On the Different Meanings of 'Judicial Dialogue'

Carla Zoethout*

Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), 310 p., ISBN 978-0-19-968038-2

Over the past ten years, a discussion has been going on about 'judicial dialogue'[1] – one of those notions in comparative constitutional and international law that are appealing and elusive, yet diffuse at the same time. Everyone seems to have different associations with the term and cynical commentators might remark that it means anything its user wants it to mean: exchange of ideas in judicial networks,[2] dialogues between international and national courts, or judges quoting each other's decisions. One of the ways 'judicial dialogue' is most often being used is when judges refer to foreign case-law in constitutional interpretation.[3] The United States'

* Associate Professor of Constitutional Law, University of Amsterdam.

[1] To mention some publications on the topic of 'transnational judicial dialogue', 'a global community of courts' or 'constitutional comparativism': Anne-Marie Slaughter, 'A Global Community of Courts', 44(1) *Harvard International Law Review* (2003) p. 191-219; Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', 20(4) *Oxford Journal of Legal Studies* (2000) p. 499-532; Sujit Choudry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', 74 *Indiana Law Journal* (1999) p. 819-892.

[2] Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks, 8(2) *Utrecht Law Review* (2012) p. 100-114.

[3] Gábor Halmai, 'The Use of Foreign Law in Constitutional Interpretation', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press 2012), p. 1328-1349. Closely related to this is the article by Vlad Perju; 'Constitutional Transplants, Borrowing, and Migrations', in: *The Oxford Handbook of Comparative Constitutional Law,* p. 1304-1328 dealing with constitutional borrowing (also by courts) and the migration of constitutional ideas. *See* further on this topic: Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013). Yet another recently published and highly interesting book on this topic is: Elaine Mak, *Judicial Decision-Making in a Globalised World, A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford and Portland, Hart Publishing 2013). Mak's research aims to identify different judicial views and approaches to the use of foreign law rather than to analyse quantitatively the practices in the courts.

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Supreme Court has done so in a (limited) number of cases – a practice which has prompted a heated discussion on the legitimacy of this phenomenon.[4] Furthermore, the Canadian Supreme Court tends to be very open towards other jurisdictions and refers to these quite regularly. But while the latter two courts invoke other jurisdictions of their own accord, there is also the rather unique situation in which courts are *obliged* to refer to international and foreign law. The South African Constitution contains a provision compelling courts to refer to other legal systems. When interpreting the Bill of Rights, a court, tribunal or forum is obliged to consider international law and foreign law.[5]

'Comparative reasoning' is yet another term to indicate the same phenomenon of courts referring to foreign law in order to explain their decisions, to substantiate their cases or to confer legitimacy upon their decisions. Intuitively, one has the feeling that this development has much to do with what Ran Hirshl has recently expressed about comparative constitutional law research. In his view, 'the rapid development of information technology, and the tremendous improvement in the quality and accessibility of data sources on constitutional systems and jurisprudence worldwide' are new incentives for comparative constitutional inquiries.[6] The question is however what this means for the present topic – do (constitutional) courts indeed refer more often to each other's decisions? It is this intriguing claim which is put to the test by Michal Bobek in his book on *Comparative Reasoning in European Supreme Courts.* As he puts it: 'the aim is to close the gap between the mainstream scholarly writings on the issue of comparative arguments by the courts and the actual current practice.'

[4] *See* Carla M. Zoethout,'The Dilemma of Constitutional Comparativism', 71(4) *Zeitschrift für ausländisches, öffentliches und Völkerrecht* (2011), p. 787-806.

[5] Of course, these provisions are intimately intertwined with South Africa's national history. The transition of South Africa from an apartheid regime to a constitutional democracy was very much influenced by constitutional borrowings, for the simple reason that South African lawyers had had no real experience of constitutional law or bills of rights prior to the Interim Constitution. From the very first decisions delivered after its establishment in 1995, the South African Constitutional Court has made extensive use of international and foreign law. Halmai, 'The Use of Foreign Law in Constitutional Interpretation', p. 1344-1346. *See also* D.M. Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience', 2 *International Journal of Constitutional Law* (2003), p. 181-195 and other articles in this issue of the same journal. *See also*: Michael Martinek, 'Comparative Jurisprudence – What Good Does It Do – History, Tasks, Methods, Achievements and Perspectives of an Indispensable Discipline of Legal Research and Education', *Journal of South African Law* (2013) p. 39-58.

[6] 'Editorial', 11(1) *International Journal of Constitutional Law* (2013) p. 11.

Part I: The framework of the book

Comparative Reasoning in European Supreme Courts consists of three parts entitled 'the framework', 'the practice' and 'the appraisal'. The first part puts two claims in a broader context: a. the claim that the use of foreign law by courts is a new phenomenon and b. the claim that it is rising. At times Bobek's book can be rather sobering in its findings. For one, references to foreign law are 'nothing new'. And secondly, 'on the existing evidence, it cannot be stated that comparative engagement, if defined as *voluntary* comparative engagement with the foreign, is globally on the rise'.[7] Referring to a recent study of the comparative practice of the Federal Constitutional Court of Germany from 1951–2007, he remarks it shows 'a fairly constant (and in total minimal) use of comparative reasoning' by the Court.[8] Subsequently, he outlines what his study is about: its object is non-mandatory references to foreign law by a national judge interpreting domestic law for the purpose of solving a domestic dispute. 'It tests if and how far judges in Europe today indeed choose to become transnational actors, seek to engage with the foreign, and seek to be influenced by it even if not obliged to.'[9] That means that all those instances where courts use foreign law because they are obliged to do so (as in the case of EU law, the South African example, or the different styles of incorporation of the ECHR) are not the focus of this study. Furthermore, there are other more practical factors influencing the use of comparative arguments by courts. Undoubtedly, a majority of judges is willing to 'draw inspiration from relevant foreign materials', provided there is time, the sources are accessible (also from a linguistic point of view) and one is able to at least understand the materials at hand.

After analyzing the different factors that influence the use of comparative arguments, Bobek observes that it is constitutional law and human rights which truly form a kind of 'transversal category that radiates through the entire legal order'. According to Bobek, it is in the area of constitutional adjudication and human rights that the greatest quantity of comparative arguments is present, at least with respect to Germany, the Czech Republic and Slovakia. One caveat should be made here, however. Since the focus of this study is on the case-law of European supreme courts, it is difficult to find out whether the higher frequency of invoked foreign law in constitutional courts is due to the special characteristics of constitutional law, or is in fact due to the institutional design of the courts (being the highest institutions of the judicial system).

[7] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 15.
[8] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 14.
[9] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 19.

Part II: The practice

The second part of the book is dedicated to the practice of the use of non-mandatory comparative arguments by supreme courts in England and Wales; France; Germany; the Czech Republic and Slovakia. Any references to foreign non-mandatory sources, however vague, were included in the study. Furthermore, no distinction is made as to the argumentative value of the foreign reference. For two reasons, firstly, according to Bobek it is simply impossible to discern the real argumentative value of the reference in question. Secondly, if one would limit the empirical study to only those references that are genuinely important, the study would indeed be very short.

Within the framework of this book-essay, it is impossible to do justice to all the different parts of Bobek's book. As far as part II on the practice of comparative reasoning is concerned, I will highlight some interesting aspects of each of the countries discussed. One question needs to be addressed beforehand, however, and that is Bobek's method of research. With respect to Germany, France and England and Wales, the research is mainly based on secondary sources. That is to say, Bobek uses materials from other authors on the frequency and use of comparative arguments in national supreme jurisdictions. The information thus gathered, was verified by 'limited primary research' into the case-law of these jurisdictions. Apart from this, Bobek also conducted interviews with judges as to their views on comparative reasoning by courts, a method which is illustrative for the difficulties one encounters when conducting this kind of research. After all, which justices should one identify for an interview? As Bobek admits, those judges who tend to be in favour of comparative reasoning would typically consent to an interview on the subject. Those who do not care or those who tend to be sceptical or even hostile towards 'foreign law' were not inclined to share their views. Moreover, being interviewed on the importance of foreign case-law and jurisdictions, the judges overall were inclined to be positive and willing to consult foreign sources. As a result, Bobek tends to be rather sceptical about the relevance of interviews for his research on comparative reasoning: 'interviews with judges as a method can account for judicial self-perception and self-presentation, but hardly provide a truthful account of genuine judicial practice'.[10]

The practice of the English courts and especially of the United Kingdom House of Lords (which seems to be continued in the case-law of the recently installed Supreme Court of the UK) demonstrates that, if any legal comparisons are carried out, they mostly involve countries within the former British colonies, including the USA. That may raise the question whether this should be considered as foreign law at all. Since direct ties to the UK have been loosened over the past fifty years,

[10] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 72.

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it seems justified indeed to do so. The underlying reason of referring to – in particular these systems – seems to be the unity of the common law. Despite the fact that the UK entered the European Union – which resulted in a considerable 'influx' of EU law – the patterns of comparative reasoning seem unchanged.

The French judicial style is a special case in kind (as they all are, as a matter of fact). The French Revolution ended the power of the 'parlements' and with that, of the local judges. Judicial decision-making was centralized and judicial power was to be submitted to the will of the legislature. Up until this day, this tradition has been prolonged. Written law is the only visible authority on which a French judicial decision can be based. 'All other types of references and arguments, including reference to previous case law, legal scholarship, and also comparative arguments, are excluded from a judicial decision.'[11] Thus, foreign inspiration is never openly cited in a French judicial decision. That does not mean to say that there is no foreign inspiration, but if there is, it takes a different route. Foreign influences take place through the legislature and scholarship rather than through judge-made law.

The German legal tradition is relatively open to 'non-mandatory legal inspiration'. Although there are only sporadic references to foreign laws or scholarship, these may serve as an additional supportive argument in case-law. Besides this, there is a relatively rich comparative law scholarship and comparative studies carried out by the legislator. Particularly the former may prove useful in discussing comparative reasoning in the past. When it comes to the present situation however, Bobek observes that of the thousands of decisions rendered by the Federal Constitutional Court every year, only one or two (!) contain references to foreign sources. The areas in which comparative reasoning was used included fundamental rights and constitutional principles (including problems of competence) and for instance, the interpretation of international treaties.

In the Czech Republic and Slovakia, judges rarely write and speak 'extra-judicially' – a tradition that dates back to the Austrian-Hungarian Empire and continued during the communist era. In the latter period, textualism was the 'advised survival strategy' within the judiciary.[12] Official legal theoretical debates were 'a strange mixture of an extreme positivistic vision of legal interpretation, declaring full loyalty to the will of the communist legislator irrespective of the content of the law adopted, mixed with occasional direct application of political slogans, in particular in the early period of communist rule'. Of course, this attitude must be seen against the background of 'a communist system, which perceives law merely as the emancipation of the will of the governing class, and announces its gradual

[11] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 99.
[12] Bobek, *Comparative Reasoning in European Supreme Courts*, Chapter 8, footnote 92.

dying out in the (soon-to-be-achieved) classless socialist society'.[13] After the communist takeover in 1948, comparisons between the socialist and capitalist systems were initially prohibited. In 1959 these comparisons were again allowed but, 'the only permitted result of a similar study for a socialist lawyer was to "establish" the superiority of the socialist system of law'.[14]

As far as Slovakia is concerned, there is a remarkable difference with the Czech republic. Slovak judges do regularly consult foreign (Czech and, less frequently Hungarian and German) legal writings and case law, but actually referring to these sources appears to be one step too far. According to Bobek, the style of the Slovak courts appears still to be the style of the late communist era of the 1970s or 1980s. The reasons for this difference with the Czech Republic can be traced back to a number of factors. Academically minded justices are in a minority in Slovakia. Furthermore there is the factor of limited human resources: most Slovak judges do not have any legal secretaries. Finally, political reasons seem to play a role – full judicial independence is still not self-evident in Slovakia.

Part III: The appraisal

From a quantitative point of view, the identified amount of the use of non-mandatory foreign inspiration by supreme courts in the jurisdictions studied is very low. Despite this observation, in the third part of his book, entitled 'the appraisal', Bobek intends to focus on a theoretical underpinning of the use of comparative arguments in courts. He underlines again that he wants to refrain from any normative claims as to whether this is good, bad or whether comparative arguments should be reconsidered altogether. Since the existence of gaps in the law is an accepted phenomenon, these gaps have to be filled with the help of additional materials such as scholarly writings, non-legal normative systems and, comparative sources. Even so, the way comparative arguments are being used is rather modest. They are perceived to be:

persuasive only, but never binding;
(i) subsidiary, but never controlling;
(ii) additional, but never free-standing;
(iii) just defendable and by necessity selective, never exhaustive.

In conclusion, Bobek wryly remarks that 'this expedition has provided a different picture of judicial use of comparative arguments from the one repeated in a mantra-style in the current scholarly mainstream.'[15] The rather bleak image he sketch-

[13] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 168.
[14] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 170.
[15] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 282.

es of comparative reasoning in European supreme courts has much to do with something which may appear counterintuitive, according to Bobek. The very fact that national judges in Europe today are obliged to understand and apply a great deal of (international) materials may be the cause of an opposite reaction. That is to say, they may be inclined to retreat rather than be open-minded towards foreign law. Just the same reaction might result from the increasing possibilities to receive legal information from all over the world through internet – 'greater selectivity, citation restrictions and mental closedness'.

Appraisal of the book

It will be clear by now that Bobek's book is remarkable indeed. Its clarity, method and sharp analysis make it an important study on the topic. All the same, reading *Comparative Reasoning in European Supreme Courts* is a somewhat disenchanting experience, compared to the idealistic and high-minded approach many scholars in the field of comparative judicial reasoning take as their starting-point. In the introduction Bobek declares his aim is rather modest – no grand theories are offered. The book only compares and seeks to systemize within the existing theoretical frameworks. In other words, Bobek seems nowhere tempted to comment on the desirability of comparative reasoning. Is it a phenomenon which is to be lauded or is it not? He simply accepts it exists (albeit in a limited way). No more nor less. But the question is whether some reflections on the underlying idea of comparative reasoning would not have been a welcome contribution on the scholarly debate on the topic?

By the end of the book, the reader almost has the impression that the end of constitutional comparativism is in sight. Maybe we academics simply ask too much of judges – as is generally known, most courts are overloaded with cases. Is it not comprehensible that judges are not inclined to embrace theories that make their work even more complex? It is indeed. But then, Bobek changes his perspective from judges towards academics. He concludes that there is a lot of work to be done – first of all for legal (more specifically constitutional) scholars. It is legal scholarship that has the time and the resources to play with foreign ideas, not the judges. Besides that, 'constitutionally, it is better if the range of possible ideas is firstly digested by the legal scholarship and the emerging mainstream opinion then taken over by the judiciary.'[16] A more obvious appeal to constitutional comparativists is hardly possible. With this book, Michal Bobek has contributed considerably to this assignment.

[16] Bobek, *Comparative Reasoning in European Supreme Courts,* p. 287.

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