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The Morality of Foreign Law

Abstract: The article explains the normative foundations of the use of foreign law in constitutional reasoning. It pursues four claims. First, it argues that a normative explanation of the use of foreign law must elucidate the connection between foreign legal facts and moral values. Second, it distinguishes between the deductive model of the use of foreign law, which ascribes value to foreign legal facts directly, and the reflective model, which ascribes value to the outcomes of the reflective process facilitated by foreign legal facts. Third, it shows how the deductive model fails to explain the value of foreign law for constitutional judgment. Fourth, the article demonstrates how the reflective model can be justified with a reference to a set of virtues of good moral judgment, but argues that this model poses important limits to the use of foreign law.

1. Introduction

While we often side with moral opinions of others, this is rarely accepted as a valid justification of our actions: as every child knows, the fact that your friends did not wash their hands too will not save you

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from your mother's scolding.[1] Yet, when constitutional and other courts refer to foreign law to support their judgments, they are accused of adopting the same argumentative strategy – it appears as if they rely solely on the fact that other courts are doing something to justify their decisions.[2] The question is: how can their actions be justified by reference to other courts' behavior?

The aim of the article is to answer this question and elucidate the moral foundations of the non-mandatory judicial use of foreign law.[3] There is now a rich literature that explores various empirical and normative dimensions of the use of foreign law in constitutional reasoning. However – while this literature has been successful in illuminating many important aspects of this phenomenon – it has not provided a compelling explanation of the connection between *normative* justification of judicial action and *descriptive* facts about judicial behavior in foreign constitutional systems.[4]

The article argues that a successful justification of the use of foreign law must first resolve this problem. The normativity of foreign law is puzzling: foreign legal facts cannot acquire normative

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[1] Not only do we side with other people's opinion but we do so *because* it is their opinion, that is, notwithstanding its content. *See* Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001). For a conformist, conventional stage in the moral development of a child, *see* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1965) and LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981). This rhetorical example does not do justice to complex philosophical arguments about moral expertise and authority. There may be people who have more time and resources to reflect upon moral judgments, and whose opinion may be treated seriously when it comes to moral decision making. *See* Peter Singer, *Moral Experts*, 32 ANALYSIS 115 (1972). However, as I shall explain, this need not entail treating their conclusions as authoritative, but may imply that we choose to *engage* with their moral opinions based on their presumed expertise, and thus retain the possibility to make our own moral judgment, the one that we ultimately *care* about. *See* Gilbert Ryle*, On Forgetting the Difference Between Right and Wrong, in* MORAL PHILOSOPHY (A.I. Melden ed., 1957).

[2] *See* Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 PROC. ANN. MEET. A.S.I.L. 305 (2004), Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005), and Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319 (1957).

[3] The article deals with the instances of the *facultative* use of *foreign law* in *constitutional* reasoning. It does not address the issues of mandatory use of foreign law (which, for example, occurs in the conflict of laws cases) and the use of non-binding international documents (which poses similar but not completely overlapping concerns). Moreover – given that in practice this phenomenon mainly pertains to the use of foreign case law in constitutional adjudication – the article does not deal with the use of foreign legislation or the use of foreign case law in non-constitutional contexts. Some of its conclusions could potentially apply to some of these phenomena, but they also bring about further questions that cannot be discussed at appropriate length here.

[4] Some notable examples that do discuss this issue are: JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (2012), James Allan, *Jeremy Waldron and the Philosopher's Stone*, 45 SAN DIEGO L. REV. 133 (2008), and Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007).

weight by virtue of the same principles that justify the authority of domestic law, such as democracy or integrity. For this reason, any normative explanation of the use of foreign law must eventually claim that exposure to foreign law generates better moral answers to constitutional dilemmas. Such an explanation then also needs to bridge the gap between foreign legal facts and the domain of moral values that are revealed in this process. It must show, in other words, how these legal facts enable judges to grasp the realm of value and consequently reach better moral solutions to constitutional problems.

The article contends that there are two ways to make sense of the connection between values and foreign legal facts. The *deductive model* ascribes normative weight to foreign legal facts directly, while the *reflective model* ascribes normative weight to the outcomes of the reflective process facilitated by foreign legal facts. The article argues that the deductive model either fails to explain the connection between foreign law and moral values, or collapses into the reflective model. In contrast, the reflective model can explain this connection but at the same time poses important limits to the use of foreign law.

The structure of the argument is as follows. The second part of the article explains why illuminating the connection between foreign law and moral values is indispensable to a normative justification of the use of foreign law. The third part shows that the deductive approach to the use of foreign law does not succeed in explaining the connection between foreign law and moral values. The fourth part demonstrates how the reflective approach can be justified by reference to a number of virtues of good moral judgment, but it also underlines the limitations of this approach. The last part concludes.[5]

[5] The paper discusses cases from three jurisdictions: the United States, South Africa and Israel. The cases do not aim at a comprehensive comparative law explanation of the practice but are illustrative of certain major tendencies: in the United States there has been a lot of opposition to the use of foreign law and values are often seen as local, but the Supreme Court often uses foreign law in a deductive way; in South Africa, the court adopts a cosmopolitan understanding of value

2. Foreign Law and the Moral Reading of Constitution

The use of foreign law is best explained as a moral reading of constitution: it belongs to an interpretative approach that aims to reach an all-things-considered better moral judgment in a certain constitutional matter.[6] But – in addition to general dilemmas associated with this interpretive approach – the use of foreign law raises further questions that concern the relationship between facts and values. An adequate normative account of the use of foreign law needs to not only demonstrate how this practice contributes to a better moral judgment, but also do this in a way that establishes a meaningful connection between foreign law and moral value that grounds such judgment. There are thus two preliminary claims that demand explanation: first, the use of foreign law is motivated and can only be justified by its propensity to facilitate better moral answers to constitutional problems; and second – because of this – there is a need to clarify the relationship between foreign legal facts and moral values.

The first claim is less controversial. On the one hand, judges that use foreign law are well aware that it assists them in making moral calls. This is obvious in systems such as South Africa[7] or

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and is open to foreign law, but its use of foreign law is most often reflective; in Israel, the vision of value is local and context-sensitive, but the results of the use of foreign law are frequently universalistic.

[6] I use the notion of "the moral reading of constitution" to denote a variety of approaches to constitutional interpretation which do not aim to discern the meaning of a legal directive or the intentions behind it. This conception need not necessarily embrace the understanding of interpretation initially championed by Ronald Dworkin (*see* e.g. RONALD DWORKIN, LAW'S EMPIRE ch. 10 (1986) and RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38 (1996)).

[7] The South African Constitution of 1996 confers a duty upon the court to promote moral *values* and authorizes it to consider *foreign law* (Section 39(1)). The South African Constitutional Court openly accepts moral reading as its interpretive philosophy (*see*, for instance, Justice Mokgoro in S. v. Makwanyane and Another, 1995 (3) SA 391 (CC), at para. 303). The court's value choices are regularly based on the analysis of foreign law, which appears in at least half of its judgments (Christa Rautenbach, *South Africa: Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010)*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 194 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013)). Justices also openly admit that foreign law serves to assist their law-making function (*see*, for example, Justice O'Regan in K. v. Minister of Safety and Security, 2005 (6) SA 419 (CC), at para. 35), and this is particularly relevant when there is no previous law that would guide the court's decisions (*see*, for example, Justice Chaskalson in S. v. Makwanyane and Another, *supra*, at para. 37, and Mistry v. Interim National Medical and Dental Council, 1998 (4) SA 1127 (CC), at para. 3).

Israel,[8] where the courts embrace their role as a vehicle of moral change and understand the use of foreign law as a part of value-based reasoning when they exercise law-making authority.[9] Even in the United States – where the Supreme Court faces much more criticism for its moral interpretation of the constitution – foreign law is used only when there is a need to find better solutions to controversial moral issues,[10] or to expound ambiguous moral concepts from the constitution.[11]

On the other hand, foreign law does not acquire paradigmatic features of valid legal sources.[12] The use of foreign law is *facultative* and *selective*: there is never a legal duty to consult foreign sources and they are never consulted comprehensively.[13] Consequently, foreign law lacks the key trait of ordinary legal sources that can be termed *prima facie authority*, as there is no obligation to first attempt to establish the content of the rule of foreign law in order to subject it to moral critique or find its

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[8] The lack of a canonical constitutional text and a complete bill of rights has moved the Israeli Supreme Court towards value-based reasoning without the constraints of originalism and textualism (MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL ch. 4 (2011)). The court has traditionally been open to foreign legal sources as it has attempted to build a new legal system with limited existing legal materials. In the 100 cases with most precedential weight the average number of foreign citations was 7.8 per case (Chanan Goldschmit *et al.*, *100 Leading Precedents of the Supreme Court – A Quantitative Analysis*, 7 HAIFA L. REV. 243, 267 (2004)). The court used foreign law both to read new moral values into the constitution and to secure its own position as the guardian of these values (*see*, for example, HCJ 73/53 Kol Ha'am v. Minister of Interior [1953] and CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village [1995]).

[9] *See* AHARON BARAK, THE JUDGE IN A DEMOCRACY 138 and 200 (2006), and Laurie W. H. Ackermann, *Constitutional Comparativism in South Africa: a Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169, 193 (2005).

[10] To mention but a few groundbreaking cases that used foreign law to decide some of the most important moral dilemmas of their era: Dred Scott v. Sandford, 60 U.S. 393 (1856); Reynolds v. United States, 98 U.S. 145 (1878); Lochner v. New York, 198 U.S. 66 (1905) (Justice Harlan's dissenting opinion, at para. 71—72); Roe v. Wade, 410 U.S. 113 (1973); Washington v. Glucksberg, 521 U.S. 702 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986); Lawrence v. Texas, 539 U.S. 558 (2003); Trop v. Dulles, 356 U.S. 86 (1958); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982); Thompson v. Oklahoma, 487 U.S. 815 (1988); Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

[11] The use of foreign law occurs most frequently when the court interprets the prohibition of "cruel and unusual" punishment from the 8th Amendment and the substantive component of the due process clauses from the 5th and 14th Amendments, which prohibit the deprivation of "life, liberty, or property, without due process." Both clauses enable the court to enrich the constitution with new interpretations beyond the strict reading of its text, and – in the case of the substantive due process doctrine – to protect new rights on the basis of the notion of liberty. For a comprehensive overview *see* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 846—847 (2005).

[12] Jeremy Waldron for example claims that convergent foreign legal practice "applies to us simply as law" (WALDRON, *supra* note 4, at 3). I discuss and reject this view in Bosko Tripkovic, *Judicial Comparativism and Legal Positivism*, 5 TRANS. LEG. THEORY 285 (2014), and this part builds on the insights of that article.

[13] *See* for example Article 39 of the South African Constitution of 1996. A common objection to the use of foreign law is that it presents cherry-picking of sources that support the opinion of the court (*see* e.g. Scalia's dissent in Roper v. Simmons, *supra* note 10, at 627).

best justification.[14] In addition, it is not possible to claim misapplication of foreign law through *appeal*, and it is the *highest courts* that refer to foreign law while other institutional actors most often ignore it, which is not the case with any other legal source. In sum, foreign law does not become a source of law but assists courts in finding better moral solutions to difficult constitutional questions.[15]

The second claim is more contentious. Because the use of foreign law is not an instance of a mere application of law, it demands a separate normative grounding: there is a need to explain how the use of foreign law facilitates the exercise of judicial law-making authority in a normatively attractive manner. And if the use of foreign law is an example of the moral reading of constitution, it is sensible to assume that its justification depends on its propensity to generate better moral answers to constitutional dilemmas. A successful normative account of the use of foreign law would then have to explain how foreign law facilitates this process and – in so doing – illuminate the connection between foreign legal facts and moral values.

Many normative accounts of the use of foreign law do not take this justificatory route. Instead, they aim to demonstrate that this practice is – at least partly – valuable independently of its substantive outcomes. For example, Jeremy Waldron advances an integrity-based argument for the use of foreign law. In his view, there is a reason to prefer global consistency in legal policies because people legitimately expect similarity in the rules that determine their basic status.[16] However, legitimate expectations typically do not outweigh other moral reasons, but become important once such reasons are weak or uncertain, and when some substantive moral threshold is secured. If the moral issue is not insignificant or uncertain there is no reason to prefer consistency without substantive moral backing.

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[14] Even on the assumption that the validity of law depends on its moral merit – for instance, because legal sources acquire their legal status through moral evaluation (*see* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS ch. 19 (2011)) – foreign law would not become our law, as its use is much more *topic-dependent* than *merit-dependent*; foreign law is used in some areas, and completely ignored in others, irrespective of its possible merit.

[15] For a broader discussion of these issues *see* Tripkovic, *supra* note 12, at 306—311.

[16] WALDRON, *supra* note 4, ch. 5.

The justification is therefore weak: it pertains to a small fraction of cases where there is an expected convergence in morally less significant policies.[17]

Another example is Vlad Perju's argument that ties the use of foreign law to democratic legitimacy.[18] In his view, foreign law can provide the vocabulary for minorities to voice their concerns when they are not a part of mainstream law. If foreign law can facilitate this process, judges have a reason to use it.[19] But if this argument is understood in procedural terms – according to which foreign law serves as a vehicle for empowerment of minorities regardless of the content of their claims – then its reach is limited: first, it neither explains how judges ought to treat foreign legal resources nor how these resources ought to affect their judgment, and second, it applies only to the cases in which minorities actually base their claims on foreign law.[20] If the argument is understood in a more substantive way – whereby the use of foreign law does not only empower minorities but also helps the courts to realize which of their claims are justified – then it also needs to show how the exposure to foreign law contributes to better moral answers.[21]

This is why a justification of the use of foreign law must make the connection between foreign law and moral value more perspicuous. The question is: how can a factual occurrence in the world – such as foreign law – track or reveal value? This problem has been recognized in the debate about the use of foreign law.[22] The opponents of this practice often argue that it presumes a robust connection

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[17] Waldron himself admits that the argument is "pretty modest." *Id.* at 141.

[18] Vlad Perju, *Cosmopolitanism and Constitutional Self-government*, 8 INT'L J. CONST. L. 326 (2010). *See* also Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008).

[19] Unless the reasons not to use it – such as legal certainty or respect for the will of majority – are more significant.

[20] Perju does not demonstrate that this is an empirically significant phenomenon, even in systems that are open to foreign law. In fact, if law ossifies the structures of oppression then cherry picking of foreign legal sources – other things being equal – could possibly contribute to further oppression instead of dismantling of such a system.

[21] Perju himself levitates between these two options: on the one hand, he sees the use of foreign law as contributing to the marketplace of ideas or "constitutional imaginary" (Perju, *supra* note 19, at 343–345), but then also presents it as a "self-correcting mechanism" (*id.* at 349–353).

[22] *See* for example Mark V. Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299, 310—311 (2006), and Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2004). Empirical studies also demonstrate that this divide is relevant: judges with universalist sentiments tend to cite foreign law in support of their opinions, while judges with a more particularistic vision

between moral values and foreign law.[23] For instance, Richard Posner contends that the use of foreign law presupposes the existence of universal moral values that are reflected in foreign law,[24] while Justice Scalia argues that this practice rests on a "Platonic" understanding of value that is revealed in foreign law and thus may prevail over local moral commitments.[25] But the question is whether the use of foreign law must be based on this assumption.

There are in fact two ways to think about the relationship between moral values and foreign legal facts. The first is *deductive*. According to this model, foreign legal facts carry normative weight because of their robust connection with moral values. Such values can be external to the moral attitudes of a constitutional community, in the sense that what is actually valuable may be completely independent from the content of domestic attitudes. As a consequence, the principles discerned from foreign law can be directly applied to domestic constitutional cases. The second is *reflective*. According to this model, foreign legal facts do not reveal moral values directly, but the process of the use of

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of values oppose this trend (RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 74 (2014)).

[23] This approach to the use of foreign law is well captured by Harold Koh's metaphor of a "global community of reason and rights" according to which convergence in foreign law points to moral truths discovered through the faculty of reason exercised in the legal context. Harold Hongju Koh & William Michael Treanor, *Keynote Address: A Community of Reason and Rights*, 77 FORDHAM L. REV. 583 (2008).

[24] Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 85 (2005). For a discussion of this issue *see* also Eric Engle, *European Law in American Courts: Foreign Law as Evidence of Domestic Law*, 33 OHIO N.U. L. REV. 99, 103 (2007); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 16—21 (2005); and Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1322—1326 (2004). Posner believes that the use of foreign law does not take into account moral disagreement and violates democratic values (Posner, *supra*, at 84—90). But it is not clear why democratic values are not subject to the same disagreement objection. For consider: either the judges who use foreign law disagree with Posner about the relevance of democratic values, or he is building a straw-man; in the former case, democratic values are subject to the same disagreement problem, and in the latter, his argument is confused. The argument from disagreement to democracy is often invoked in the debate without recognizing this problem. *See* for example Dixon, *supra* note 19, at 958—959.

[25] As he puts it, "[o]ne who believes it falls to the *courts* to update the list of rights guaranteed by the Constitution tends to be one who believes in a Platonic right and wrong in these matters, which wise judges are able to discern when people at large cannot [...] Platonic living constitutionalist must surely consider the views of all intelligent segments of mankind" (Scalia, *supra* note 2, at 308). Note that Scalia is not consistent in rejecting "Platonic living constitutionalism." For example, in *Thompson* he wrote: "The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident…" (Thompson v. Oklahoma, *supra* note 10, at 868 note 4). If there is no Platonic right and wrong, then all practices *are* historical accidents. Posner also used to defend the view that the use of foreign law is very useful in legal interpretation (*see* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13 (1996)).

foreign law may improve moral judgments. The values that ground such judgments are internal to constitutional community, and foreign law facilitates a reflective state in which the balance and consequences of domestic values are better recognized.

The deductive and reflective model should be understood as analytic categories which often do not perfectly overlap with a much messier empirical reality: there are sometimes traces of both models in a single instance of the use of foreign law. But it is nonetheless important to analyze them as distinct conceptual possibilities. On the one hand, the opponents of the use of foreign law have often presented the deductive model as the dominant approach to the use of foreign law, and it has also received at least partial endorsement and defense by some of the proponents. Since it has been a significant part of the debate and has occasionally been implicit in the way foreign law is used, my aim is to make the assumptions behind the deductive model explicit and explain why it is not plausible. On the other hand, the proponents of the use of foreign law have often accepted the reflective model without illuminating the more comprehensive ethical framework in which it is embedded. It is thus important to draw attention to this framework and demonstrate how the use of foreign law can be justified; at the same time, it is significant to underline some of the limits of the reflective use of foreign law that this ethical framework makes more visible.

3. The Deductive Model

The deductive model confers normative weight upon foreign legal facts by virtue of the following propositions: (i) foreign law reliably reflects or tracks moral values; (ii) because of this, foreign law acquires epistemic authority in moral matters; and (iii) its normative weight is independent from domestic moral attitudes.

Let us start from proposition (iii) in order to understand the ethical framework that explains it. The paradigmatic example of the deductive model is judicial reliance on convergence[26] in comparative law.[27] The consequence of the deductive model is that foreign convergence acquires independent normative weight, in other words, that it counts for something in judicial reasoning in a way that is autonomous from domestic moral attitudes. This does not mean that foreign law has to run against domestic attitudes, for it may simply reinforce or confirm them. For example, in *Roper v. Simmons*, Justice Kennedy explained that the international opinion had "overwhelming weight" and provided "significant confirmation" for the conclusions of the court.[28] The point is that foreign law is not superfluous in the balance of reasons that lead to a decision: it is not the starting point of reflection – the trigger that initiates further deliberation on the content and consequences of already internalized moral attitudes – but has some confirmatory or confuting power of its own.[29]

The best explanation of the normative weight of foreign law is that it operates as an epistemic authority in moral matters (ii). Courts believe that foreign convergence points to an adequate way to deal with a certain moral problem and it takes up a role of a moral expert (hence: epistemic); at the same time, foreign law acquires independent normative weight in their reasoning as the fact of convergence serves as a proxy for moral value (hence: authority). Notice that such authority need not have exclusionary weight and preclude all other reasons the courts may have for a decision; foreign

[26] Vicki Jackson calls it "the convergence model," but the deductive model is not necessarily connected to consensus (Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 123—124 (2005). Even a single foreign court or jurisdiction could be taken to reflect the true values. However, this position does not often occur in practice.

[27] In a number of cases, the US Supreme Court has deduced conclusions about domestic law from an overlap in foreign law. *See*, for example: Trop v. Dulles, *supra* note 10, at 103; Coker v. Georgia, *supra* note 10, at 592 note 4 and 596 note 10; Atkins v. Virginia, *supra* note 10, at 316 note 21; Roper v. Simmons, *supra* note 10, at 575 and 577.

[28] Roper v. Simmons, *supra* note 10, at 578.

[29] There is a subtle difference between following foreign law, and citing foreign law as a source that made the court aware of reasons that it would have accepted had it been aware of them. Ernest Young, for example, does not recognize this distinction, argues that the argument from consensus always amounts to "counting noses," and believes that in such cases the court does not get "persuaded by new rationales" because it is "deferring to numbers, not reasons." Young, *supra* note 2, at 150—151 and 155.

law may simply add to the balance of reasons or may even reinforce the court's decision, as it did in *Roper*. But it is an authority nonetheless because it is the consensus that carries normative weight, and not some other moral reason: otherwise the fact of consensus would be superfluous in judicial reasoning, and the court would not in fact rely on foreign law but on that normative reason.[30]

The idea that confers the status of epistemic authority upon foreign law is that it echoes moral values (i). This idea is implicit in judicial decisions. For example, in *Roper*, Justice Kennedy noticed that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,"[31] and mentioned that Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China had abolished the death penalty for minors.[32] The assumption behind this approach seems to be that values will be recognized even by the regimes which do not share the strong commitment to fundamental rights protection, or that values will somehow affect their contingent, worldly practices.[33] Consequently, the connection between contingent evaluative attitudes and moral values is robust: what is valuable will find its way into attitudes not because of similarities but even in spite of differences.[34]

The question is what accounts for the conclusion that foreign law reflects moral values (iii) as an epistemic authority (ii) with normative weight independent from domestic moral attitudes (i)? While

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[30] *See* more on this in Tripkovic, *supra* note 12, at 303—305.

[31] Roper v. Simmons, *supra* note 10, at 575.

[32] *Id.* at 577.

[33] For example, in *Atkins v. Virginia*, the majority led by Justice Stevens held that execution of the mentally challenged is a cruel and unusual punishment, and indicated "that there is a consensus among those who have addressed the issue," suggesting that if the issue is addressed by a sufficient number of systems the solution reached will be morally adequate. Atkins v. Virginia, *supra* note 10, at 316 note 21.

[34] The deductive model is not specific to the US constitutional practice, and is often mixed with other approaches to the relationship between foreign law and value. For example, in HCJ 7052/03 Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior [2006], Justice Cheshin of the Israel Supreme Court argues that comparative and international law show that "[e]very state has a natural right … to determine who will be its citizens" (*id.* at para. 51), and that "on the basis of this logical deduction, a deduction that is common to all human beings and to all human peoples, it has been determined in international law that when there is dispute between nations, a nation may prohibit the nationals of the foreign nation, as such, from entering or immigrating to it." (*id.* at para. 188). On the other hand, he argues that when there is no such principle reflected in global legal consensus, then "specific arrangements which are not universal", *id.* at para 39) reflecting local values ought to prevail (*id.* at para. 63).

the deductive model has mostly been used by the opponents of the use of foreign law to discredit the practice as a whole, some proponents have alluded to an explanation that could support it. This explanation is based on two central assumptions. First, it is assumed that there are true moral values, and that correct moral answers based on such values can be independent from local moral attitudes. For example, Cass Sunstein suggests that foreign law reveals "what is right and what is true"[35] and that the use of foreign law thus occurs "out of sense that [foreign law] might be correct."[36] As he puts it, for this model to work, "it is necessary to reject any strong form of cultural relativism, according to which the appropriate moral rules are culture-dependent, so that the moral requirements that are suitable for one culture need not be suitable for another culture."[37] Second, there must be a connection between true moral values and foreign consensus. Again, Sunstein's position is illustrative: "[i]f we are not skeptics, and if we believe that moral questions do have right answers, then it makes sense to consult the majority's view."[38] In Sunstein's view, the fact of consensus demonstrates that the connection between foreign law and moral values has been established: "the very fact that different societies have come to the same conclusion increases one's confidence that the norms are genuinely universal and transcend merely historical or institutional differences."[39] The consensus in foreign law – in this interpretation – is a signal that true moral values have been exposed.[40]

Let us examine this model more closely. The deductive model needs to overcome a tension: moral values at the same time exist independently of culturally contingent moral attitudes, but these moral attitudes reveal such values. On the one hand, because moral attitudes in any given

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[35] CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 180–190 (2009).
[36] *Id.* at 190.
[37] *Id.* at 195—196.
[38] *Id.* at 191.
[39] *Id.* at 197.
[40] Similarly, Jeremy Waldron believes that "the obviousness of certain moral principles [...] would be reflected in their ubiquitous adoption as laws in the world." WALDRON, *supra* note 4, at 37.

constitutional system can be right or wrong in relation to true moral values, such values and domestic moral attitudes must be independent from each other. On the other hand, because of the assumption that the consensus in attitudes yields moral value, the deductive approach also needs to explain how such attitudes reliably reflect moral values or how moral values causally affect these attitudes. In other words, moral values and contingent moral attitudes must at the same time be detached from and attached to each other.

The challenge for the deductive model is to bridge the gap between the causal world of moral attitudes and normative realm of moral values in a way that does not collapse the distinction between them. There are two possible ways to approach this problem. The first builds a *causal* connection between values and contingent attitudes, and the second assesses this connection from the *normative* point of view. While the first approach fails to bridge the gap between values and attitudes, the second does bridge this gap but fails to retain the distinction between them. As a consequence, neither can account for the normative weight of foreign legal facts. Let me explain.

The first way to overcome the tension in the deductive model would presume that values causally affect our moral attitudes. Sunstein for example believes that the authority of foreign law and scientific authority are analogous: for him, consulting foreign law is like consulting foreign doctors.[41] This analogy suggests that in the same way in which scientific methods are able to discover what the world is like, moral reasoning – or better, legal reasoning as a subset of moral reasoning that occurs in the context of contemporary political institutions – is able to track moral values. In this view, values are a part of, as Bernard Williams puts it, "the world that is there *anyway*"[42] and "might be arrived at by any investigator"[43] regardless of their contingent dispositions and beliefs. And because our moral

[41] SUNSTEIN, *supra* note 36, at 190. Waldron also trusts that "a body of legal science […] represents the accumulated wisdom of the law on certain recurrent problems, in much the way that science reflects the accumulated results of experiments in hundreds of different laboratories." WALDRON, *supra* note 4, at 77.
[42] BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 138 (2006).
[43] *Id.* at 139.

faculties track moral values it is sensible to assume that we will eventually converge on the right moral answers. If successful, this explanation would resolve the tension in the deductive view: it would demonstrate the connection between moral attitudes and moral values, and thus explain the normative force of the fact of legal consensus; at the same time, it would retain the distinction between true moral values and contingent moral attitudes, and thus make sense of the claim that our existing moral attitudes can be wrong.

But notice that this view effectively needs to argue that convergence in foreign law is a consequence of discovery of moral values. Its plausibility thus depends on the credibility of the empirical claim about the causes of moral/legal convergence. The question is then whether the best explanation of converging moral judgments presupposes the existence of true moral values.[44] For only in this case the deductive model is able to connect the domain of true values with contingent attitudes in a way that would confer normative authority on foreign consensus.

The convergence is, however, not explained better if we suppose the existence of true values.[45] Let us take the example of the death penalty. There is a growing consensus about its inappropriateness: if the consensus is explained by the immorality of the death penalty, then the deductive view has some purchase. But presupposing the truth of its moral inappropriateness does not add anything to the explanation of its abolition.[46] We need only suppose that our moral attitudes have changed, regardless of their truth. On the one hand, the death penalty has been used ever since there were organized societies. It is reasonable to suppose that an explanation – i.e. that the moral wrongness of the death

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[44] *See* Nicholas L. Sturgeon, *Moral Explanations,* and Richard N. Boyd, *How to Be a Moral Realist*, *in* ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord ed., 1988) and DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989).

[45] Bernard Williams explains the distinction between there being a consensus and there being a consensus because it tracks facts in the world: "It might well turn out that there will be convergence in ethical outlook, at least among human beings. The point of the contrast is that, even if this happens, it will not be correct to think it has come about because convergence has been guided by how things actually are, whereas convergence in the sciences might be explained in that way if it does happen." WILLIAMS, *supra* note 47, at 136.

[46] GILBERT HARMAN, THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS 7—8 (1977).

penalty will lead to its abolition – will have some predictive value; if it is unable to explain why the perception of moral wrongness of the death penalty has not led to any change for millennia, then it is probably an *ex post facto* rationalization and not an explanation. On the other hand, it is doubtful that the truth of moral values plays any role in actual social scientific explanations. The abolition or survival of the death penalty, slavery and the like is much better explained by psychological, social, economic, and cultural variables than the perception of true values.[47] Even if there is a consensus on the death penalty, slavery or torture, the best explanation of that fact is not that it tracks the truth of the matter, but that new sensibilities and institutions have developed under contemporary social circumstances.[48] And because the best causal explanation of convergence does not need to presuppose that foreign law tracks true values in this causal sense, there is no reason to treat foreign consensus as normative. While this need not necessarily suggest that there are no true moral values, it does show that it is very difficult to sustain a claim that such values would be an indispensable part of a causal explanation of moral convergence.

The second way to motivate the deductive model – one that is much more plausible and that perhaps implicitly informs some of the existing accounts of the use of foreign law – could take the opposite path and argue that the support for this model must come from within the normative domain.[49] This variant of the deductive model would see the attempts to situate values within the causal domain as a mistake, and would instead rely on the idea that the normative domain is

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[47] For example, in a much-praised sociological study of the abolition of death penalty in the US, David Garland never mentions moral truth as playing any role in his explanation. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010). For further discussion, *see* Brian Leiter, *Moral Facts and Best Explanations*, 18 SOC. PHILOS. POL. 79 (2001).

[48] For instance, there are a number of credible explanations that demonstrate how our current moral attitudes would be favored by evolution: they explain the commonalities in moral attitudes without relying on the idea of moral truths. *See* e.g. ALAN GIBBARD, THINKING HOW TO LIVE ch. 13 (2003); RICHARD JOYCE, THE EVOLUTION OF MORALITY (2006), PHILIP KITCHER, THE ETHICAL PROJECT (2011), and Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 Phil. Stud. 109 (2006).

[49] For instance, following Jürgen Habermas, Sunstein believes that the value will appear in the process of deliberation and discourse among free and equal individuals. Sunstein, *supra* note 36, at 170.

autonomous from the causal world: moral principles allow us to make normative, not causal inferences and they are thus different from scientific laws. What we ought to value is not a matter of scientific discovery of values that causally affect our moral opinions, but a matter of first-order moral judgment.[50] According to this view, instead of understanding value as something that is potentially disconnected from our moral attitudes, we can only work out which values and moral judgments are adequate by attending closely to our existing normative commitments. Thomas Nagel, together with many others, takes this position and argues that "the only way to answer moral skepticism is to meet it with first-order moral arguments"[51] precisely because the realm of the normative is autonomous in a sense that "[w]e have to have or develop some internal [normative] understanding of the possibility that a belief might be false before any suppositions external to it can bring us to abandon it."[52] By the same token, the normativity of consensus must also be explained with a reference to some existing moral attitude.

However, this understanding of value cannot support the proposition that foreign law acquires independent epistemic authority in moral matters, and – as a result – leads to the reflective and not the deductive model of the use of foreign law. If causal and normative domains are separate, then the empirical claim that consensus points to moral values – to the extent that it has normative consequences – must be further evaluated on moral grounds. And the authority of foreign law is then inconsistent with the presupposed autonomy of the normative domain. Because the judgment on what

[50] Even the argument about the existence of true values – if it is supposed to carry normative weight – could be treated as a moral argument independent from the realm in which causal explanations count. *See*, for example, Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHILOS. PUBLIC AFF. 87 (1996), ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990), ALLAN GIBBARD, THINKING HOW TO LIVE (2003), and SIMON BLACKBURN, RULING PASSIONS: A THEORY OF PRACTICAL REASONING (1998). I discuss these views at length in BOSKO TRIPKOVIC, THE METAETHICS OF CONSTITUTIONAL ADJUDICATION ch. 5 (2017).

[51] THOMAS NAGEL, THE LAST WORD vii (1997).

[52] *Id.* at 58.

is valuable is treated as a moral judgment, we have no reason to give up on our moral judgment and follow foreign consensus.[53]

This is best explained with an example. Consider Justice Daniel's consensus-based view from *Dred Scott v. Sandford*:

> …the following are truths which a knowledge of the history of the world […] compels us to know – that the African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term.[54]

While Justice Daniel thought he had found "truth and knowledge" in global consensus, no one would argue that adequate moral principles had actually been reflected in these laws and traditions. Nor would anyone think that he discovered truths in foreign law in a way analogous to the acquisition of scientific knowledge. Unless one can come up with a causally informed account that would with sufficient precision indicate a point in time in which consensus reveals true values, the answer to this type of argument must be normative: treating people unfavorably because of their race collides with our deepest moral commitments. Thus, each claim made with the support of foreign law needs to be

[53] To be sure, convergence in foreign law may *give us reasons to question our moral views*. As I have explained, we might be interested in other people's moral opinions if they spend more time and resources on reflection, on the assumption that reflection forms a part of normatively desirable moral epistemology (on this issue, *see* Peter Singer, *supra* note 1). But this is fundamentally different from arguing that foreign consensus has independent normative weight, or that it has more than a suggestive value to our own moral judgment.

[54] Dred Scott v. Sandford, *supra* note 10, at 475 (Daniel J.).

reflected upon and assessed from our own moral perspective, which then makes this model reflective and not deductive.

To sum up: the deductive model needs to close the gap between moral attitudes and moral values that would at the same time demonstrate the intrinsic connection between them and keep them distinct. Starting from the causal side, it is not possible to explain the connection; proceeding from the normative side, it is not possible to retain the distinction. As a consequence, it is not possible to account for the normative weight of foreign law in the deductive model.

4. The Reflective Model

The reflective model makes foreign law normatively relevant by virtue of the following propositions: (i) foreign law enables the courts to reach better moral judgments; (ii) foreign law has no authority in moral matters; and (iii) moral judgment of the court ultimately depends on domestic moral attitudes.

Let us again start from proposition (iii). Even in the case of reliance on consensus, the courts deny that their judgment is based on foreign law: the expectation on both sides of the debate is that moral judgment ought to be based on domestic moral attitudes. For example, Justice O'Connor argued in *Roper* that "the existence of an international consensus … can serve to confirm the reasonableness of a consonant and genuine American consensus."[55] Similarly, former Chief Justice of the Israeli Supreme Court, Aharon Barak, says that "even when comparative law is consulted, the final decision must always be local."[56] And because the judgment depends on domestic moral attitudes, foreign law does not acquire independent normative weight and has no authority (ii). Again, judges who use

[55] Roper v. Simmons, *supra* note 10, at 605.
[56] BARAK, *supra* note 9, at 198.

foreign law typically take this position. Laurie Ackermann, a former Justice of the South African Constitutional Court, for example, claims that foreign law "never [has] authority binding on one's own decision;"[57] Aharon Barak argues that foreign law is "never binding;"[58] Justice Ruth Bader Ginsburg contends that "foreign opinions are not authoritative" and that "they set no binding precedent,"[59] while Justice Breyer sees them as "useful even though not binding."[60]

The key then is to explain how foreign law contributes to a better moral judgment (i) without becoming authoritative (ii) and in a way that heeds the domestic moral perspective (iii). The assumption seems to be that foreign law enables reflection upon domestic moral attitudes that leads to better moral solutions to constitutional dilemmas.[61] But notice that the reflective model faces a double burden here: it needs to demonstrate how *facts* about foreign law can contribute to *normative* judgments, and how *foreign* law can enrich normative judgments that are ultimately based on *domestic*

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[57] Ackermann, *supra* note 9, at 183. *See* also Justice O'Reagan in K v. Minister of Safety and Security, *supra* note 7, at para. 35.

[58] BARAK, *supra* note 9, at 199.

[59] Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]Kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 2005 CAMBRIDGE L.J. 575, 580 (2005).

[60] Knight v. Florida, 528 U.S. 990, 998 (1999).

[61] This is the assumption in some of the existing accounts of the use of foreign law, but it stands in need of further clarification. For example, Vicki Jackson believes that "ethical engagement" with foreign law may help "a judge to distance herself from her own first reactions, testing them for prejudice and subjecting them to reasoned interrogation," thus offering "the hope of more impartiality." Jackson, *supra* note 27, at 118—119 (footnotes omitted). This is an intuitive idea which presupposes that reflection leads to adequate moral answers: it is reminiscent of Rawls' "original position" and Nagel's "view from nowhere," but also of Adam Smith's "impartial spectator" and Sidgwick's "point of view of the universe." *See*: JOHN RAWLS, A THEORY OF JUSTICE (1999), THOMAS NAGEL, THE VIEW FROM NOWHERE (1986), ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (2002); and HENRY SIDGWICK, THE METHODS OF ETHICS (1962). But the nature of this reflective process could bring into doubt the claim that the decision of the court is ultimately based on domestic normative attitudes. For instance – while Jackson places weight on particular values and traditions of the constitutional system – she at the same time believes that there are "supra-positive" and "universal" dimensions of constitutional rights to be revealed in this manner (*Id.* at 18. *See* also Lee, *supra* note 4.) The same view is present in judicial opinions: Justice Barak trusts that "[c]omparative law can help judges determine the objective purpose of a constitution," (BARAK, *supra* note 9, at 200) while Justice Ackermann argues that "constitutional law … embodies a certain universally normative minimum core," (Ackermann, *supra* note 9, at 181) and that the goal of the use of foreign law is to "work towards a greater universalizing of these values as enforceable rights" (*Id.* at 193). These views suggest that there is something "universally normative," "supra-positive" and "objective" to be discovered in the process of the use of foreign law. This is not necessarily problematic, as we may accept the notion that there are both universal and local values, or local understandings of universal values, and that we can participate in both. But the question is to what extent, if at all, is it possible to assume that we may find true values in foreign law and not ascribe epistemic authority to foreign consensus? More reflection of this kind by many different courts in the world would enable greater transcendence of contingent constitutional experiences and local evaluative attitudes, and thus come closer to universally true values. But this would then support the deductive and not reflective model, and – as I have explained – the deductive model is not plausible.

attitudes. This model then needs to offer an account of reflection based on foreign law that satisfies two criteria: it should make sense from the normative point of view, and it should not impose foreign views on local evaluative perspective.[62] Let us see how these criteria can be fulfilled.

There are several virtues of good moral judgment that foreign law might facilitate, but that do not aim at full detachment from the local moral experience of a constitutional community. These virtues make sense as normative guidance as to how moral judgments ought to be made, and do not ascribe independent normative weight to foreign legal facts.[63] The most obvious virtue of good moral judgment is *information*. Moral judgment ought to be based on solid empirical premises. There are a number of examples where the courts used foreign law to enrich their understanding of an empirical problem. In *Roe v. Wade*, for instance, the court cited foreign experiences to support its claim that mortality rates for abortion are the same or lower than for regular childbirth.[64] The court concluded that the state has no interest in protecting women from a procedure that is not more dangerous than ordinary childbirth.[65] The conclusion depended on a local value – that higher mortality rates in abortion count against it – and foreign law interfered only with the factual basis of the argument. Similarly, in *Washington v. Glucksberg* justices invoked empirical evidence from the Netherlands while discussing the claim that legalizing euthanasia might lead to abuses.[66] The court found that the Netherlands did not successfully prevent abuses despite a very thorough regulation of euthanasia.[67] It concluded that this empirical fact counts in favor of banning euthanasia altogether. Thus – while the

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[62] The empirical research also shows that a completely detached moral reflection is an illusion; at best, we reason about moral attitudes from the perspective of other attitudes, adjusting them to the ones we find more important, or trying to achieve a higher level of coherence in our moral outlook. *See*, for example: PHILIP KITCHER, THE ETHICAL PROJECT 179 (2011); Gilbert Harman *et al.*, *Moral Reasoning*, *in* THE MORAL PSYCHOLOGY HANDBOOK (John M. Doris & Moral Psychology Research Group eds., 2010); and Haidt, *supra* note 1.

[63] The list of virtues is not comprehensive, they are intrinsically connected, and they overlap: the aim is not to demonstrate that these virtues can be neatly demarcated but that – taken together – they show how the reflective analysis is possible and sensible from the local moral point of view.

[64] Roe v. Wade, *supra* note 10, at 149 note 44.

[65] *Id.* at 149.

[66] Washington v. Glucksberg, *supra* note 10, at 732—734 and 785—786 (Souter J.).

[67] *Id.* at 734.

evidence from foreign law was empirical – the value judgment that it was better to ban euthanasia than risk abuses remained local.

The exposure to foreign law might also foster another virtue of good moral judgment: *flexibility*. Good moral judgment presupposes the ability to re-question one's own position. Looking at foreign law may reveal some of the neglected concerns or might show that the question has been inadequately framed; in such a case, foreign law might prompt the court to overturn its previous judgment. For example, in *Bowers v. Hardwick*, the Supreme Court upheld Georgia's law, which criminalized consensual sodomy. In his concurrence, Chief Justice Burger asserted that Western civilization unequivocally condemns homosexual sodomy.[68] In arguing that this value judgment "is firmly rooted in Judeo-Christian moral and ethical standards,"[69] Burger relied on contingent normative attitudes, embedded in tradition, history and culture. The majority in *Lawrence v. Texas* overturned *Bowers* but retained its approach. Justice Kennedy wrote at length about examples from "Western civilization" that refute the inference in *Bowers* about the traditional ban on homosexual conduct.[70] He thus did not deny that value may be locally constructed, but argued that important aspects of the value of liberty were not taken into account, especially in its implications for the state's interference with private life. Kennedy argued that the court ought to understand its previous decisions and the values behind them more flexibly. As he put it:

> times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[71]

[68] Bowers v. Hardwick, *supra* note 10, at 196–197 (Burger J.).
[69] *Id.* at 196.
[70] Lawrence v. Texas, *supra* note 10, at 571—573.
[71] *Id.* at 579.

Kennedy also thought that once the doubts about a precedent become evident, "criticism from other sources is of greater significance."[72] One of these sources that enables greater reflective flexibility is the laws of the nations that share similar values and heritage. The best way to understand the use of foreign law in *Lawrence* to elucidate the contours of liberty is not that this concept has a meaning to be discovered in the world, but that the core of its meaning is shared by many other countries, and that it includes certain concerns that have been neglected in *Bowers*.[73]

Flexibility usually derives its appeal from yet another virtue of good moral judgment: *coherence*. The *Lawrence* court used foreign law to show that *Bowers* was inconsistent with a set of other locally shared values. The aim was not to import values from foreign law, but to bring local commitments into balance. An attempt to achieve greater coherence implies an awareness that there is a set of evaluative commitments in a community that cannot all be realized at the same time without sacrificing some of them. It requires careful reflection on the consequences of each commitment and its relative importance within the local evaluative standpoint.

Achieving coherence is difficult in its own right, and foreign law cannot alleviate disagreements. The classic example is a tension between Israeli constitutional commitment to both "Jewish" and "democratic" values. The former are understood as local and traditional, and the latter as cosmopolitan and modern. Foreign law can be used to reach the balance or sharpen the trade-off between these commitments. The opposing opinions of Justice Barak and Cheshin in the seminal *Adalah v. Minister of Interior* case illustrate this.[74] In this case the court upheld a blanket prohibition of granting residency permits and citizenship to residents of the Occupied Territories who are family

[72] *Id.* at 576.
[73] *Id.* at 576—577.
[74] Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior, *supra* note 35.

members of Israeli citizens.[75] The citizens who had family ties with Palestinians were predominantly members of the Arab minority, and the prohibition raised concerns regarding both their right to family life and equality. With the extensive support from foreign law, Justice Barak derived the right to family life and, consequently, to family reunification from the right to dignity. Foreign law served to show that all countries that respect human dignity also guarantee the right to family life and that these two are intrinsically connected; it followed for him that in Israel family rights are also protected by virtue of human dignity.[76] Barak's conclusion underlined the democratic character of local constitutional identity: he found the law "inconsistent with the character of Israel as a democratic freedom-seeking and liberty-seeking state."[77] In contrast, Justice Cheshin argued that Barak's opinion is appropriate for the "state of Utopia" but not for Israel.[78] Cheshin relied on the "basic principle in the law of the countries in the world" according to which states determine the boundaries of their citizenship.[79] In his view, local security concerns demanded that the state retain the authority to regulate this question. Both Barak and Cheshin used foreign law to address the tension in Israeli constitutional framework and reached opposing results. Each opinion achieved coherence between the two different sets of values and concerns by sacrificing one for the other; however, looking at the jurisdictions that Israel identifies with helped the justices understand the extent to which cosmopolitan values can be realized in Israel, and where the local circumstances ought to take precedence.

Attaining stable coherence often demands another virtue: *imagination*. Foreign law can serve in overcoming what Justice Ackermann calls "tunnel vision," which prevents the judge from noticing

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[75] The blanket ban concerned only men between 14 and 35 years of age and women from 14 to 25, while those outside of this age span could be granted residence permits at the discretion of the minister of interior. The ban was later extended to citizens of "enemy states" (Iran, Lebanon, Syria and Iraq). In another divided judgment (6–5), the court upheld these amendments. *See* HCJ 466/07 M.K. Zahava Gal-On (Meretz-Yahad) v. Attorney General [2012].

[76] *See* Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior, *supra* note 35, at para. 33–38 (Barak J.). He also concluded that equality is guaranteed by virtue of dignity, but did not rely on foreign law as there was enough domestic jurisprudence on this question.

[77] *Id.* at para. 93 (Barak J.).

[78] *Id.* at introduction (Cheshin J.).

[79] *Id.* at para. 51 (Cheshin J.).

some aspects of values, less visible connections between them, or fruitful ways in which they can be balanced. Justice Chaskalson's opinion in *Makwanyane* provides a fine example of how foreign law can expand the imaginative horizons of the court. In this decision, the South African Constitutional Court found that death penalty was inconsistent with the local constitutional commitment to the value of human life and dignity. Chaskalson understood foreign law as a pool of potential arguments, and not as a source of authoritative solutions. In his view, "foreign authorities are of value because they analyse arguments for and against the death sentence."[80] Chaskalson thus used arguments present in foreign law to determine the relevant concerns for his own decision: the arbitrariness and inequality of the death penalty, the consequences for the right to life and dignity, the relevance of public opinion, and the balance between other implicated values.[81] Foreign law served as a resource of information about relevant issues, possible tensions between values, and creative solutions to constitutional problems.

Imagination is closely connected to another virtue of good moral judgment: *maturity*. It seems sensible to expect that a decision in moral matters will be better balanced if the court is more experienced and aware of possible solutions and pitfalls. But sometimes the courts are not experienced enough. Again, Chaskalson's opinion in *Makwanyane* is illustrative. In his view, "[c]omparative 'bill of rights' jurisprudence will … be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence."[82] Since the South African Constitutional Court did not have enough familiarity with rights-based review of legislation, it looked for inspiration elsewhere; part of the reason why the South African Constitution encompasses the explicit permission to use foreign law lies in the fact that there was no experience or tradition of dealing with constitutional problems from a liberal-democratic perspective.

[80] S v. Makwanyane and Another, *supra* note 7, at para. 34 (Chaskalson J.).
[81] *Id.* at para. 40—109 (Chaskalson J.).
[82] *Id.* at para. 37 (Chaskalson J.).

A couple of cases from Israeli constitutional history also demonstrate how the use of foreign law may enable the court to reach greater maturity in its judgment. In *Kol Ha'am v. Minister of the Interior*, the court established that administrative action must conform with values and rights implicit in Israel's commitment to democracy.[83] Justice Agranat, writing for the court, relied almost exclusively on foreign law to tease out the relevant concerns surrounding the restrictions to free speech in a democracy.[84] Agranat found that Israel is "a state founded on democracy" and that although there was neither constitutional review of legislation nor an explicit textual guarantee of the freedom of expression, "the law of people must be studied in the light of its national way of life," which he understood to be fundamentally democratic.[85] Agranat's idea was that there is a non-parochial common framework of values shared by all democracies, and that foreign law may serve to disclose them: they present a set of broad and basic moral premises of a constitutional democracy, such as the commitment to free speech.

Similarly, Justice Barak in *Mizrahi Bank* looked at the law of other democratic countries to understand the role of judicial review.[86] In this case, the court conferred constitutional status upon the basic laws and proclaimed its right to conduct judicial review of legislation.[87] Barak used American cases to show that "true democracy cannot exist without the limitation of the power of majority,"[88] and relied on German and Canadian law to confirm that the legislature must be obliged to respect fundamental rights.[89] He cited wide acceptance of constitutional review in comparative law to support his argument that it is the "soul of the constitution" – indispensable to a system that respects the

[83] Kol Ha'am v. Minister of Interior, *supra* note 8.
[84] The case cites 9 American, 8 English, and only 3 Israeli cases.
[85] Kol Ha'am v. Minister of Interior, *supra* note 8, at section E.
[86] United Mizrahi Bank Ltd. v. Migdal Cooperative Village, *supra* note 8. The case raised the issue of the constitutionality of measures aimed at alleviating the consequences of economic crisis in the agricultural sector that could interfere with a creditor's claims through the restructuring or cancellation of unpaid debts.
[87] For context, *see* Gideon Sapir, *Constitutional Revolutions: Israel as a Case-study*, 5 INT'L J. LAW CONTEXT 355 (2009).
[88] United Mizrahi Bank Ltd. v. Migdal Cooperative Village, *supra* note 8, at para. 47 (Barak J.).
[89] *Id.* at para. 69 (Barak J.).

separation of powers, rule of law and democracy.[90] Nonetheless, Barak's arguments are at the same time couched in the idea that a constitution is a "reflection of national experience."[91] Values protected by the court do not arise from global norms but from "national consciousness"[92] and a "social contract"[93] reflected in the best understanding of Israel's history. Barak's attitude towards foreign law followed from this understanding of value. While he did cite foreign law extensively, he also argued that a judge must do so carefully, because the "scope of the constitutional right is derived from society's understanding of its importance," and the balance between a right and public interest is determined by the "unique outlook of Israeli society."[94]

This kind of use of foreign law can work both ways: the more experienced court may also have a baggage of concerns which younger courts do not face, such as doctrine, intentions of framers, or interpretive techniques. While the new constitutional systems may look at foreign jurisdictions for mature solutions to constitutional problems, the old ones may rely on foreign law to overcome the vice of too much self-containment – good moral judgments demand a degree of *openness*. Much of the use of foreign law in the United States can be explained in this way. Even though it has a lot of experience and maturity, the US constitutional system may entrench certain judgments which neither correspond with the current needs of the society nor fit with the overall framework of its values. When the US Supreme Court refers to the fact of foreign consensus this could be understood in terms of openness: as a recognition that the maturity of the system has also ossified specific views which may no longer be acceptable from the perspective of other evaluative attitudes. This argument may thus be interpreted in light of identity concerns and self-perception, rather than as a belief that foreign law

[90] *Id.* at para 78 and 75—80 (Barak J.). He did note however that this approach is "accepted in Israeli community." *Id.* at para. 77 (Barak J.).
[91] *Id.* at para. 38 (Barak J.).
[92] *Id.* at para. 38 (Barak J.).
[93] *Id.* at para. 50 (Barak J.).
[94] *Id.* at para. 88 (Barak J.).

reliably tracks values; for example, the mention of Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, Congo and China in *Roper* is a reminder that the country cannot remain a leader in human rights protection if these countries have abolished capital punishment for juveniles and the United States has not.

Such openness to consensus seems like the bulwark of the deductive model. But this need not be the case. The best explanation of the existence of consensus is that contingent socio-economic circumstances have produced similar value systems around the world and that they have led the courts to similar normative judgments. If there is a global consensus on some issue, we might be missing out on something in our value judgments if we diverge from it. While this gives us no reason to ascribe any independent normative weight to consensus, it may invite us to re-think our views. We may then distinguish our case from the prevailing opinion, or agree with it on substantive moral grounds, and not simply because of consensus. The reflective model can thus explain the importance of consensus without renouncing moral agency: in this version, the consensus ignites reflection instead of foreclosing it. This also explains why the argument from consensus is not likely to play an important role in practice, as it will most often point to widely accepted and least controversial moral principles.

The virtue of openness does not have to imply only the consensus-based use of foreign law. Most cases of the use of foreign law presuppose looking at jurisdictions that share a similar value-framework, so they can clearly contribute to the self-understanding of the system that is making the comparison; if we share values and do different things, there is a good chance that we have probably not fully explored our evaluative outlooks. But openness also entails looking at systems that do not share similar background commitments. Aharon Barak for example denies that there can be fruitful comparison between systems that do not have a "common ideological basis,"[95] while Justice Breyer

[95] BARAK, *supa* note 9, at 198.

retreated from his mention of Zimbabwe in *Knight v. Florida* calling it a "tactical error."[96] If we accept the reflective model, there is a way to resist such conclusions. Being exposed to other perspectives could teach us a lot about ourselves. As in *Roper*, we could realize that some of our values are not as progressive as we previously might have thought. But the more important effect goes in the other direction. By distinguishing other systems, we learn where the borders of our moral outlook are, and we understand which values are more central to it. Recognizing that a value system is not a real option for us – that accepting it would demand sacrificing a significant part of our evaluative framework – can make us re-think some of the moral judgments we share with such a system, and can also confirm our confidence in our own perspective.

These processes are also significant when the law fails to engender appropriate *sensibility* towards different perspectives. A good moral judgment includes the ability of role-taking and seeing problems from the perspective of others. As Perju notices, this is particularly problematic if minorities do not get to articulate their voice within the dominant legal environment.[97] This intuition gains greater weight if it is connected to the idea that appropriate moral judgment demands reflection and incorporation of different points of view. So the use of foreign law is not justified on a narrower basis of minority protection, but by virtue of its connection with the way moral judgments ought to be made. Incorporation of different perspectives into judgment is part and parcel of the moral point of view, and not only a mechanism of accommodation of the needs of different segments of society.

A case in point is *Lawrence*. Unlike *Bowers*, where the court asked if there is a fundamental right to engage in homosexual sodomy,[98] the *Lawrence* court asked whether the state has a legitimate interest to interfere with the liberty of its citizens in the domain of personal relationships. The use of foreign

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[96] Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 528 (2005).
[97] Perju, *supra* note 19.
[98] Bowers v. Hardwick, *supra* note 10, at 190.

law sensitized the court to understand the problem from the perspective of a minority, and comprehend the devastating consequences of sodomy laws for their privacy and liberty.[99] Kennedy argued that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries" and that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[100] The issue was not about the meaning of liberty which is to be imported from foreign law, but about the implications of criminalization of sodomy in a system that is committed to the value of liberty.

Finally, another reflective virtue is *clarity*. A precondition for moral reflection is a clear understanding of the relevant concerns. For example, the use of foreign law frequently pertains to proportionality analysis: a set of analytic stages that the courts go through to determine whether a state policy is justified from the perspective of constitutionally protected values.[101] In *Makwanyane*, the South African Constitutional Court examined different models of proportionality analysis – from Canada, Germany and the European Court of Human Rights – to find that such reasoning was "implicit" in the limitation of the rights clause of the constitution.[102] Similarly, Justice Barak argued in both *Mizrahi* and *Adalah* that proportionality analysis was the appropriate framework for exploring the boundaries of justified limitations of human rights and – in so doing – he relied on an extensive examination of foreign approaches to this type of reasoning.[103] Again, proportionality analysis as such does not guarantee much in terms of substantive results, and there need not be any transfer of values

[99] Justice Kennedy made this point in the opening of his opinion: "Freedom extends beyond spatial bounds." Lawrence v. Texas, *supra* note 10, at 562.
[100] *Id.* at 577.
[101] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).
[102] S v. Makwanyane and Another, *supra* note 7, at para. 103—112. *See* also Section 33(1) of the Interim Constitution of 1993.
[103] United Mizrahi Bank Ltd. v. Migdal Cooperative Village, *supra* note 8, at para. 83–99 (Barak J.); Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior, *supra* note 35, at para. 54–75 (Barak J.). In particular, Barak was influenced by the Canadian law and the proportionality test developed in R v. Oakes, [1986] 1 S.C.R. 103.

from one system to the other; rather, what happens is that one system finds it useful to rely on a procedure that makes explicit the method of analysis that would otherwise stay implicit.

To sum up: the reflective model is able to explain the normativity of the use of foreign law (i) without making foreign law authoritative (ii) and by departing from the local evaluative commitments (iii). There are a number of virtues of good moral judgment – such as information, flexibility, coherence, imagination, maturity, openness, sensibility and clarity – which may be achieved in the process of the use of foreign law. On the one hand, these virtues do not gain normativity because they enable the courts to discover values which are detached from the domestic evaluative perspective, but because they are typically seen as traits of a good moral judgment. On the other, these virtues retain the central role of local moral attitudes. They allow constitutional systems to perfect their own self-understanding and not to acquire knowledge about external values. The courts do not learn moral answers from foreign law, but become aware of them with assistance from foreign law; the form of knowledge they gain is realization rather than discovery.[104]

However, the reflective use of foreign law is limited in several respects. First, it leaves open the larger question of whether the moral reading of constitution is desirable. Any justification of the use of foreign law must explain how foreign legal facts contribute to a better normative judgment. Yet – while this is analytically prior and indispensable – the benefits of an improved moral judgment would still have to be compared to the gravity of legitimacy concerns surrounding the judicial review. In other words, the model can only work in so far as there can be a separate argument that can motivate the moral reading. It may well be that the moral reading is at least sometimes inescapable, but there are strong arguments why judges ought to be cautious about this approach. Although it does not

[104] As P.M.S. Hacker put it: "We realize features of our conceptual scheme that we had not apprehended. Realization is a form of cognitive receptivity that is the upshot of putting together things we already knew, and grasping consequences we had not noticed." P.M.S. Hacker, *Some Remarks on Philosophy*, 1 ARGUMENTA 43, 47 (2005).

discuss the legitimacy of the moral reading of constitution, the argument presented here makes one thing explicit: if they do use foreign law, judges also need to accept that their choice entails making a moral decision in the name of the whole constitutional community, which then implies accountability for such choice.

Second, and more important, the reflective model may amplify the concerns about the moral reading of constitution. The reflective model relies on the second-order virtues – the virtues *about* already existing moral attitudes – that have a limited transformative potential, and eventually go back to local and contingent values of a constitutional community. In this model, foreign law is not authoritative and constitutional judgment depends on local values. Given that the contingent moral attitudes are the basis of such judgment, the question is how can a court invalidate current moral opinions, which are arguably a constitutive feature of this contingent evaluative outlook? The courts may, for example, find that such opinions are formed in a non-reflective process that neglects the ways in which moral judgments ought to be made, disregard some important features of the shared framework of values, or are a consequence of a widespread weakness of the will. But this makes the transformative potential of the use of foreign law limited, and ought to make the courts more restrained. The courts should be aware that they are making a moral decision, while not being able to claim that such decision points to moral solutions that are not already implicit in the widespread domestic moral attitudes.

Third, there is also a possibility that the use of foreign law does not only support the reflective virtues but also some less desirable practices. The courts are often aware of a range of possible arguments that emerge in the deliberative adjudicative process, and they may be inclined to seek foreign authorities to confirm their preexisting beliefs. It is important then to accept that the use of foreign law, in the reflective model, becomes a way of acknowledging the sources of inspiration and has no justificatory weight of its own. For example, if the reflective model is accepted, the objections

of cherry-picking and lack of comparative law expertise are still important but take a slightly different form. On the one hand, given that the reflective model makes it clear that the court is making a moral judgment which crucially depends on domestic moral attitudes, that foreign law is not authoritative, and that values are not discovered but are simply realized by studying foreign law, no amount of comparative law research can alleviate judicial responsibility for their moral judgment. While there is a need to understand the details of foreign law in their complexity and context, studying foreign law, no matter how carefully conducted, cannot make it authoritative: what matters is whether the judgment is morally adequate and not how versed the court is in comparative legal analysis. On the other hand, the court ought to spell out why it made the choice to use foreign law in the process of adjudication, what exactly is the insight gained from it, and how it made the judgment more informed, flexible, coherent, imaginative, mature, open, sensible, or clear. The jurisdictions that are chosen for comparison must make sense from the perspective of some of the reflective virtues: it cannot be enough to point to consensus in foreign law as if it would reveal the correct moral answers, but there must be an explanation as to how foreign law actually contributed to a better moral judgment. For instance, the virtue of maturity will demand engagement with more experienced jurisdictions, while flexibility and openness will necessitate studying a wider range of jurisdictions that do not necessarily share the same evaluative outlook with the domestic constitutional system. It is therefore crucial that the courts are actually equipped to conduct a comparative law exercise in a way that would not simply serve to confirm their already existing views, but that would in fact broaden their horizons.

Fourth, the reflective model does not aim to offer a timeless and universal account of the value of foreign law for constitutional judgment. This approach makes the question of what constitutes good moral judgment dependent on local moral attitudes. The reflective virtues may be valued differently in different constitutional systems. This means that each constitutional system must decide for itself whether the specificities of this framework are meaningful in relation to the set of virtues

that prevail in it at any given point. This however does not lead to an incoherent version of relativism: the fact that there are different solutions to constitutional problems in different constitutional systems does not mean that judging from our own perspective we cannot say that some of these solutions are morally inadequate. The model advanced here does not commit anyone to skepticism about the domestic normative perspective. If anything, the model makes this perspective stronger.

5. Conclusion

The positions in the debate about the use of foreign law in constitutional reasoning are well-known and well-entrenched. Yet, one key question has not been answered: what is the connection between foreign legal facts and moral values? If this connection is not explained, the normative understanding of the use of foreign law cannot be complete. The opponents of this practice are, for example, correct to point out that there are instances of the use of foreign law that lack solid moral foundations; however – since they neglect the details of the connection between foreign legal facts and moral values – they are less successful in illuminating the reasons why this is so, and they do not appreciate that there are other possibilities for the use of foreign law that do not suffer from similar inadequacies. The proponents of the use of foreign law are, for instance, right to claim that this practice could be justified; nonetheless – because they do not pay sufficient attention to the relationship between foreign legal facts and values – they are less effective in providing a comprehensive justification of the use of foreign law, and they do not always appreciate its limits. The aim of this article has been to explain the relationship between foreign law and moral values, suggest a framework that enables a more perspicuous discussion about the use of foreign law, and articulate a substantive normative position about the value of this practice.

The article has argued that there are two ways to explain the normativity of foreign law. The deductive model ascribes normative weight to foreign legal facts directly. This model fails to establish a meaningful connection between foreign legal facts and moral values, and is therefore untenable. The reflective model ascribes normative weight to judgments reached in a reflective process facilitated by foreign legal facts. This model is able to explain the connection between foreign legal facts and moral values from the perspective of contingently shared normative attitudes in a constitutional community. The value of the use of foreign law is best expressed in the vocabulary of reflective virtues of good moral judgment: information, flexibility, coherence, imagination, maturity, openness, sensibility and clarity. However, the reflective model should make judges cautious about the use of foreign law: they ought to be aware that they are making a moral judgment in the name of others, that this judgment depends on domestic moral attitudes, and that the transformative potential of the reflective virtues is consequently limited.