law in domestic legal adjudication with particular reference to the Supreme Court of Estonia, and introduces the opinion number nine of the Consultative Council of European judges. According to the author, judicial borrowing means to broaden one's vision; it does not stand for copying foreign examples, but for learning from them and enriching one's own legal system. In this respect, the legal culture and traditions, as well as the mentality of judges, play an important role. One of the aims of judicial borrowing is to ensure the protection of the rule of law and human rights, as well as the implementation of international obligations, and for European countries, effective application of European law. The author believes that if used properly, judicial borrowing is more advantageous than staying in isolation from global legal developments.

I. Judicial Borrowing and Domestic Legal Adjudication

"It is a poor wit who lives by borrowing the words, decisions, inventions [,] and actions of others. . ."

Johann Kaspar Lavater, (1741-1801, Swiss poet and physiognomist).[2]

> Doubt is the vestibule which all must pass before they can enter the temple of wisdom. . . . When we are in doubt and puzzle out the truth by our own exertions, we have gained something that will stay by us and will serve us again. . . . But if to avoid

1. The author delivered a speech on the same topic at the 15th Annual International Judicial Conference, May 17, 2007, University of Michigan Law School. The current paper is an elaborated version of the speech.

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2. Johann Kaspar Lavater, *in* GREAT TRUTHS BY GREAT AUTHORS 242 (Philadelphia; Lipincott, Grambo & Co.1856).

> the trouble of the search we avail ourselves of the superior information of a friend, such knowledge will not remain with us; we have not bought, but borrowed it.
>
> Charles Caleb Colton (1780-1832, an English cleric, writer and collector).[3]

In order to define the term "judicial borrowing," we need not confuse the term with the notion "borrowing" in its every day sense. As seen from the citations given above, maybe the word "borrowing" is not the best term, taken literally, to characterize the use of international and foreign law in national judgments. Who would be in favor of borrowing instead of applying the law himself or herself, or even creating law?

Judicial borrowing, however, should have a much wider significance than just the adoption or use of the ideas of others. Judicial borrowing means to broaden one's vision; it does not necessarily need to result in copying foreign examples, but can result from learning from them and using international, European, and comparative law as tools in domestic legal adjudication. In this respect, the legal culture and traditions, as well as the mentality of judges—their open-mind and knowledge in foreign languages—play an important role.

One of the best ways to promote international thinking in domestic adjudication is to encourage direct contact and interaction between judges of different nations and diverse legal systems. Application and interpretation of international law, comparative law, and for European countries especially, also European law, is essential in promoting the rule of law and in succeeding with the necessary judicial reforms.

A. Development and Reasons for Judicial Borrowing

Montesquieu argued that the laws of each nation are those best suited to a number of variables which, when taken together, comprise the quintessence of a people.[4] Factors such as geography, religion, history, and form of government were determinative of this essence.[5] Instead, today there is said to be a "world-wide legal culture."[6] Perhaps the truth lies somewhere in the middle –the best variables for legislature and judicial practice of one country should be combined with a touch of global thinking. At a minimum, the internationally recognized principles in the field of protection of human rights should be part of the judgment-writing components for a national judge.

Judicial borrowing in itself is not strictly a contemporary phenomenon. For at least the past several decades, judges around the world have been looking beyond their own states' jurisprudence to international law and to the decisions of foreign courts in order to apply domestic law. Anne-Marie Slaughter calls this phenomenon "judicial globalization."[7]

Judges may increasingly resort to judicial borrowing for the following reasons:

- Internationalization of societies;

3. Charles Caleb Colton on Doubt, *in* A Dictionary of Thoughts 126 (Tryon Edwards ed, Edwards Press 2007) (1891), *available at* http://books.google.com/books?id=JIQcAAAAMAAJ&printsec=frontcover&dq=A+Dictionary+of+Thoughts&source=gbs_book_other_versions_r&cad=0_1.

4. Charles de Secondat Montesquieu, The Spirit of the Laws 8 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge University Press 1989) (1752).

5. *Id.*

6. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, (1999), 108 Yale L.J. 1225, 1286. (1999).

7. Anne-Marie Slaughter, *Judicial Globalization* (2000), 40 Va. J. Int'l L. 1103 (2000).

- Internationalization of laws and, as a consequence, of domestic legal adjudication;
- International and European norms, as well as court practice, are rapidly growing both numerically and in complexity, thereby increasing the focus of judges on international and European law;
- Common problems, such as organized crime, terrorism, environmental and energy problems, etc., which urge judges to try to find similar solutions and learn from one another.

B. Aims and Areas of Judicial Borrowing

One of the main aims of judicial borrowing is to ensure the protection of the rule of law and human rights, as well as the implementation of international obligations, and for European countries, effective application of European law. National judges are the guarantors of the protection of the rule of law and human rights. National judges are also the warrants of the respect and proper implementation of international and European treaties to which the state to which they belong is a party, including for the member states of the Council of Europe, the European Convention on Human Rights. Therefore, judicial borrowing is mainly used with tasks that protect human rights, such as in constitutional law, in the framework of protection of human rights, and in judicial review of legislative acts.[8]

It is evident that judicial borrowing is more frequent in the areas where there are many international instruments. For example, in the courts of the member states of the European Union, European Community law is mostly used in deciding matters of administrative law because many European regulations and directives cover the relationship between the authorities of the member states/European Union with citizens. Lately, however, the EU law is gradually appearing more and more in civil law cases, as well as in adjudicating cases concerning criminal law; the latter emerges in the framework of securing a common European area of freedom, security, and justice.

C. Items, Tools, and Models of Judicial Borrowing

It is important for us to go beyond the reasons and aims of judicial borrowing to list the items that will be borrowed, as well as the methods or tools and models how this will be done. Under items of judicial borrowing, we mean the objects that will actually be "borrowed." Here we can talk about the following items:

- Law: general principles and norms, conventions, legislation;
- Legal practice, case law, and ideas in the judgments;
- Legal doctrine;
- Soft law;

A distinction must be made between borrowing of international/European law (international law as tool of domestic adjudication); and foreign law (comparative law as tool of domestic adjudication).

8. *See, e.g.*, Mila Versteeg, Harvard Law School, Address at the Human Rights Journal Human Rights Brownbag Lunch: International Judicial Borrowing in the Context of Human and Constitutional Rights, http://www.fas.harvard.edu/~pbh/psn/updates/2006-2007/February_22_Newsletter.pdf (last visited Jan. 20, 2009).

When defining the importance of judicial borrowing and its value-added purpose, it is important to ensure that a well-established methodology is used in judicial borrowing. In this context many questions arise, such as: "Is borrowing simply copying or comparing, or does it at all involve creative thinking of judges?" and "Is judicial borrowing used as one of the tools of interpretation, or is it used as fundamental argument in reasoning?"

The best course of action would be, of course, if the borrowing does not simply consist of copying foreign systems and ideas; it does need to involve to a certain extent creative thinking of the judge engaging in it. Judicial borrowing should not be considered as a goal in itself, but rather as a tool in order to achieve the best solution. One needs to be very careful about borrowing items without knowing their background and without trying to find out whether they would fit into one's own legal system. Therefore, one should avoid judicial borrowing becoming a fundamental argument in reasoning; it should remain one of the helping tools of interpretation. Judicial borrowing should include comparative analysis based on commentaries and interpretation of international instruments and the experiences of others. It requires asking questions from colleagues abroad, other judiciaries, international bodies, and scholars, etc.

There also exist some formal channels for borrowing, for example, in the European Union. Here, according to foremost Article 234 of the Treaty Establishing the European Community, a national court may, or sometimes even has an obligation to, ask for a preliminary reference from the European Court of Justice (ECJ) and bring the matter before the ECJ.

Scholars tend to distinguish between the persuasion model and the acculturation model of judicial borrowing.[9] According to the persuasion model, a transfer of ideas will involve the export of specified modes of implementation; whereas under the acculturation model, a diffusion of ideas takes place at the level of general public positions and idealized conceptions of modernity and statehood.

II. Judicial Borrowing–Two Sides of One Coin

To a European lawyer from a country with a history in transition towards democracy, where major legal reforms occurred, and comparative law was and still is part of everyday life, it might come as a surprise that not everybody around the world is in favor of judicial borrowing. The best example of the fact that constitutional borrowing has not proliferated to every corner of the globe is one of the world's oldest constitutional democracies, the United States, and its Supreme Court, which have resisted this trend for quite a long time. Today, however, some changes are noticeable.[10]

Professor Roger Alford argues that judicial borrowing opens courts to "selective and incomplete" presentations of the true state of international and foreign affairs.[11] Of course this risk exists; however, there are a number of advantages that should not be for-

9. *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (Oxford University Press, forthcoming 2008).

10. *See* Martin Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT'L AFF. 477, 477-503 (2006).

11. Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, (2005) 98 AM. J. INT'L L. 57, at 65-66. (2005).

gotten. We need to look first at the reasons for differences in attitude towards judicial borrowing and then elaborate the pros and contras of the phenomenon studied.

There are various reasons why judicial borrowing is viewed so differently–praised by some and criticized by others. Such reasons might emerge from the relations of domestic adjudication with international (European) law. Is the country of origin where the adjudication takes place member of different international treaties, conventions? Is it bound to international jurisdiction? The size and global importance of the country—whether it is a global player—can make a difference in the attitude. History, legal traditions of the country, and the existence of legal reforms play an important part in this respect. If a country is bound by international and European conventions, the judges need to take this into account in their every day work. In doing so, they should not only look at the international legislation and case law, but also at the practice of applying the international/European law of other member states. They could get some help and, at the same time, some encouragement for doing so from the international jurisdictions/courts of European organizations. A judge from a country with rich legal traditions, considerable size, and that is an experienced player in global legal world perhaps tends less to look at the practice of others. He or she has enough to study with all the relevant materials and doctrines in his or her own legal culture, whereas a judge from a state of young democracy, where legal reforms are still part of everyday work, would likely be more interested to look at the experience of his or her colleagues abroad.

Furthermore, the attitude towards judicial borrowing depends on the concept of international law and norms and their reflection, transposition, application, and implementation in national legal order. Is monism or dualism favored? What is the status of international law and standards in national law, including relationship to the national constitution? What is the position of international norm in the hierarchy of norms? Is it above the constitution; below the constitution, but above a law or equal with a national law or even in case of the agreements made by executive below national laws?

There is also a difference between borrowing or interpreting international/European instruments, including case law, and borrowing the examples and experiences of other countries. The former can sometimes be compelling; the latter, which should be facultative, can also be more dangerous as more mistakes could be made by applying pure norms or case law of a foreign country.

Last, but not least, the differences in attitude towards judicial borrowing depend on the culture and mentality of judges (justices), as well as the availability of international and foreign materials and judges' knowledge of foreign languages and international law.

It is also important to ask whether the borrowing is only non-binding. International soft law and foreign norms are not binding; however, for the European Community, law norms can be binding and directly applicable to the member states, their citizens, and of course, the judges of the European Union in interpreting and applying laws.

As far as the pros and cons of judicial borrowing are concerned, the following positive aspects of this legal instrument can be highlighted:

- To facilitate the achievement of the following aims: better protection of human rights, implementation of international and European obligations of the state, and effective application of international and European law;

- To preserve the checks and balances necessary for a functioning democracy (this balance is very important because globalization tends to strengthen the executive branch especially);
- To avoid isolation of domestic judges in relation to other judiciaries around the world;
- To find the best solutions to common problems together and promote understanding, even between different approaches; and
- To develop and enrich law. In the contemporary legal world, judicial creativity is a well-recognized phenomenon, but it should not be arbitrary.[12]

On the other hand, some negative aspects of the judicial borrowing need to be mentioned:

- There is a problem of legitimacy/democracy when using foreign law as an example. Foreign law does not reflect the will of the people of the country of adjudication and/or of legitimate representatives of people in one's country, although this problem does not exist if the international instrument reflected has been approved by the state;
- Judicial borrowing is a time consuming undertaking; it requires the judge to conduct more research than writing a regular judgment based on national law only;
- Judges have enormous freedom to determine which foreign materials they find compelling, therefore, they might abuse their power to pick and choose favored foreign precedents; and finally
- There is a danger that judicial borrowing could become a product of an elite, nontransparent network.

III. International and European Law as Tools of Domestic Legal Adjudication. Opinion Number Nine of the Consultative Council of European Judges

In the context of using international and/or European law (especially in member states of the Council of Europe and the European Union), the question that arises is whether international/European law is really nonbinding or rather a binding tool of domestic legal adjudication. Thus, we must talk about necessary or voluntary judicial borrowing.

European law, both the European Convention on Human Rights and the case law of the Strasbourg Court (European Court of Human Rights), as well as European Community law and case law of Luxembourg court (ECJ) is necessary in European countries, and, for member states, is even compulsory.

The European Convention on Human Rights is in many member states regarded as above the ordinary laws of the country, having at least a higher value than the ordinary laws or even being equal with the constitution. The Convention is often used in the decisions of the courts of the member states, especially in judgments concerning constitutional issues and human rights.

European Community law is in many cases directly applicable to member states (stipulations of the founding treaties, EU regulations and decisions, and sometimes directives). The courts of member states of the European Union are compelled to apply and imple-

12. *See* CARLO GUARNIERI & PATRIZIA PEDERZOLI, THE POWER OF JUDGES 7 (C.A. Thomas ed., Oxford University Press 2003) (2002).

ment the directly applicable Community law, which has supremacy over national law, according to the case law of the ECJ even when the Community law conflicts with the national constitution.[13]

A decision of the Strasbourg Court in a concrete case is to be followed by the applicable member state just as the preliminary ruling of the ECJ is binding to the court of a member state which made the reference. But the case law of both of these European courts has a much wider significance than just *inter partes*; the judgments build a sound case law to be followed by national jurisdictions while applying and interpreting European law.

Therefore, in this context we should especially avoid using the term "borrowing"—in reality it often means interpreting national law in light of and in conformity with international and European law.

The importance of international and European law as tool for domestic legal adjudication is stressed in opinion number nine of the Consultative Council of European Judges (CCJE)[14] for the attention of the Committee of Ministers of the Council of Europe on the role of national judges in ensuring effective application of international and European law.[15] International and European law are seen as normal, natural, and, in today's world, indispensable tools of adjudication in most European countries. However, problems might occur in accessing the necessary information. There are also problems of "psychological" nature and specific legal problems.[16] For example, how far can a judge go using international instruments, if its country has not ratified the international instrument in question?

Opinion number nine of CCJE gives several recommendations of what should be done in order to make proper use of international and European law and points out that it is advisable even to refer to the non-binding recommendations of Council of Europe, both in law-making and in applying the law by judges. Special mechanisms are suggested in order to observe the judgments of the European Court of Human Rights.

13. *See* ECJ, Case C-6/64, Costa v. ENEL, ECR English special edition p.E.N.E.L., 1964 E.C.R. 585 (holding the supremacy of Community law over the national constitutions); *see* ECJ, Case C-11/70, Internationale Handelsgesellschaft [mbH v. Einfuhr] 1970 E.C.R. 1125.

14. The Consultative Council of European Judges (CCJE) is an advisory body of Council of Europe that serves as a guarantor of judicial independence. It gives advice on issues such as the impartiality and competence of judges strengthens the role of the judiciary in Europe and issues yearly opinions. It is the first advisory body within an international organization to be composed exclusively of sitting judges from all member states of the Council of Europe, and these judges serve as professional individuals who are not accountable to their governments. CCJE is in this respect unique in the world. Besides the opinions, the CCJE provides practical assistance to help states comply with standards relating to judiciary; increases contacts between judges of different member states, and organizes Europe-wide conferences. *See* Consultative Council of European Judges, http://www.coe.int/ccje (last visited Jan. 20, 2009).

15. *Id.*

16. *See* Legal Co-operation of the Council of Europe with the Countries of Central & Eastern Europe, Conclusions of the Second Meeting of the Lisbon Network, *The Training of Judges on the Application of International Conventions*, (July 4, 1997), http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/lisbon/meetings/Plenary/1997Bordeaux_en.pdf.

IV. Comparative Law as Nonbinding Tool of Domestic Adjudication

A. Particularities and Methods of Comparative Law as Nonbinding Tool of Domestic Adjudication

The primary aim of comparative law, as of all sciences, is knowledge. Comparative law can provide a much richer range of models; it can be *école de vérité*, which extends and enriches the "supply of solutions" and offers critical capacity and opportunity of finding the "better solution" for his time and place.[17]

The term "comparative law," however, must be qualified in domestic adjudication in several respects. First, courts do not really undertake a comparison of law. Often the courts refer to individual sources of foreign law without indicating why a particular country was selected. Secondly, in some countries there are limits of a procedural nature that prevent courts from taking into account foreign law. On the other hand, in such countries citations and references to foreign law can be found in well-reasoned opinions of advocate generals (France) or attorney generals. Thirdly, the court can refer to a domestic law or law book that is already based on foreign law (implicit use of comparative law).[18]

Therefore, the question of methodology is crucial in using comparative law as a tool of domestic adjudication. It seems that there does not exist one single model of sound methodology in using comparative law. One should be extra cautious with using analogy without further investigation and reasoning. As there are already limits in analogical reasoning, even in a purely national legal context, the existence of limits is even truer by using analogy from foreign examples.[19]

Whatever methods are used, two questions must always be asked: whether the item that will be borrowed has proved satisfactory in its country of origin, and whether it will work in the country where it is proposed to be adopted.

German legal thinker Rudolph von Jhering has concluded that "reception" of foreign law is a matter of usefulness and need.[20]

B. Practice and Problems in using Comparative Law as Nonbinding Tool of Domestic Adjudication

Comparative law has proven to be extremely useful in the countries of Central and Eastern Europe in reconstructing their legislation and legal order.

Quite often, judicial systems similar to the domestic judicial system (belonging to same legal family) are used as foreign examples. For instance, Canada and other states frequently cite the case law of the U.S. Supreme Court as well as, the Irish Supreme Court and the U.K. House of Lords.[21]

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17. *See* Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 15 (Tony Weir trans., Oxford University Press 1998) (1977). *See generally* Peter de Cruz, Comparative Law in a Changing World (2d ed. 1999).

18. *See* Ulrich Drobnig & Sjef van Erp, The Use of Comparative Law by Courts 4 (1998)

19. *See* Ronald Dworkin, Taking Rights Seriously (1997), *and* M.D.A. Freeman, Lloyd's Introduction to Jurisprudence 1406 (7th ed. 2001).

20. Rudolph von Jhering, Geist des römisches Rechts 8 (9th ed. 1955).

21. *See* David Schneiderman, *Exchanging Constitutions: Constitutional Bricolage in Canada*, 40 Osgoode Hall L.J. 401, 402 (2002).

Comparative law is not necessarily a binding tool, but mostly a non-binding tool of domestic adjudication. One of the main problems in using foreign law examples is a problem of legitimacy; this problem is more acute when applying comparative law rather than when applying international or European law.

A side effect of using international law, and especially comparative law (due to the legitimacy problems), is that judges may feel a stronger pressure to justify actions externally (publicly); although this pressure can also have a positive consequence.

More problematic, however, is the risk of "superficial" borrowing. Sources of information are often accidental. For instance, judges search in various databases, including webpages on the internet, in order to find relevant materials. This superficial borrowing can lead to controversial and inadequate information. Any references to other legal systems, made by one of the parties, are taken for granted without going into further research as to whether there are other countries and/or international norms and jurisprudence that contradict the examples brought by one of the parties of the case.

Comparative law can also be abused when only certain countries are used as examples without justifying the selection. Judges frequently tailor or reject foreign law in accordance with local needs and conditions.

Due to a lack of time or the pressure to justify the selection, there is a danger that comparative and/or international law could be set aside completely. This option would also not be effective, especially if deciding a case of fundamental issue, and would not result in a well-reasoned judgment. Another possibility, that addresses the time and capacity constraints, is that comparative and/or international law could be used, but the sources would not be revealed—the "borrowing" would not be made public.

The abuse of comparative law can also result in excusing certain legal policy by pointing out to foreign examples. On the other hand, an absence of a foreign practice can make a void in legal regulation seem natural or necessary (an example of the use of comparative law as excuse for its reasoning). Sometimes a judge cannot simply identify the logic of a single foreign country that he or she finds convincing. Therefore, private preferences of the judge are used that could result in abusing comparative law as tool in domestic adjudication.

It is not always easy to guarantee that the judge understood the foreign law correctly. Proper understanding is connected with the methodology of how the national judge interprets foreign law; does he or she use the legal materials, case law, any other background materials, or legal literature of the country of origin from which the jurisprudence is borrowed? This understanding depends, to a large extent, on the language skills of a judge.

V. International, European, and Comparative Law as Tools of Domestic Adjudication in Estonia—Reasons and Outcome of Extensive Application of these Tools

Estonia is among the Central and Eastern European countries where comparative law has proven extremely useful in reconstructing the legislation and legal order.

Estonia has a court system that consists of three levels. The first level consists of county courts and administrative courts, the second level is comprised of circuit courts, and the third and last level is the Supreme Court of the Republic of Estonia (Riigikohus) situated

in Tartu. The Supreme Court is simultaneously the highest court in ordinary jurisdiction, the supreme administrative court, and the constitutional court.[22] Many of the Supreme Court judgments have *de facto* precedential value, especially due to the legal reforms that have taken place and the need to develop law by interpretation.

Estonia has undergone major legal reforms in a very short period of time since restoring its independence in 1991. Thus for a small country starting to develop its legal system, a voluntary reception of norms and models of democratic European societies was necessary in order to overcome the Soviet legal culture and re-introduce and strengthen the rule of law.[23] One must, however, avoid copying foreign norms. One can copy the laws, but one cannot easily copy the legal culture, the traditions behind the legislation, the implementation of laws, and the case law. This balance was not always easy for Estonia.

From 1995 to 2004, the Estonian legislature constantly worked to harmonize domestic law with European Community law, including case law,[24] The enormous speed of passing new legislation daily often affected the quality. On the other hand, this period also helped to create and systemize Estonia's own very modern legal order that is open to all inventions of contemporary society and attempts to take only the best of the best from foreign and international law. Since May 1, 2004, Estonia has been a member of the European Union, and Community law has become part of everyday work for many Estonian judges.

Both private international private law[25] and international public law have been used by the Supreme Court of Estonia in supporting its judgments.[26] These have been mostly instruments of the United Nations, such as the CISG (United Nations Convention on Contracts for the International Sale of Goods) and the UN International Covenant on Civil and Political Rights.[27]

To a much larger extent, however, European law serves as tool in domestic legal adjudication in Estonia, especially in the Supreme Court. Hence, mostly the European Convention on Human Rights, the case law of the European Court of Human Rights, and different charters and conventions of the Council of Europe (conventions and charters on social issues, local authorities, etc.) have been used in the judgments of the Supreme Court

22. Supreme Court of the Republic of Estonia in English, http://www.riigikohus.ee/?id=188 (last visited Jan. 20, 2009).

23. *See* Marju Luts, *Jurisprudential Reception as a Field of Study*, 2 JURIDICA INT'L 2 (1997). The Estonian law journal Juridica has published several special editions devoted to the legal reforms in Estonia. See special issues such as: 5 JURIDICA INT'L (2000) (discussing legislation and legal policy, as well as, legal reforms in Estonia); 6 JURIDICA INT'L (2001) (exploring civil law reforms); 7 JURIDICA INT'L (2002) (commenting on penal law reforms); *see* Kalle Merusk, *Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation*, 9 JURIDICA INT'L 52 (2004) (discussing administrative law reforms).

24. *See* Julia Laffranque, *Influence of European Community Law on Estonian Law and, in Particular, Lawmaking*, 4 JURIDICA INT'L 82 (1999); Heiki Pisuke, *The Process of Bringing Estonia's Legal System Into Conformity With the European Union's* Acquis Communautaire, *in* THE BALTIC STATES AT HISTORICAL CROSSROADS: POLITICAL, ECONOMIC, AND LEGAL PROBLEMS IN THE CONTEXT OF THE INTERNATIONAL CO-OPERATION AT THE BEGINNING OF THE 21ST CENTURY (Talavs Jundzis ed., 2d rev. & expanded ed. 2001).

25. *See* LAURI ALMANN ET AL, RAHVUSVAHELINE ERAÕIGUS (2005) (law book on international private law).

26. *See* MERILIN KIVIORG ET AL, RAHVUSVAHELINE ÕIGUS 65 (2007) (law book on international public law).

27. *See* No. 3-2-1-124-03, Riigi Teataja [RT] III 35, 363 (Civil Law Chamber of the Supreme Court 2003) (Est.); No. 3-1-3-10-02, RT III, 10, 95 (Supreme Court 2003) (en banc) (Est.), *available at* http://www.nc.ee/?id=419.

of Estonia (in constitutional and criminal matters as well as in administrative cases).[28] But even references to documents of the Council of Europe, such as recommendations (for example European prison rules) and soft law, have been used by the Supreme Court.[29]

In all of the above mentioned cases, international/European law was used as a supportive argument in the reasoning of the judgment. Thus, it was employed as an additional tool for the Estonian legal system for interpreting the law in question. Sometimes this kind of interpretation, by its nature a teleological interpretation, can lead to a completely different solution if the Estonian norm in question would have been interpreted in a more positivist manner using grammatical interpretation. Thus, the use of international/European instruments as examples tends to be more favored by the members of the court who prefer value jurisprudence and more liberal, wide ranged interpretation (sometimes even judicial activism).

It is of interest that some ten years before Estonia's EU membership, its Supreme Court stated in a judgment that the general principles of Community law act as one of the sources of Estonian law.[30] This statement was followed slowly, but persistently, in the subsequent case law, beginning mostly in dissenting opinions of justices,[31] but later also in judgments.

Today, we can say that more and more the Supreme Court has applied both specific Community law and general legal principles of EC law including the non-binding Charter of Fundamental Rights of the European Union (hereinafter "the Charter"). It is particularly remarkable that the decisions of the Supreme Court refer to the Charter as a tool for interpretation, which even occurred in three cases before Estonia's membership in the EU. As noted *supra*, the Charter is not legally binding and, even if it will be binding one day, in the event that the Treaty of Lisbon enters into force, it will affect the member states of the EU mostly in cases when they apply EU/Community law. To summarize the practice of the Riigikohus referring to the Charter, two features can be highlighted: 1) the Supreme Court has used the Charter in "domestic cases" (i.e. in matters that did not have a direct link to the EU law), (but not as the only source/argument) except in the case of distributing structural aid[32] and in a dissenting opinion that concerned the rights of citizens of other member states of the EU to belong to political parties[33] where the commu-

28. *See* Hannes Vallikivi, *Use of the European Convention on Human Rights in the Practice of the Supreme Court*, 11 JURIDICA 399 (2001).

29. *See* No. 3-3-1-2-06, RT III 11, 107 (Administrative Law Chamber of the Supreme Court 2006) (Est.); No. 3-3-1-14-06, RT III 11, 108 (Administrative Law Chamber of the Supreme Court 2006) (Est.).

30. No. III-4/A-5/94, RT I 80, 1159 (Constitutional Review Chamber of the Supreme Court 1994) (Est.). *See also* Uno Lõhmus, *Generally Recognized Principles of International Law as part of the Estonian Legal System*, [Estonian only] 9 JURIDICA 425 (1999), Hannes Vallikivi, *Domestic Applicability of Customary International Law in Estonia*, 7 JURIDICA 28 (2002); Peeter Roosma, *Rahvusvahelise ja siseriikliku õiguse vahekorrast Eestis* [*Relationship between International and National Law in Estonia*], *in* KONSTITUTSIOONIKOHTUD PÕHIÕIGUSTE JA - VABADUSTE KAITSEL (1997).

31. *See* No. 3-4-1-4-98, RT I 49, 752 (Constitutional Review Chamber of the Supreme Court 1998) (Est.) (Maruste, R., dissenting).

32. The Charter of Fundamental Rights of the European Union 364/01, art. 41, 2000 O.J. (C 364) 1 (E.C.), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf; No. 3-3-1-80-06, RT III 1, 10 (Administrative Law Chamber of the Supreme Court 2006) (Est.).

33. The Charter of Fundamental Rights of the European Union, *supra* note 32, at art. 12, ¶.1; No. 3-4-1-1-05, RT III 13, 128 (General Assembly of the Supreme Court 2005) (Est.) (en banc) (Laffranque, J., dissenting), *available at* http://www.nc.ee/?id=391.

nity law relevance was present; and 2) the Supreme Court has used the Charter in very important and sensitive areas like human dignity,[34] the rights of EU citizens and issues of democracy, the right to good administration (the Supreme Court has even referred to this right in two cases[35]), political parties as an expression of political will of EU citizens,[36] justice (procedural fundamental rights[37]), solidarity,[38] and also the right to bequeath one's property.[39] This summary illustrates the fields in which the Charter could be useful as a supplementary source of law in Estonian legislation.

The Riigikohus has used Community law as a tool for interpretation not only in constitutional matters and matters concerning human rights,[40] but also in deciding cases in civil and administrative litigation,[41] and even in some criminal cases as far as European arrest warrant and framework decisions are concerned.[42] The Supreme Court has also explicitly recognized the right of the Estonian legislature to transpose EC directives into Estonian law[43] and has not applied an Estonian law that was in contradiction with Community law.[44]

Today, comparative law as tool for domestic legal adjudication is used less in the case law of the Supreme Court in Estonia than the international and European law. Judges use comparative law arguments in their deliberations. They avoid, however, including these arguments in judgments because doing so could give an impression of selective use of comparative law and/or even harm the authority of the court. Mostly, when comparative law is used, at least not in judgment, the judge does not elaborate on why exactly these countries have served as examples and what scientific methods of comparative law the judge has used.

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34. The Charter of Fundamental Rights of the European Union, *supra* note 32, at art. 1; No. 3-3-1-14-06, RT III 11,108 (Administrative Law Chamber of the Supreme Court 2006) (Est.) (opinion unavailable in English).

35. No. 3-4-1-1-03, RT III 5, 48 (Constitutional Review Chamber of the Supreme Court 2003) (Est.), *available at* http://www.nc.ee/?id=418. No. 3-3-1-80-06, RT III 1, 10.

36. No. 3-4-1-1-05, RT III 13, 128 (General Assembly of the Supreme Court 2005) (Est.) (en banc) (Laffranque, J., dissenting).

37. No. 3-1-3-10-02, RT III 10, 95 (Supreme Court 2003) (Est.) (en banc) (referring generally to the Charter and to the principles of legality and proportionality of criminal offences and penalties, according to which a heavier penalty shall not be imposed than that which was applicable at the time the criminal offence was committed), *available at* http://www.nc.ee/?id=419.

38. The Charter of Fundmental Rights of the European Union, *supra* note 32, at art. 34; No. 3-4-1-7-03, RT III 5, 45 (Constitutional Review Chamber of the Supreme Court 2004), *available at* http://www.nc.ee/?id=412.

39. The Charter of Fundmental Rights of the European Union, *supra* note 32, at art. 17; No. 3-2-1-73-04, RT III 8, 73 (Supreme Court 2005) (Est.) (en banc), *available at* http://www.nc.ee/?id=394.

40. *See* Joachim Sanden, *Methods of Interpreting the Constitution: Estonia's Way in an Increasingly Integrated Europe*, 8 JURIDICA INT'L 128 (2003).

41. *See* No. 3-3-1-5-97, RT III 12, 136 (Administrative Law Chamber of the Supreme Court 1997) (Est.); No. 3-2-1-66-05, RT III 23, 245 (Civil Law Chamber of the Supreme Court 2005) (Est.); No. 3-4-1-7-03, RT III 5, 45 (Constitutional Review Chamber of the Supreme Court 2004) (Est.) (referring to the Charter of Fundamental Rights of the EU).

42. *See* No. 3-1-1-5-06, RT III 20, 181 (Criminal Law Chamber of the Supreme Court 2006) (Est.); No. 3-1-1-125-06 (Criminal Law Chamber of the Supreme Court 2006) (Est.).

43. *See* No. 3-3-1-5-05, RT III 12, 177 (Administrative Law Chamber of the Supreme Court 2005) (Est.).

44. No. 3-3-1-33-06, RT III 35, 301 (Administrative Law Chamber of the Supreme Court 2006) (famous decision concerning the surplus stocks of sugar products).

In Estonia, Estonian law, including international instruments ratified by Estonia, and Community law are applied. Therefore, examples of foreign law in the Supreme Court judgments are rare. One of the few examples where the judgment of the Riigikohus referred to the laws of other countries can be found in a case concerning the principle of *nulla poena sine lege* in a criminal case against S. Brusilov where the constitutionality of the Estonian Penal Code Implementation Act was challenged. The Supreme Court found the above mentioned Act to be in conflict with the second sentence of section 2 of article 23 of the Constitution that states that if after the commission of an offence, the law is amended to provide for a lesser punishment, then the lesser punishment shall apply. Additionally, the Penal Code Implementation Act was found to be in conflict with the first sentence of section 1 of article 12 of the Constitution that stipulates everyone is equal before the law. The Penal Code Implementation Act was found unconstitutional to the extent that the Act did not provide for a possibility to mitigate the punishment of a person serving imprisonment, imposed under Criminal Code, up to the maximum rate of imprisonment established by a corresponding section of the Special Part of Penal Code. In this judgment, the Supreme Court referred to codes of other countries in addition to international and European human rights instruments. In paragraph 22 of the judgment the Riigikohus affirmed, stating:

> Some countries have further specified or established the principle of retroactive force of a lesser punishment in their Penal Codes. For example, the 1997 Criminal Code of Poland establishes that if for an offence, for which a new law establishes a maximum punishment which is lower than the sentence already passed, a judgment has already been rendered, then length of the sentence shall be decreased up to the maximum punishment established by the new law (§ 4(2)). The 1995 Penal Code of Spain stipulates that a law which alleviates the situation of a person shall have retroactive force, even if a sentence has been pronounced and enforced (§ 282). The same principle has been adopted in the 1999 Criminal Code of Latvia (§ 5(2)) and 1996 Criminal Code of the Russian Federation (§ 10(5)). These examples allow to draw [sic] a conclusion that the Penal Codes of several European countries extend the effect of criminal laws alleviating the situation of a person also to the time of serving the sentence.[45]

The judgment was accompanied by a critical dissent from justice Eerik Kergandberg, who argued that there are countries that do not use the system referred to by the majority opinion, and thus, the comparative law selection of the majority opinion is not convincing. Justice Kergandberg was of the opinion that to simply look at the stipulations in the penal codes of other countries would not reflect the complete situation surrounding the protection of fundamental rights in the respective foreign countries. The dissenter argued further that the comparative law aspect of the majority judgment would have been more convincing if, in addition to the plain meaning of the texts of the penal codes of the Russian Federation, Latvia, Poland and Spain, the majority would have analyzed the doctrines (leading scientific works) of the lawyers of these countries about the current issue. Justice Kergandberg questioned the selection of the "model" countries and did not share

45. No. 3-1-3-10-02 (General Assembly of the Supreme Court 2003) (en banc), *available at* http://www.nc.ee/?id=419&print=1.

the majority's opinion that these four countries represent the prevailing understanding of retroactive force of mitigating punishment in Europe.[46]

On the other hand, in Estonia comparative law is seen as a normal part of every scientific work and curricula at law schools. It is important to draw borders, to know how far to go by using foreign law examples, and to know how many times they really prove to be helpful.

Therefore, comparative law is used much more carefully than international law or European judicial practice.

VI. Judicial Borrowing in International and European Jurisdictions

Without going to details, as this would be a separate subject of research, it is interesting to note that the use of international, European, and comparative law in legal adjudication is not only common to domestic jurisdictions but is also practiced at the courts of international and European organizations.

This use is often due to mutual influences: International and European courts in settling disputes can use national laws and case law as tools of interpretation.[47]

Judicial borrowing is relatively broadly practiced by the European Court of Justice. This mission derives from paragraphs 1 and 2 of article 6 of the Treaty on European Union that states that the European Union was founded on the principles of liberty, democracy, respect for human rights, fundamental freedoms, and the rule of law—principles that are common to the member states. "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms–and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[48] The ECJ, however, prefers European norms to international ones and does not always refer to its sources of inspirations (European Convention on Human Rights, the Strasbourg court case law, European legal traditions, and legal concepts common to its member states, etc.). More likely an advocate general of the ECJ will cite national legislation in his or her opinion, as well as legal doctrine and case law of member states.

VII. Questions and Keywords Concerning the Best Practice of Judicial Borrowing

Besides the aims of judicial borrowing, which are legitimate and include as listed above the protection of human rights and application of international norms, one should also draw attention to the following questions. Does judicial borrowing settle prejudicial be-

46. *See id.* at ¶ 10 (Kergandberg, E., dissenting).

47. *See* Daniel Halberstam, *The Bride of Messina or European Democracy and the Limits of Liberal Intergovernmentalism*, *in* ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE (J.H.H. Weiler & Christopher L. Eisgruber, eds., Jean Monnet Working Paper 5/04 2004), *available at* http://www.jeanmonnetprogram.org/papers/04/040501-20.pdf (stressing that Members of the European Court of Justice are educated in national settings and thus generally more comfortable with domestic constitutional modes of legal analysis than they are with interpreting intergovernmental treaties).

48. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

liefs and attitudes? Does it serve liberal, as opposed to illiberal, outcomes? And, above all, does the local use of transnational norms serve the interests of local citizens?[49]

In today's world, where it is impossible for domestic case law to stay in isolation from global legal developments, it seems reasonable to be generally in favor of judicial borrowing ; however, judicial borrowing should not be mechanical. It should be creative and not abusive, and it should respect the legal principles recognized by democratic states and promote them. It should understand the background of the norm that it is intended to borrow, as well as case law of the respective foreign country and/or international court concerning the concrete problem. Judges should use the norm or case law to be borrowed as a tool of interpretation while considering their own local legal culture and traditions.

Judicial borrowing has become an overall trend in Europe. It is difficult to imagine national judgments of member states from European organizations that do not take into account the relevant Community law and case law of the European Court of Justice, as well as the European Convention on Human Rights and respective existing case law.

Due to the fact that European judges are more frequently using supranational European law or European human rights law, these judges are also looking more to what the other judges in other European countries do and how they apply European law. They might not only refer to the practice of their colleagues in their judgments, but may also write useful studies and create helpful data-bases.[50]

In order to make the best out of judicial borrowing the following is needed[51]:

- In the field of training of judges in international, European, and comparative law, it is important to grant judges full access to relevant information, foreign language courses, and translation facilities;
- It is essential that judges possess a good understanding of international, European, and comparative law; therefore, judges must receive information (including via the internet) on recent developments in international law, European law, and legal events in other countries;
- Training of judges is very important. International, European, and comparative law should be included in university curriculum and considered in entry examinations of the judicial profession, where such examination exist, as well as form part of further and continuous training of judges;
- Translation and documentation services, libraries, and judicial assistants are needed in order to help judges effectively apply international and European law;

49. *See* Wen-Chen Chang, Paper Presented at the Annual Meeting of The Law & Soc'y Ass'n: Empowering or Disempowering? A Comparative Study on Judicial Use of Transnational Norm (July 2006), *abstract available at* http://www.allacademic.com/meta/p96171_index.html.

50. *See generally* Conseil d'Etat, *Rapport public 2007: L'administration française et l'Union européenne: Quelles influences ? Quelles stratégies?*, Etudes & Documents No. 58 (2007), http://lesrapports.ladocumentationfrancaise.fr/BRP/074000224/0000.pdf (last visited Jan. 20, 2009); Cour de Cassation, *Rapport 2006: La Cour de cassation et la construction juridique européenne* (recent judgments and research of French higher jurisdictions) (2006), http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf. *See also* Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, www.juradmin.eu (last visited Jan. 20, 2009).

51. *See also Opinion No. 9 of the Consultative Council of European Judges for the Attention of the Committee of Ministers of the Council of Europe on The Role of National Judges in Assuring an Effective Application of International and European Law* (Nov. 8, 2006), http://www.coe.int/ccje (follow "CCJE Opinions" hyperlink; then follow "Opinion n9 (2006)" hyperlink).

- Judges should possess knowledge of foreign languages, as well as have access to language training.

All the above mentioned require the states to provide adequate means to judiciary.

One of the key elements of the successful application of international, European, and comparative law in domestic legal adjudication is a sound and functioning relationship between national judicial institutions and international and European judicial bodies.

In order to make proper and effective use of judicial borrowing, contacts between different judges are essential. Therefore, the development of direct contacts and communications between judges of all levels, not only supreme court judges, in the form of conferences and seminars as well as small scale bilateral meetings should be encouraged between different national jurisdictions and national and international courts and tribunals. In addition, information of such events should be available to everybody via electronic means. Also, visits and study programs to other national and international judicial institutions should be made.

Despite differences in legal systems, the judges and judicial institutions should ensure that national law, including national case law, conforms to international and European law and respects the judgments of international and European judicial institutions, such as the European Court of Human Rights. One should reduce differences in application of similar general principles of law.

In the end, taking into account the above listed suggestions, the many benefits of judicial borrowing seem more advantageous than ignoring the rest of the world. It is hard to believe a legal system exists from which others cannot learn and which only borrows from others. Judicial borrowing is not a one way street and does not mean losing one's own identity.