Comparative Modesty

Victor Ferreres Comella*

Vicky Jackson. *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010), 536 p., ISBN 0195333446

Vicky Jackson has written the excellent book that we expected from her. After many years devoting most of her time and energy to cultivating the expanding field of comparative constitutional law, she has gained the right perspective from which to filter and make sense of the incredible amount of information she has gathered.[1] Her previous publications were already a great contribution to the literature.

This book brings to maturity all her thoughts on the relevance of transnational law for purposes of interpreting domestic constitutions. The book develops a long but well-structured argument, one that is filled with many interesting and illuminating examples.

In this review, I will highlight the basic claims advanced in the book, and will offer some brief and marginal comments of my own. It is impossible, however, to convey the richness of the book through the summary I will provide here.

The key question

Although Jackson addresses several issues, the key question she confronts is this: what relevance should domestic courts ascribe to 'transnational law' when interpreting the national constitution? It's important to note that by 'transnational law' she means both international law and the laws of foreign countries. She is careful to distinguish between these two sources of law throughout the discussion, but she thinks that we need to take both of them into account if we want to get a

* Professor of Constitutional Law, Pompeu Fabra University (Barcelona, Spain).

[1] Vicki Jackson has co-authored, with Mark Tushnet, the pioneering book *Comparative Constitutional Law*, 2nd edn. (Foundation Press 2006), and co-edited, also with Mark Tushnet, *Defining the Field of Constitutional Law* (Praeger 2002). She has also been one of the editors of *I.CON, International Journal of Constitutional Law* since its foundation.

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complete picture of the ways in which national constitutions interact with other legal regimes in the globalised world we currently inhabit.

A crucial event that must have triggered Jackson's interest in this question, leading her to write this book, is the passionate debate that has recently developed in the United States (US) concerning the legitimacy of courts using and citing transnational law in their opinions. The very first sentence in the book informs readers that a committee of the House of Representatives of the US Congress held hearings on a bill providing that American courts 'may not rely upon' laws, rules, or judicial decisions of foreign countries or international organizations in deciding constitutional cases. And the last sentence of the book urges Americans to reject the provincial attitude that such a bill reflects, and to embrace the model of engagement with transnational law that Jackson proposes, articulates and refines throughout the book. If the US Constitution is still 'intended to endure for ages to come', she writes at the end, 'it must be able to navigate through the twenty-first century's expanded universe of law' (p. 285). Actually, two chapters (4 and 5) are specifically designed to show that her model is perfectly legitimate for American courts to adopt, and to answer the objections that have gained currency in some judicial and academic quarters in the US.

The American debate is thus very much in the background of Jackson's meditations, but it does not constrain her discourse at all. One of the many virtues of this book is its cosmopolitan tone. What the author has to say is interesting for jurists educated in diverse legal systems. Her arguments and counter-arguments are never parochial. The reader gets the sense that there is a common venture we are all concerned with: the well-functioning of democratic constitutional regimes.

Three models: Resistance, convergence, and engagement

In order to clarify the different positions one may hold concerning the interpretive uses of transnational law, Jackson distinguishes three models or 'postures', which she calls 'resistance', 'convergence', and 'engagement'. There is actually a continuum along a spectrum of positions, but identifying three models helps organize the discussion. Jackson argues powerfully in favour of engagement, which somehow occupies the middle ground.

Resisting the transnational is the first posture that Jackson presents, in chapter 1. This approach is associated in the US with Justice Scalia, who wrote that there is a difference between drafting a new constitution – when comparison with the systems of other countries is appropriate – and interpreting it – when comparison is not appropriate. Other Justices on the Court, such as John Roberts and Samuel Alito, seem to share this view: in their confirmation hearings, for example, both of them affirmed a general opposition to considering transnational sources in

constitutional interpretation. But, as Jackson shows, this view is not an American eccentricity. Other voices have been heard in other countries advancing similar claims.

The sources of resistance are of various kinds, and run quite deep. Jackson does a nice job at identifying the most important reasons offered by those who endorse this position: a) national constitutions, it is said, are documents that express the national identity of a particular political community, not universal norms; b) interpreting the constitution is an activity that should aim at unearthing the specific intentions of those who framed and ratified the document, and this 'originalist' theory of interpretation is in tension with the idea of opening the constitution to external sources ; c) the legitimacy of the constitution derives from its having been democratically consented to; transnational law lacks this democratic pedigree; d) law is an expression or outgrowth of a particular culture, which may be at odds with the cultural underpinnings of the constitutional regimes of other countries; e) judges do not have the time and the competence to seriously engage in comparative analysis; f) transnational law reflects Western dominance (or, alternatively, it embodies a set of understandings that don't fit the exceptional character of a particular nation, such as the US); g) the substantive content of transnational law is not as good – in terms of the kinds of rights it guarantees and the sort of restrictions it authorizes – as the content one can derive from the text of the national constitution, when interpreted independently of external sources; h) using transnational law would decrease the level of national diversity and experimentation with different solutions to similar problems ; i) resort to transnational law is the product of an international elite that wants to change popularly supported judgments.

This is a useful catalogue of objections to domestic uses of transnational law. These are ultimately the objections that Jackson seeks to respond to in many parts of her book.

The second posture that Jackson presents (in chapter 2) is 'convergence', which is at the opposite end of the spectrum. The aspiration here is to make sure that the national constitution is interpreted in such a way that it conforms to transnational law. Jackson maintains, quite persuasively, that the rise of the convergence theory is in part the result of certain developments: many constitutions drafted since World War II rely on international human rights instruments, or on other constitutions that relied on these instruments, as archetypes; membership of certain organizations, such as the European Union, the Council of Europe, the British Commonwealth, and other regional organizations in Latin America and Africa, have promoted exchange, and some degree of convergence, of constitutional ideas; several international bodies (such as the World Bank and the International Monetary Fund) that seek to promote the rule of law have offered

financial and other sorts of incentives to induce compliance with certain constitutional rights and principles.

But quite apart from these factual changes in the world, the convergence model rests on certain normative assumptions by way of justification. Jackson explores the main lines of arguments that have been articulated in support of the model. They are basically these: a) human rights are moral rights of a universal character – constitutional guarantees are cut from a universal cloth; b) a certain kind of international consensus provides reliable (though not infallible) evidence of the answer that should be given to the interpretive issues that human rights pose; c) judicial discretion is constrained if judges are forced to read the constitution in light of transnational law; d) judges should promote the development of the international legal system, so that citizens are well treated wherever they reside, and force is not aggressively used among states; e) using transnational law enhances the local legitimacy of judicial decisions and invites external monitoring, all of which secures a better protection of rights; f) if constitutions share parallel provisions, inspired in part by provisions of older constitutions and of human rights covenants, a textualist theory of interpretation would support the proposition that interpretation of all those documents should be convergent.

Having presented the postures of resistance and convergence, Jackson proceeds in chapter 3 to set the stage for the model she ultimately is inclined to endorse: engagement. Under this conception, judges are invited to take into account transnational law, but they are not required to follow it. 'Engagement', she explains 'is founded on commitments to judicial deliberation and is open to the possibilities of either harmony or dissonance between national self-understanding and transnational norms' (p. 71). International and foreign legal sources are used to better understand the domestic constitution. They are relevant as 'reflective tools' rather than 'hierarchic demands'. Transnational law is a sort of mirror that helps a national community define itself in a self-critical way. There is no quasi-universal consensus out there that national courts should follow (or should presumptively follow in the absence of strong reasons to the contrary). Rather, there are texts, judicial opinions and political practices from other jurisdictions that judges would be wise to take into account to shed some light on domestic discussions.

Thus, a foreign precedent may be cited by courts as an 'aversive precedent' – in that it licenses the government, for example, to do the kind of thing that is paradigmatically taken to violate the basic principles of the domestic constitution. The aversive precedent is useful to indicate more clearly that there are certain practices that, though allowed in other countries, are unacceptable to us. Alternatively, foreign precedents may be 'distinguished' from the national precedents, by pointing to the different circumstances – political, social, institutional, cultural – in which they were established. Foreign precedents can also be relied upon to

reinforce an interpretation that the judge has already deemed plausible on the basis of domestic law.

Some scholars have written about the existence and legitimacy of judicial 'dialogues' among the courts of different countries. Jackson, however, prefers to use the term 'engagement', rather than 'dialogue', since 'a court may engage the work of other courts, or the experiences of other polities, or international human rights instruments, without any necessary expectation of response' (p. 71).

Within the engagement model, Jackson further distinguishes between 'deliberative' and 'relational' engagement. The difference, roughly, is that the deliberative modality treats transnational law merely as a permissive source for national courts to use, whereas the relational modality actually requires judges to take that source into account. The South African Constitution would be a prominent example of this understanding of the connection between the domestic constitution and transnational law.[2] The relational version of engagement can take a step further and impose on judges the duty to explain why they do not embrace the interpretations that flow from transnational law.

Even in its relational modality, however, the engagement posture does not rest on the presumption that transnational law should be followed. Jackson thinks the 'convergence model', which does advance such a presumption, is an easy prey to the objections raised by those who favour the 'resistance' approach. In the area of human rights, for example, Jackson argues, the international consensus may be wrong – and it certainly evolves, as a result of contestations that take place in many fora, both national and transnational. Constitutions, moreover, give expression to 'national particularity and historically important compromises' that may need to be preserved (p. 11). A more moderate attitude – that of engagement – can survive the objections launched by 'resistance' theories, while still yielding valuable fruits.

Jackson offers many useful examples of courts in different jurisdictions playing by the engagement game, either in the deliberative or the relational forms. Among the cases she cites, I find the reference to *Marbury* v. *Madison* (1803) particularly interesting. In that foundational case that created the basis for the practice of judicial review of legislation in the US, the Supreme Court highlighted the written character of the American Constitution, in contrast to Britain's. At the same time, the Court drew affirmatively on British legal traditions of suing the King. This is an example of engagement at its best. For those American readers who may be sceptical of judicial uses of comparative law, Jackson's reference to *Marbury* strikes me as a powerful move.

[2] Art. 39 (I) of the South African Constitution of 1996 explicitly provides that, 'when interpreting the Bill of Rights', judges 'must consider international law', and 'may consider foreign law.'

Shaping the engagement model for Americans (and for Europeans too)

Having explained to the reader what the engagement model is about, Jackson devotes chapters 4 and 5 to shaping its contours and defending it against the particular objections that have been submitted in the US.

Jackson is persuasive when she claims, first of all, that it is not foreign to US traditional practices for judges to link constitutional interpretation to transnational law. She provides us with a string of cases where American courts took foreign and international legal materials into account when reading the constitution. There is even more reason nowadays for judges to do so, she writes, since there are more transnational legal resources to learn from.

Also, Jackson points out, the assertion of American exceptionalism is no basis for resisting comparative inquiry: if America is exceptional in some respects, foreign practices should be examined to better define what it is that America departs from. If the US is to be a 'city on a hill', 'the surrounding terrain must be known', as she aptly puts it (p. 105).

Furthermore, it would be inconsistent for Americans to insist too much on exceptionalism, for the US played an important role in promoting the development of human rights instruments that have influenced many post-World War II constitutions.

Apart from these arguments that are specifically framed to answer American worries about judicial references to transnational law, Jackson thinks that the more general arguments in favour of engagement are perfectly applicable to the US. Two arguments she makes in this connection are of particular interest.

First, Jackson claims, American judges actually rely on what they think they know about other legal systems. They simply don't tell us, or they do not supply the evidence to support their beliefs. If judges were explicit in their opinions about the systems they have in mind, and if they took care to check the information they come up with, many mistakes would be avoided. Jackson mentions Chief Justice Warren Burger, for example, who wrote a concurring opinion in the 1986 *Bowers* v. *Hardwick* case, implying that homosexual sodomy was universally condemned in Western civilization. Burger was mistaken about this. Several years prior to *Bowers*, Jackson reminds us, the European Court of Human Rights had already held (in the 1981 case of *Dudgeon* v. *The United Kingdom*) that prohibiting homosexual sodomy violated the European Convention. If Burger had seriously engaged with the transnational in an explicit way, he would probably have found out that he was wrong on this.

Second, Jackson asserts, foreign precedents can sometimes perform a similar role to dissenting opinions: the existence of a different interpretation in another jurisdiction poses a challenge, forcing judges to better justify their own solutions.

When a party to a lawsuit cites a foreign precedent to support a particular interpretation of domestic law, I would add, the court is entitled to disagree, but it should at least explain the reasons why it does not find that precedent persuasive.

I believe, for example, that the European Court of Human Rights missed a great opportunity to engage with foreign legal sources in the case of *Mc. Vicar* v. *The United Kingdom.*[3] The applicant was a journalist who had written an article suggesting that the athlete Linford Christie used banned performance-enhancing drugs. Mr Christie commenced an action for defamation against the journalist. Under English law, the burden is on the defendant in a libel action to prove the truth of the defamatory statement on the balance of probabilities. Since the journalist did not prove the truth of the allegation he had made, he was ordered to pay the costs of the action and was made subject to an injunction restraining him from repeating the relevant statement. When the journalist went to the European Court of Human Rights, he supported his free speech arguments by citating a passage from *New York Times* v. *Sullivan* on the burden of proof, where the US Supreme Court had said that if the burden is placed on the defendant, 'would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.'[4] The European Court in Strasbourg disagreed. It unanimously held that the English rule on the burden of proof did not violate freedom of speech as protected by the European Convention.

Now, this holding may be correct, but the Court should have reasoned why it did not think the US Supreme Court's theory in *Sullivan* was an attractive doctrine for Europeans to borrow. Maybe *Sullivan* is too controversial in America itself? Maybe there are other ways to protect freedom of speech, other than the *Sullivan* rule? The principle of proportionality, for example, allows the European Court to assess in each case how serious the damage to reputation is, and how grave the criminal or civil sanction imposed on the journalist is. The Court can make sure in this way that journalists face no risks of suffering disproportionate consequences for their failure to prove in court the truth of what they said.

Maybe this is a sufficient strategy to safeguard freedom of speech – a strategy that, for institutional reasons, the Supreme Court of the US felt it could not resort to? Or maybe *Sullivan* makes sense in a country like the US, where juries can easily award large amounts of damages to plaintiffs, than in European countries where there are no juries, or where jury determinations are more strongly constrained by judges? Whatever the possible justification for rejecting the *Sullivan* rule that the

[3] Judgment of 7 May 2002, No. 46311/99, ECHR 2002-III.

[4] *See* paras. 27 and 65 of the European Court's judgment, where the applicant's reference to *Sullivan* is mentioned.

applicant invoked, the European Court would have provided a stronger rationale for its decision if it had made explicit the reasons why *Sullivan* was not to be followed. Instead, the Court kept silent.

Some guidelines for judges

Jackson proceeds, in chapter 6, to suggest some criteria judges should use when dealing with transnational law. She draws some interesting distinctions here. Judges, for example, should give more or less weight to transnational sources depending on their nature. Thus, both judicial decisions and legislative enactments are potentially useful, but their impact is likely to be different. Foreign statutes, Jackson explains, may be referred to as an indication that a particular practice cannot be regarded as unreasonable. Judicial decisions on constitutional matters, however, are generally more useful, for they exhibit a quality of judgment that Jackson calls 'seriousness': courts review acts of the ongoing government of which the judges are a part, and they do so in the name of principles that restrain future legislatures from acting.

Jackson has interesting things to say about the differences between legislative and judicial decisions for comparative purposes. In this connection, let me refer to an intriguing question that was raised in Spain concerning the relevance of a set of constitutional events in France. The French Constitutional Council held in two decisions (rendered in 1982 and 1999) that legislation imposing gender quotas in political elections violated the constitution. The decisions caused much opposition, and the political branches chose to override the Court's judgment by means of a constitutional amendment (enacted on July 8, 1999). The Council, in a later case, upheld the new ordinary statute on gender parity that was passed after the constitutional reform came into effect.[5] Some years later, the Spanish Parliament decided to enact a statute imposing similar forms of gender parity in political elections. The parliamentary opposition filed an abstract review challenge before the Constitutional Court (and an ordinary court deciding a specific case raised a question against the statute too). The Court finally upheld the new law, over the dissent of one of the judges.[6] The interesting point is that when the bill was being considered and discussed in Parliament, and when it was reviewed by the Court, the French episode was referred to approvingly by both supporters and critics of the new law. There were, indeed, at least two ways of reading the French precedent. One possibility was to argue that the Spanish statute should be struck down by the Court, just as the French Constitutional Council had initially done with the pertinent pieces of French legislation. Measures of gender parity in po-

[5] *See* Decision No. 2000-429 DC, May 30, 2000.
[6] *See* STC 12/2008, Jan. 29, 2008. The dissenting judge was Jorge Rodríguez-Zapata.

litical elections had to be authorized by an explicit constitutional amendment. The other possibility was to focus on the final outcome: after a fruitful public debate, triggered by the disagreement between the court and the legislature, the French codified the principle of gender parity in their Constitution. The lesson to be drawn from the French experience, therefore, is that a measure like the one introduced by the Spanish statute under attack is perfectly acceptable in a liberal democracy.

It is not obvious to me which reading is to be preferred. To make matters more complicated, one should mention that it is much easier to amend the French Constitution (it has been reformed 24 times since it was enacted in 1958) than it is to amend the Spanish Constitution (which has been changed only twice since its adoption in 1978, in order to adjust some of its provisions to the EU Treaty). Is this difference with respect to the degree of obduracy of the constitution a relevant feature to consider? The Spanish Court referred to the French case, and reasoned that no constitutional reform was necessary in Spain, since the Spanish Constitution already includes a provision (Article 9.2) requiring the government to actively ensure real equality for all individuals and groups, in all spheres of political, economic, cultural and social life. This may be true, but the fact that the Spanish Constitution is much harder to change than the French Constitution is a factor that the Court is sure to have taken into account, although it does not figure in its reasoning.

This Spanish controversy illustrates the need for judges to perform a nuanced and subtle comparative analysis, of the kind that Jackson advocates.

In the same spirit of sensitivity to detail, Jackson further claims that a distinction should be drawn between international law and foreign law. Among other differences, she notes, international law is of limited scope, compared to what most national constitutions address, and it lacks an authoritative final decision-maker capable of generating specific operative rules to implement the broad international principles. More importantly, international law generally lacks the kind of 'seriousness' one finds in judicial decisions interpreting national constitutions. The judges enforcing the rule they derive from the national constitution 'live in the country in which the rule is applied and, as part of the system of governance, are subject to institutional reactions of other parts of the government and the public reactions of a particular polity' (p. 175). This is an insightful comment.

It is also important for judges to assess the degree to which the country whose practices are being considered is 'comparable'. Jackson rejects the sceptical position that denies that two countries are ever sufficiently similar. But she does insist on being careful in order to avoid superficial similarities. She makes the valuable point, for example, that a British Court's decision declaring a statute to be incompatible with a human right may be different from a decision by a US court declaring a

statute unconstitutional: judicial review in Britain is of the so-called 'weak form' – it does not bind the legislature (p. 180-181).

Jackson is sensitive, therefore, to the many details that need to be explored when reading foreign legal materials. And she is perfectly aware of the difficulty of the task. Apart from accuracy, 'legitimate legal argument requires fair treatment of sources, including respect for the context of decision, appropriate recognition of divisions of opinion, and a reasoned basis for selecting comparators' (p. 184). It is not right, of course, for judges to use transnational law in a partial manner, choosing the foreign precedents they like on substantive grounds, and silencing those others they dislike. Both 'liberal' and 'conservative' sources are potentially relevant. Comparative analysis must be consistent – no 'cherry-picking' allowed.

Jackson, however, is not as pessimistic as others are, about the capacity of the judicial system to open itself to the transnational. But this is in part a function of the relatively modest task she is advocating. What her engagement model encourages judges to do is not to gather all the relevant transnational material, get a comprehensive picture of it, and draw conclusions for the domestic issue under discussion. This would be a Herculean task that judges are not prepared for. Instead of gaining a systematic view of the transnational landscape, judges are simply asked to expand their horizon. 'Knowledge of even a single other system may enhance a judge's critical objectivity, providing a reflective mirror for better understanding' domestic law (p. 189). Some degree of judicial 'bricolage' is to be expected, she says, drawing from Mark Tushnet's metaphor.[7] Judges can use the legal materials that are 'at hand' in the parties' briefs or the judge's accumulated knowledge or the lower court opinions. Some knowledge, however limited, is better than none.

From a European standpoint, one is inclined to share Jackson's plea for modesty. It is indeed difficult for judges to expand their horizon and handle sources of law that are not seriously taught at the law schools. European Union law, for example, is still an area of the law that judges in many European countries do not know much about. This is so, in spite of the fact that European Union law is not 'transnational law' in Jackson's sense, but a legal regime of a quasi-federal organization. European Union law, moreover, has increased its visibility in recent years, both in academic life and in legal practice. Yet, in many countries the general knowledge of that branch of the law among judges and practitioners is rather poor. There is still a lot of cognitive resistance that needs to be overcome. The difficulties are only compounded when it's not European Union law that we ask domestic judges to take into account, but foreign legal sources. Bricolage is probably the only performance we can reasonably expect from them.

[7] *See* Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', 108 *Yale Law Journal* (1999) p. 1225.

The need for institutional and procedural reforms

Jackson devotes some pages to exploring the institutional and procedural reforms that may improve the capacity of the judiciary to engage with the transnational. Several steps could be taken in this direction. Some constitutional courts, for example, Jackson explains, hire foreign experts to work as law clerks. The role of lawyers is very important too. In this regard, Jackson suggests that courts should give lawyers some guidance in their opinions as to which countries are more likely to be useful for comparative purposes for different kinds of constitutional questions. This would allow lawyers to focus their comparative law research. Also, if a party or *amicus* brings transnational material to the judicial table, the rules of procedure should allow an opposing party or amicus (or a court-appointed unaligned expert) to respond.

These are all very reasonable proposals. Yet, Jackson is aware that most courts are not in the right position to handle and digest transnational sources of law. In the particular case of the US, for example, she thinks that the ideal place for comparative analysis is the Supreme Court, 'given the higher percentage of relatively open constitutional cases' it hears, and given the fact that its docket is not overburdened (p. 193). Lower courts will find it much harder to engage with the transnational.

One could extend Jackson's realistic position and suggest that, in many European countries, constitutional courts are the main fora where the transnational judicial conversation is to be developed. Indeed, one of the potential advantages of constitutional courts is that they focus even more intensely, than the US Supreme Courts does, on the kinds of constitutional issues for which comparative law seems to be so important.[8] Maybe the so-called 'centralized model' of judicial review makes it easier for domestic legal systems to embrace the engagement model that Jackson supports?

Some illustrations (and a coda)

Jackson devotes two chapters to elaborating the interpretive strategies she recommends as they are applied to particular constitutional topics. Chapter 7 deals with the right to equality, while chapter 8 examines federalism issues. There is no point in summarizing Jackson's claims here, all of which are interesting (such as, for example, her claim that, with respect to abortion, the US is not an extreme outlier from an international point of view). These two chapters allow her to demon-

[8] On the potential advantages of centralising legislative review in a specialized constitutional tribunal, *see* Victor Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press 2009).

strate that transnational law is of more limited value when it comes to issues of federalism (and other structural questions), than when human rights issues are discussed. This is so, she argues, because federal arrangements result from historically contingent compromises; they form 'packages' of interrelated institutional pieces; and there is no general 'archetype' they can be understood to be patterned after. Given these features, it is harder for constitutional judges to find comparator countries whose practices will be illuminating to decide local controversies.

The final chapter examines a different question from the one explored in the rest of the book, but it is connected: what is the status of national constitutions in a world where there has been such an explosion of transnational law? Jackson argues that constitutions will still play a key role: they will function as 'sites of engagement between domestic and transnational norms' (p. 255). She gives several examples to illustrate the strong links between constitutional and international law (with regard to problems of secession and recognition of new states, for instance, or with regard to the checks that domestic courts sometimes impose on the decisions of international bodies to safeguard the fundamental rights enshrined in the national constitutions). With this sort of 'coda', the author reaches her final destination. The reader that has accompanied her along this journey gets a perfect sense of the complex legal network that our globalised world has created.

I am deeply sympathetic with the engagement model that Jackson has articulated in this book. And I think her plea for intellectual modesty and sensitivity to context is particularly welcome. Whatever disagreements readers may have with the proposals that Jackson has developed, they will appreciate the richness of the information contained in the book, and the thought-provoking character of her claims.