

BOOK REVIEW

Tania Groppi – Marie-Claire Ponthoreau (eds): The Use of Foreign Precedents by Constitutional Judges, Hart Publishing 2013, pp. 431.

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The use of arguments from comparative law are a popular topic in constitutional scholarship nowadays.¹ Besides the fact that their study can give an international reputation to their authors, they are actually also highly interesting and, at occasions, very complicated, even if not a really new phenomenon.

We know much about pros and contras in the debate about the use of arguments from comparative law (especially concerning methodology or legitimacy), and we also know quite a few examples where they were actually used. So we mostly have a settled opinion what courts should do, but we did not have exact data (only examples which served as anecdotal evidence) what they were *actually* doing. The volume of Groppi and Ponthoreau fills finally this research gap by delivering an empirical analysis on the topic. Sixteen country reports from all around the world (Australia, Canada, India, Ireland, Israel, Namibia, South Africa, Austria, Germany, Hungary, Japan, Mexico, Romania, Russia, Taiwan, US) analysed the use of foreign precedents in constitutional cases, and besides the usual qualitative analysis also a quantitative one has been done and presented for each of them (the ECJ and the ECtHR were not analysed). With this volume, we now finally have data about the actual number of cases in which foreign case law was cited (also in comparison to the total number of cases in that country), the total number of citations (and the numbers according to the cited jurisdictions), the number of citations in cases dealing with human rights and in cases dealing with institutional issues, the number of citations in majority and minority opinions. Several tables and graphs help in understanding the numbers.

The main results of the volume are the following (pp. 429–430):

(1) Arguments from comparative law are only used as an additional argument in support of the previously developed position. This confirms to the usual recommendation about how such arguments should be used. They do not have any binding force,² and it is

¹ For recent general overviews of the literature see Halmai, G.: The Use of Foreign Law in Constitutional Interpretation, in *The Oxford Handbook of Comparative Constitutional Law* 1328–1348 (Michel Rosenfeld and András Sajó eds, 2012); Saunders, Ch.: Judicial Engagement with Comparative Law, in *Comparative Constitutional Law* 571–598 (Tom Ginsburg and Rosalind Dixon eds, 2011).

² This is called ‘soft use’ by Taavi Annus: Comparative Constitutional Reasoning: The Law and Strategy of Selecting the Right Argument, 14 *Duke Journal of Comparative and International Law*

not prescribed by positive law to use such arguments – except for South Africa and Malawi. It is well-known that Section 35.1 of the South African Interim Constitution, as well as Section 39.1 of the now valid Constitution of the Republic of South Africa, explicitly encourage the study of foreign cases in constitutional review. But it is probably less well-known that also the s. 11.2 of the 1994 Constitution of Malawi does the same: “In interpreting the provisions of this Constitution, a court of law shall ... where applicable, have regard to current norms of public international law and comparable foreign case law.”

(2) Courts do not explain or justify the case selection, they are just cherry-picking. The usual trick is choosing only those countries that apply the same solutions as we prefer.

(3) Arguments from comparative law are rather used in human rights cases than in institutional ones. This is due to the internationalised (or even universal) human rights discourse which is less bound to the national traditions.

(4) Citations are more likely to occur in new and complex cases, or in cases which have a potentially important social or political impact. The explicit reference to foreign case law might be especially relevant for new constitutional courts of transitional countries which try to show themselves in a prestigious society of well-established foreign constitutional or supreme courts in order to collect more credibility in their respective domestic discourses.

(5) The number of citations is directly related to the level of disagreement (the more dissenting opinions we have, the more likely it is to have an argument from comparative law). They are used in order to give the impression that a decision was arrived at after careful consideration.

(6) The South African Supreme Court, the US Supreme Court, the ECtHR (and the German Federal Constitutional Court, even though it is not mentioned in the final conclusions, but it comes up in many country reports) are the most influential “foreign” constitutional courts in the world.

Usually we read in books that were written on arguments from comparative law that such arguments are becoming more and more frequent in courts all around the world (this is often supposed to legitimise why someone writes a book on the issue). The main causes of the trend are said to be: The general trend of globalization, and, as a consequence, the overall weakening of national isolation; the emergence of inter- or supranational courts as meeting points of different legal cultures, where the practice of legal comparison spreads the culture of comparative law; and the similar role-perception of judges (i.e. that of guarding the basic values of constitutionalism which are considered as being some kind of modern or postmodern natural law or as a modern *ius gentium*)³ in liberal democracies. This common identity then serves as the ground for a feeling of global community, which in turn leads to a dialogue,⁴ which manifests itself in references made in decisions to each

301 (2004). According to an even more radical description, such references have a merely ‘ornamental function.’ See Drobniġ, U.: The Use of Comparative Law by Courts, in *The Use of Comparative Law by Courts* 3, 18. (Ulrich Drobniġ and Sġef van Erp eds, 1999).

³ See Halmai, G.: The Use of Foreign Law in Constitutional Interpretation, in *The Oxford Handbook of Comparative Constitutional Law* 1331–32 (Michel Rosenfeld and András Sajó eds, 2012).

⁴ For a discussion on the dialogue model of this phenomenon, see Choudhry, S.: Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation, *74 Indiana Law Journal* 819, 855–65 (1999); *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Filippo Fontanelli et al. eds, 2010).

other's works.⁵ Groppi and Ponthereau deny the existence of this trend (p. 430), and most of the country reports do support this brave (but somewhat sad) thesis with data. Their explanation is that international courts (ECtHR and IACHR) take over this role (in the terminology of the volume, international courts are not "foreign", if there is an international obligation to follow their decisions).

Whether one goes for arguments from foreign law or not, often also depends on whether one has sufficient time and knowledge of the relevant languages. The editors' "suspicion is that this practice of citation more than contributing to the enhancement of 'legal cosmopolitanism', actually promotes the creation of a 'closed circle', from which most of the non-English speaking countries are left outside in the cold" (p. 429). This linguistic barrier might be the reason why the ECtHR is world-wide much more cited than the German Federal Constitutional Court, even though the latter one does have a doctrine of fundamental rights which is at certain parts more sophisticated than the one of the ECtHR. To a good part for linguistic reasons, the ECtHR seems to have the role of disseminating European constitutional culture all around the world.

The volume of Groppi and Ponthereau is a methodologically well-designed project where all relevant questions have been asked and empirically tested (sometimes also such questions were asked which seem to be less relevant, like whether citations are in footnotes or in the main text of a judgment, or whether the citation is in the majority or in the dissenting opinion instead of just asking whether there were any dissenting opinions in the judgment). The individual chapters are also well-written, thorough and with the help of the graphs also easily understandable. This piece hopefully shows an empirical turn in legal scholarship: we much too often talked about trends without actually checking them empirically.⁶ Groppi and Ponthereau are convincingly showing that legal scholarship can and should develop in its methods, methods informed by social sciences are not simply for legal sociologists, but such data can also inform hard core doctrinal debates.

⁵ For a discussion on this phenomenon as part of the international communication between courts, see Slaughter, A.-M.: A Typology of Transjudicial Communication, 29 *University of Richmond Law Review* 99, 129–32 (1994).

⁶ For a further nice exception see Elkins, Z.–Ginsburg, T.–Melton, J.: *The Endurance of National Constitutions* (2009). For a project with similar ambitions see <http://www.conreasonproject.com/>.