

ADA PAPROCKA

An Argument from Comparative Law in the Jurisprudence of the Polish Constitutional Tribunal¹

Introduction

In the scholarship concerning constitutional courts around the world there is more and more interest not only in the judicial dialogue between those courts and international bodies,² which is deeply grounded in binding international treaties, but also in a horizontal dialogue – conducted between various jurisdictions which are not part of the same legal system.³ It is based on the similarity of constitutional norms and questions that have to be answered by the courts in different states. It contributes to the search of the best possible solutions, but also raises a number of controversies concerning both the legitimacy and the methodology of drawing from the experience of other jurisdictions. The aim of this paper is to outline the way in which the Polish Constitutional Tribunal⁴ approaches this issue.

1 An article is a result of the research conducted in the project no. 2014/15/N/HS5/00676 financed by the National Science Centre, Poland. It is a slightly revised and translated version of an article published in Polish as: *Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego* published in: “Państwo i Prawo” 2017, no. 7, pp. 37–54.

2 L. Garlicki, *Cooperation of courts: The role of supranational jurisdictions in Europe*, “International Journal of Constitutional Law” 2008, no. 3–4, pp. 509–522; W. Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford, 2012, pp. 27–33.

3 E.g. *The Use of Foreign Precedents by Constitutional Judges*, ed. T. Groppi, M.C. Ponthoreau, Oxford–Portland 2013; M. Bobek, *Comparative Reasoning in European Supreme Courts*, Oxford 2013; G. Halmai, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague 2014.

4 On the basis of the Constitution of 1997, the Constitutional Tribunal is a body entrusted with the competence to review the constitutionality of norms. It has competences typical for a constitutional court modelled after the German Federal Constitutional Court (with some differences concerning mainly the fact that, even in the procedure initiated by the constitutional complaint, it reviews only constitutionality of legal provisions and not of the decisions concerning application of law). However, due to the fact that the Polish Constitution regulates its status as one of the

The paper is based on the assumption that every element of the reasoning presented by the Constitutional Tribunal is aimed at justifying its holding and in consequence constitutes an element of the decision-making process. Only extraordinarily may it have other functions (such as informative or educational). Therefore, I assume that each reference to the foreign materials made in the reasoning of the Tribunal, is aimed at building an argument from comparative law in the case before it, even if the role of this argument in the decision-making process is not clearly indicated in the reasoning.

For the purposes of this paper, I define a comparative reference as any reference to the law or jurisprudence that is foreign to the Polish legal system, meaning that it refers to legal acts that are not binding in this system. It involves the primary domestic law or jurisprudence of other states, but it may also encompass international treaties that Poland is not party to.⁵ A comparative reference has to be clearly distinguished from the situations in which the Tribunal refers to the acts of EU or international law, to which Poland is a party (as well as to the jurisprudence of the international courts enforcing those acts).⁶ Those norms are a part of Polish legal system and the obligation to comply with them results from both Article 9 of the Polish Constitution⁷ and the particular provisions of international treaties.⁸ Hence, making reference to them by the Constitutional Tribunal is necessary and it constitutes an element of the systemic interpretation of the domestic law.

'tribunals' and not one of the 'courts' within the meanings of its provisions, I will consistently use the term "Constitutional Tribunal" and not the Constitutional Court, when referring to this body. However, whenever the "constitutional courts" as a category are referred to, it should be understood as including the Polish Constitutional Tribunal. See further K. Prokop, *Polish Constitutional Law*, Białystok 2011, p. 157 *et seq.*

- 5 Such as The African Charter on Human and Peoples' Rights or the American Convention on Human Rights (e.g. judgments of 25 May 2004, case no. SK 44/03 and of 13 October 2009, case no. P 4/08). If not indicated otherwise, all judgments referred to in the footnotes are of the Polish Constitutional Tribunal and are available in the electronic version in the Tribunal's database: <<https://ipo.trybunal.gov.pl>>.
- 6 On this subject *vid.*, among others, L. Garlicki, *Ochrona praw jednostki w XXI w. (globalizacja – standardy lokalne – dialog między sądami)*, in *25 lat transformacji ustrojowej w Polsce i Europie Środkowo-Wschodniej*, ed. E. Gdulewicz, W. Orłowski, S. Patyra, Lublin 2015, pp. 177–179; E. Mak, *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford–Portland 2015, p. 140–163.
- 7 M. Laskowska, M. Taborowski, *Obowiązek wykładni przyjaznej prawu Unii Europejskiej – między otwartością na proces integracji a ochroną tożsamości konstytucyjnej*, in *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, ed. S. Dudzik, N. Półtorak, Warszawa 2013, pp. 79–108.
- 8 E. Łętowska, *Zapewnienie skuteczności orzeczeniom sądów międzynarodowych*, "Europejski Przegląd Sądowy" 2010, no. 10, pp. 18 and 20–22; A. Paprocka, *Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego*, in *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi*, ed. M. Zubik, Warszawa 2012, pp. 77–85.

In addition to this, I analyse the judgments and decisions of the Polish Constitutional Tribunal issued from 17 October 1997, when the current Polish Constitution entered into force, till 20 December 2016, as from this date significant doubts concerning the legality and legitimacy of the judgments issued by the Tribunal may be raised.⁹

The Basis for Comparative Reference in the Polish Legal System

In international legal scholarship, especially American, one may observe heated discussions concerning the admissibility of using arguments from comparative law and jurisprudence in constitutional adjudication.¹⁰ The supporters of comparative references argue that extending the scope of the arguments used by constitutional courts contributes to the quality and persuasiveness of the reasoning. They underline that the awareness of the solutions adopted in other legal systems serves as an inspiration and allows decisions based on more extensive data to be taken.¹¹ They note that the analysis of foreign legislation and judicial decisions may provide empirical data useful for predicting the consequences

⁹ It is a result of significant constitutional crisis that resulted in the illegal election of a number of judges to the Tribunal, the way in which the new President of the Tribunal was elected, and a number of further events that allow the legitimacy of a current functioning of the Tribunal to be questioned. For more on this issue *V. inter alia*, A. Śledzińska-Simon, *Poland's Constitutional Tribunal under Siege*, *VerfBlog*, 04.12.2015, <https://verfassungsblog.de/polands-constitutional-tribunal-under-siege/> [access: 01.08.2018]; A. Grzelak, *Choosing between two Evils: the Polish Ombudsman's Dilemma*, *VerfBlog*, 06.05.2018, <https://verfassungsblog.de/choosing-between-two-evils-the-polish-ombudsmans-dilemma/> [access: 01.08.2018]; M. Matczak, *Poland's Constitutional Tribunal under PiS control descends into legal chaos*, *VerfBlog*, 11.01.2017, <https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/> [access: 01.08.2018]. The developments of the crisis around the Constitutional Tribunal were also reflected in opinions by the Venice Commission of 11–12 March 2016, CDL-AD(2016)001 and of 14–15 October 2016, CDL-AD(2016)026.

¹⁰ The literature concerning this subject is very extensive. Only some examples include: G. Halmi, *The use of foreign law in constitutional interpretation*, in *The Oxford Handbook of Comparative Law*, ed. M. Rosenfeld, A. Sajó, Oxford 2012, pp. 1330–1333; G. Halmi, *Perspectives...*, *op.cit.*, pp. 181–190; M. Rosenfeld, *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in *Oxford Handbook...*, *op.cit.*, pp. 43–52; S. Choudhry, *Migration as a new metaphor in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006, pp. 1–13 and the literature cited there.

¹¹ S. Breyer, in *A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, "International Journal of Constitutional Law" 2005, no. 4, p. 523; S. Breyer, *The Court and the World. American Law and the Global Realities*, New York 2016, pp. 249–280. In the context of counter-terrorism measures *v.*: E. Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, "The American Journal of International Law" 2008, pp. 253–258.

of certain decisions for the legal system¹². They also indicate that the reference to foreign sources may help to place the judicial decision not only in the given legal culture, but also to show its universal character, which enforces its legitimacy.¹³ In addition to this, some scholars argue that comparing and contrasting the solutions adopted in various systems may facilitate more profound understanding and assessment of one's own system.¹⁴

The opponents of using comparative references in the constitutional adjudication stress the close relationship between the constitutional text and the principles of national sovereignty and the democratic legitimization of constitutional judges. They argue that the reference to foreign materials disrupts the democratic process of law-making and the principle that decisions concerning a given legal system can be taken only by judges duly appointed within this system.¹⁵ They emphasize that constitutional interpretation ought to be deeply rooted in a constitutional and legal tradition, shaped in a particular social and cultural environment, which renders all the reference to the law and jurisprudence that is foreign (i.e. shaped in other circumstances) irrelevant.¹⁶ Furthermore, they indicate that there is no consensus as to the methods by which the comparative material should be selected. Hence, the choice of certain materials instead of others is always arbitrary.¹⁷

In the Polish legal system, comparative arguments are present, however there is no wider discussion between the judges or scholars concerning the basis for their usage and its place in constitutional interpretation.¹⁸ It seems that one may indicate at least three reasons for this lack of controversy.

Firstly, the most intense controversies concerning the use of foreign materials in the constitutional adjudication arise in the common law systems based on the binding role of precedent. Traditionally, in those systems making a reference to a particular ruling demands identifying its role for the resolution of the case at hand, as either a precedent

12 V. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, "Harvard Law Review" 2005, p. 116.

13 S. Choudhry, *Migration...*, op.cit., p. 2; V. Jackson, op.cit., p. 116 and 118; E. Benvenisti, op.cit., p. 269. Cf. the opinion of S. Breyer, who notes that citing to the case-law of countries that are only now developing their democracy by more established courts (such as the US Supreme Court) contributed to the legitimacy and position-building of the court cited to (*A conversation between...*, op.cit., p. 523).

14 G. Frankenberg, *Critical Comparison: Re-thinking Comparative Law*, "Harvard International Law Journal" 1985, no. 2, p. 447; P. Zumbansen, *Comparative Law's Coming of Age? Twenty Years after Critical Comparison*, "German Law Journal" 2005, no. 7, pp. 1079–1780.

15 A. Scalia, in *A conversation between...*, op.cit., p. 526; C.F. Rosenkrantz, *Against borrowings and other nonauthoritative uses of foreign law*, "International Journal of Constitutional Law" 2003, no. 2, pp. 84–85.

16 L.J. Blum, *Mixed Signals: The limited Role of Comparative Analysis in Constitutional Adjudication*, "San Diego Law Review" 2002, no. 1, p. 163.

17 D. Canale, *Comparative Reasoning in Legal Adjudication*, "Canadian Journal of Law and Jurisprudence" 2015, no. 1, pp. 13–14.

18 Cf. however, L. Garlicki, *Ochrona praw...*, op.cit., pp. 176–179.

that has to be followed, as a case that can be distinguished from the present one, or the ruling that has to be overturned. Introducing a ruling from a foreign (non-binding) legal system to the reasoning constructed according to this pattern is problematic for the coherence and clarity of the judgment.¹⁹ However, in continental law systems, in which the previous case-law of a given constitutional court or other bodies does not bind the courts for future and serves only as an inspiration concerning possible solutions and the way to support argumentation, similar problems do not arise.

Secondly, the use of comparative material in the process of constitutional interpretation in Poland is supported by the preparatory works of the 1997 Constitution. When the new constitution was drafted, the discussions in the Constitutional Commission of the Parliamentary Assembly, as well as the legal scholarship, drew significantly on the legal institutions established in other systems.²⁰ The facts that the foreign solutions were widely discussed and applied in the constitution-making process proves that the authors of the 1997 Constitution were aware of the correlations between different legal systems and allowed inspiration to be drawn from them.²¹

Thirdly, according to Articles 9 and 91 of the Polish Constitution, Polish courts and tribunals are obliged to take into consideration the binding norms of international law and the case-law of the international courts. Despite the different significance of such reference, the methodology behind it is quite similar to the use of comparative argument and the readiness of the Polish judicial bodies to engage in judicial dialogue may influence the fact that they do not oppose comparative references.

It also seems that the text of the Polish Constitution itself allows for such references. The Constitution does not contain any provision that would oblige or mandate its interpreters to take foreign sources into consideration.²² Nonetheless, in its Preamble, it refers to the roots of Polish culture, which includes legal culture, in universal human values and expresses the awareness of “the need for cooperation with all countries for the good of Human Family”.²³ Those clauses are too general to serve as a basis for reconstructing

19 L.J. Blum, *op.cit.*, s. 166; A Scalia, in *A conversation between...*, *op.cit.*, p. 522.

20 W. Osiatyński, *Paradoxes of constitutional borrowing*, “International Journal of Constitutional Law” 2003, no. 2, p. 249 *et seq.*; M.F. Brzeziński, L. Garlicki, *Judicial Review in Post-communist Poland: the Emergence of a Rechtsstaat?*, “Stanford Journal of International Law” 1995, no. 1, p. 35 *et seq.* See also with reference to the principle of the democratic state of law: R.R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, in *Constitutional Cultures*, ed. M. Wyrzykowski, Warszawa 2000, s. 74ff and with reference to the model of constitutional jurisdiction: G. Halmai, *Separation of Power – Social Rights – Judicial Review The Polish and the Hungarian Cases*, in *Constitution-making Process*, M. Wyrzykowski, Warszawa 1998, *passim*.

21 Cf. the opinion of A. Scalia, who clearly distinguished the use of comparative material in the process of constitution-making and in adjudication – supported the former and strongly opposed the latter (*A Conversation between...*, pp. 525, 538–539)

22 Cf. Art. 39 Section 1c of the Constitution of South Africa.

23 Translation by A. Pol and A. Caldwell, in *The Constitution of Poland*, Warszawa 2007.

a constitutional norm that would oblige the Polish judiciary in general and the Constitutional Court in particular to interpret the Constitution in accordance with the standards adopted in other states. However, they indicate that the authors of the Constitution intended it to be open to dialogue with other legal systems and in consequence do not allow the possibility of conducting such a dialogue to be excluded, if – in the circumstances of a particular case – no constitutional principles or rules oppose it.

The Practice of Using Comparative Argument by the Constitutional Tribunal

The Constitutional Tribunal is quite prone to referring to comparative arguments in its reasoning. However, the practice of this reference is varied with respect to the scope, depth and subject of the analysis. One can encounter judgments in which the reference to a provision of foreign law or a statement of a judicial body seems to be incidental and lacking in more detailed analysis,²⁴ as well as ones in which a given regulation or decision is carefully scrutinised in order to determine its usefulness for the reasoning of the Tribunal.²⁵ However, in the reasoning of its judgments the Tribunal does not reflect on the axiology underlining the use of comparative material in adjudicating constitutional questions, or on its aim and function in the decision-making process. It concerns both the lack of abstract comments on the methodology of decision-making in general, and the lack of indication of the role of certain reference in the particular case before the Tribunal.²⁶ Nonetheless,

24 In extreme cases, the Constitutional Tribunal refers to a very general statement made by another constitutional court without citing its context or significance for a case before the Tribunal (e.g. judgments of: 5 May 2004, case no. P 2/02; and 28 June 2005, case no. SK 56/04). With respect to those judgments it is difficult to say that the Tribunal formulated a comparative argument as a reference to foreign decisions, since it does not have the character of an analysis, but is rather ornamental in nature.

25 For instance the judgment of 30 September 2008, case no. K 44/07. Cf. with regard to other constitutional courts: M. Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law – The Europe-Decisions of National Constitutional Courts in a Transnational Perspective*, NYU Jean Monnet Working Paper 2013, no. 25, pp. 5–12.

26 It formulates only very general statements indicating *inter alia* that presenting an argument form a foreign law is “appropriate” (the judgment of 12 January 2005, case no. K 24/04); that “the Tribunal considers that the standards developed by the foreign judiciary and the underlying values are important” and that the given material “deserves attention” (the judgment of 24 February 2010, case no. K 6/09); that “in the context of the present case it is important to present [the legal issue at hand] [...] in its wider context, including comparative approach” (judgment of 28 October 2015, case no. K 21/14); that the reference to the comparative material “is a result if growing convergence of the modern legal systems” (judgment of 3 July 2008, case no. K 38/07); or that “one can note” information concerning comparative law (judgment of 8 March 2000, case no. Pp 1/99). In many cases the Tribunal does not indicate any reason for including comparative analysis in the reasoning of its judgment (e.g. the judgment of 19 July 2011, case no. K 11/10).

partial conclusions concerning this matter can be drawn on the basis of the material used by the Constitutional Tribunal and the conclusions (if any) drawn from them.

With regard to the type of the material used, comparative references may be divided into referring to: the constitutional provisions of other states,²⁷ other legal provisions of foreign domestic law,²⁸ and the case-law of foreign courts and tribunals.²⁹ This division is not strict, as the Tribunal sometimes refers to other kinds of sources. Nevertheless, in most cases it is possible to determine that the analysis is aimed at the reconstruction of constitutional norms, the examination of possible legislative solutions to certain problems, or the inspiration behind the decision on the hierarchical control of norms reached in a different legal system. It is evident that the remaining elements of the analysis are supplementary.³⁰

References to the constitutional provisions of other states are used by the Constitutional Tribunal mainly in order to stress the importance of a given constitutional norm by indicating that it is binding not only in the Polish legal system, but that it also constitutes part of the common constitutional heritage of a group of states. The group in question may be defined as the democratic states in general or states that also fulfil other criteria (such as the member states of the EU, parliamentary democracies or even the “majority of the European states rooted in the common Christian culture”).³¹ Such a declaration, apart from educational purposes, serves as a starting point for the exercise of balancing constitutional values. By emphasizing that a particular principle (especially a fundamental right or freedom) is common to a significant number of states, the Tribunal stresses its universal character and notes that as a result it may be considered as more significant than others and its limitation has to be justified by especially compelling reasons.³²

More often the Constitutional Tribunal analyses foreign legislation and empirical data concerning its application. In those cases the Tribunal adopts one of two approaches.

27 E.g. the judgment of 26 November 2003, case no. 22/02.

28 E.g. the judgment of 24 February 2010, case no. K 6/09.

29 E.g. the judgments of 9 July 2007, SK 48/05 and of 19 July 2011, case no. K 11/10.

30 For instance in the judgment of 28 October 2015 (case no. K 21/14) the Tribunal examined a number of the judgments of the German Federal Constitutional Court concerning the notion of “social minimum”. It also briefly referred to certain provisions of German legislation. However, the Tribunal’s analysis clearly aimed at the reconstruction of the nature and scope of the positive obligations of the state, so it concerned the content of the constitutional norm. By contrast, in the judgement of 20 September 2008 (case no. K 44/07) the Tribunal presented in a very broad way the legislation concerning the possibility of shutting down a hijacked passenger airplane in Germany and, in less detailed way, in some other states, but it did so only in order to present the context of the judgment issued by the Federal Constitutional Court of Germany, which declared such a possibility unconstitutional, and to make this judgment a main point of reference in its own analysis.

31 Judgment of 7 October 2015, case no. K 12/14.

32 E.g. the passages concerning freedom of religion in the judgment of 7 October 2015, case no. K 12/14.

The first one focuses on verifying whether the operationalization of constitutional norms is conducted in different states in the same way, i.e. whether there is one “proper” way of regulating certain matter (complying with a constitutional norm present in various legal systems).³³ In the case of a positive answer to this question, the Tribunal compares whether the solution before it complies with the model it has reconstructed. The discrepancies – in the absence of other significant arguments – justifies declaring the solution adopted by the Polish lawmaker unconstitutional. In the case of a negative answer, the Tribunal holds that the lack of a common model grants the lawgiver more latitude as to the way in which it would regulate a given matter and the comparative arguments do not support the conclusion, either with regard to the constitutionality or unconstitutionality of the adopted solution. This approach is in its essence very similar to the analysis of constitutional provisions of other states and, notwithstanding the fact that it focuses on the content of legislation, is aimed at the reconstruction of the constitutional standard.

The second approach is based on the supposition that the legislative measures adopted in different states for achieving the same goals may vary. With this in mind, the Tribunal examines the way in which various regulations function, assessing their usefulness for achieving their goals and their effectiveness in achieving those goals. It takes into consideration the wording of the legislation as well as empirical data concerning its application.³⁴ Such an examination transfers the role of the comparative analysis from the level of reconstructing a constitutional norm to the level of assessing the proportionality of the limitation of fundamental rights or freedoms. It may serve as a way to verify whether the solution adopted by the Polish lawmaker – if similar to ones already in force in other states – may achieve its aims,³⁵ or – if the solution in question varies from ones adopted abroad – whether it applies the least invasive means of achieving those aims).³⁶

In addition to this, the comparative references in the jurisprudence of the Constitutional Tribunal may focus on the judgments issued by foreign courts and tribunals. It is also possible to identify two types of situation within this category.

33 E.g. judgment of 10 May 2000, case no. K 21/99.

34 E.g. the judgments of 4 November 2014, case no. SK 55/13 and of 9 July 2009, case no. SK 48/05.

35 Such examination should be supplemented by the verification of whether the conditions that are relevant for the effectiveness of a given regulation in other states are similar to ones occurring in the Polish legal system, or whether there are some differences between the legal systems that may influence the usefulness and effectiveness of adopting a similar solution in Poland (*v.*, *e.g.*, a conclusion of the analysis conducted in the judgment of 4 November 2014, case no. SK 55/13).

36 More on the structure of the proportionality test in the jurisprudence of the Polish Constitutional Tribunal *v.*, *e.g.*, the judgments of 25 July 2013, case no. P 56/11 and of 16 October 2014, case no. SK 20/12.

In the first, more common situation, when analysing comparative material, the Tribunal stresses not only the reconstruction of the content of constitutional norm or legislation, but the outcome of the supervision of the constitutionality of norms conducted by other judicial body entrusted with the power to review the constitutionality of law.³⁷ The Tribunal does not in fact interpret legal norms as such, but borrows the result of the examination of their relation to each other.³⁸ It seems that this kind of reasoning serves on the one hand as an inspiration for the Tribunal's decision and, on the other hand, as an additional way to legitimize the Tribunal's ruling, by pointing out that it is compatible with the canons of legal reasoning also adopted in other states.³⁹

The second situation is similar to the first one with respect to the aim and the methodology of the analysis, but it should be distinguished due to the fact that the focus of the analysis is not on the foreign court's resolution of the case, but on the way in which the resolution was reached. This includes cases in which the reference made concerns the principles under which the bodies entrusted with constitutional jurisdiction exercise their competence. Such references appeared in the case-law of the Constitutional Tribunal when it was faced with the problems arising from membership in the European Union and the necessity of reconciling the principle of the primary role of the Constitution with the obligations under the European Union law, as well as with the necessity of drawing lines between the scope of its jurisdiction and the jurisdiction of the Court of Justice of the EU.⁴⁰

The Problems with Methodology

The above analysis indicates that the ways in which the Constitutional Tribunal draws on the comparative law are varied. Nonetheless, all of them can be characterized as the use of particular, often fragmentary, comparative material chosen on a case-by-case basis. Such an approach is pragmatic, as in each case the Tribunal is faced mainly with the task of adjudicating a case at hand. It does, however, adversely impact the methodology of

37 Naturally, the Tribunal should in this situation refer to the content of the constitutional norms and the legislation which were analysed in the cited judgment. However, those elements constitute only background information that allows determination of whether the judgment in question is relevant for the case before the Tribunal (e.g. the judgment of 30 September 2008, case no. K 44/07).

38 E.g. the judgment of 9 July 2009, case no. SK 48/05.

39 V., e.g., the judgment of 30 September 2008, case no. K 44/07 in which the Tribunal explicitly stated that its judgment may be controversial in the eyes of public opinion and seems to defend it by pointing out its similarity to decisions taken previously by the constitutional courts in Germany and Czech Republic.

40 V., e.g., judgments of 24 November 2010, K 32/09 and of 16 November 2011, SK 45/09. See also W. Sadurski, 'Solange, chapter 3': *Constitutional Courts in Central Europe – Democracy – European Union*, "European Law Journal" 2007, no. 1, pp. 1–35.

introducing a comparative argument to the Tribunal's reasoning.⁴¹ This concerns in particular the choice of the material to be used, the random nature of the references made, and the lack of clear indication what role such an argument played in the decision-making process.

The Constitutional Tribunal, when selecting the foreign law or case-law to refer to, does not usually explain why it found relevant the materials from particular jurisdictions and omitted those from other countries.⁴² In some cases this choice – even though not clearly justified in the judgments – seems to be based on the similar constitutional history common to a number of states⁴³ or the existence of other relevant features due to the fact that they face the same constitutional challenge.⁴⁴ In other cases, the reasons for a particular choice are difficult to identify.⁴⁵ Among the few clear statements concerning the methodology of the use of foreign law by the Tribunal, it stated that: “in case of referring to the domestic law of another state, it is necessary to establish whether it is adequate to use the foreign model in order to interpret Polish law. In particular it is necessary to exercise particular caution in the choice of the legal system to which the Tribunal refers.” However, even in the case in which this statement was made, it resulted only in the general conclusion that “in the present case it is appropriate to refer to the legal solutions functioning in Germany and in the case-law of the European Court of Human Rights” without the indication of any reasons for this conclusion.⁴⁶

It may be also doubted whether the analysis of the comparative material by the Tribunal is detailed enough to conclude that, especially when referring to the

41 For more on the methodology of comparative constitutional law *v. inter alia*: M. Tushnet, *Some reflections on method in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006, pp. 68–83; S. Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, “Indiana Law Review” 1999, no. 3, p. 833 *et seq.*

42 However, there are exceptions. *V.* judgment of 30 September 2008, K 44/07 where the Tribunal reconstrued two approaches to counteracting terrorism in Western democracies and clearly indicated why one of them was more relevant for the Polish legal system and judgment of 19 July 2011, K 11/10 when it clearly referred to the common historic heritage and the similarities between the Polish and Hungarian legal system in order to justify referring to the case law of the Hungarian Constitutional Court.

43 For instance in cases concerning the lustration or benefits of the former employees of the communist secret services.

44 Such as being a Member of the EU.

45 E.g. the reference to the case-law of Germany, United States and Canada in the judgment of 11 October 2016, SK 28/15.

46 The judgment of 3 July 2008, K 38/07. See also the judgment of 28 October 2015, K 21/14 in which the Tribunal stated “The Constitutional Tribunal held that in the circumstances of the present case it is important to present the issue of the minimum of existence in the broader context, including the comparative perspective. For this reason, the Tribunal presented this issue by invoking the German legal system”.

foreign legislation, it found all the elements that were relevant to the reconstruction of a functional equivalent⁴⁷ of the assessed Polish regulation in a given legal system. This problem can arise especially in situations in which the Tribunal examines the constitutionality of a regulation that is aimed at providing a proper balance between two conflicting constitutional values, but it refers only to those elements of foreign legislation that serve the preservation of one of those principles and omits those that serve the realization of the other principle.⁴⁸

Finally, it is problematic that the Constitutional Tribunal does not formulate any statements concerning the role of comparative argument in constitutional interpretation or making decisions on the supervision of norms. In most cases in which reference to foreign materials is made, it is placed in a separate part of the reasoning (as a separate section or in one section with the analysis of international law). The material described there is not referenced later on, when the *sensu stricto* analysis of the Polish law relevant for the outcome of the case takes place.⁴⁹ This practice significantly limits the argumentative value of comparative references in the case-law, and results in the fact that their role, other than informative and educational, is difficult to grasp.

Conclusion

The above analysis indicates that the Polish Constitutional Tribunal is relatively open to dialogue with other jurisdictions, which – in principle – seems to be both within the spirit of the 1997 Constitution and pragmatic with regard to today's world of multi-level and multi-centred legal systems, in which similar problems arise all over the globe. However, the analysis also shows that in order to fully develop the pragmatic, legitimising and persuasive potential of this horizontal dialogue, more stress should be placed on the way in which comparative references are introduced to the Tribunal's case-law. In particular, the Tribunal should indicate, in a more consistent way, the place of comparative argument in its decision-making process and justify the choices it makes with this respect.

47 J.C. Reitz, *How to Do Comparative Law*, "American Journal of Comparative Law" 1998, no. 4, p. 620 et seq.

48 E.g. the judgment of 7 October 2015, K 12/14 in which the Tribunal analysed the ways in which different legislations provided the right to conscious objection to medical professionals, but failed to take into consideration the solutions that guarantee patients' rights in such situations.

49 Cf. the judgment of 4 November 2014, SK 55/13.

Literature

- A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, "International Journal of Constitutional Law" 2005, no 4.
- Benvenisti E., *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, "The American Journal of International Law" 2008.
- Blum L.J., *Mixed Signals: The limited Role of Comparative Analysis in Constitutional Adjudication*, "San Diego Law Review" 2002, no. 1.
- Bobek M., *Comparative Reasoning in European Supreme Courts*, Oxford 2013.
- Breyer S., *The Court and the World. American Law and the Global Realities*, New York 2016.
- Brzeziński M.F., Garlicki L., *Judicial Review in Post-communist Poland: the Emergence of a Rechtsstaat?*, "Stanford Journal of International Law" 1995, no. 1,
- Canale D., *Comparative Reasoning in Legal Adjudication*, "Canadian Journal of Law and Jurisprudence" 2015, no. 1.
- Choudhry S., *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, "Indiana Law Review" 1999, no. 3.
- Choudhry S., *Migration as a new metaphor in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006.
- Frankenberg G., *Critical Comparison: Re-thinking Comparative Law*, "Harvard International Law Journal" 1985, no. 2.
- Garlicki L., *Cooperation of courts: The role of supranational jurisdictions in Europe*, "International Journal of Constitutional Law" 2008, no 3–4.
- Garlicki L., *Ochrona praw jednostki w XXI w. (globalizacja – standardy lokalne – dialog między sądami)*, in *25 lat transformacji ustrojowej w Polsce i Europie Środkowo-Wschodniej*, ed. E. Gdulewicz, W. Orłowski, S. Patyra, Lublin 2015.
- Grzelak A., *Choosing between two Evils: the Polish Ombudsman's Dilemma*, VerfBlog, 06.05.2018, <https://verfassungsblog.de/choosing-between-two-evils-the-polish-ombudsmans-dilemma/> [access: 01.08.2018].
- Halmai G., *Perspectives on Global Constitutionalism. The Use of Foreign and International Law*, The Hague 2014.
- Halmai G., *Separation of Power – Social Rights – Judicial Review The Polish and the Hungarian Cases*, in *Constitution-making Process*, ed. M. Wyrzykowski, Warszawa 1998.
- Halmai G., *The use of foreign law in constitutional interpretation*, in *The Oxford Handbook of Comparative Law*, ed. M. Rosenfeld, A. Sajó, Oxford 2012.
- Jackson V., *Constitutional Comparisons: Convergence, Resistance, Engagement*, "Harvard Law Review" 2005.
- Laskowska M., Taborowski M., *Obowiązek wykładni przyjaznej prawu Unii Europejskiej – między otwartością na proces integracji a ochroną tożsamości konstytucyjnej*, in *Prawo Unii Europejskiej a prawo konstytucyjne państw członkowskich*, ed. S. Dudzik, N. Półtorak, Warszawa 2013.

- Łętowska E., *Zapewnienie skuteczności orzeczeniom sądów międzynarodowych*, "Europejski Przegląd Sądowy" 2010, no. 10.
- Ludwikowski R.R., *Constitutional Culture of the New East-Central European Democracies*, in *Constitutional Cultures*, ed. M. Wyrzykowski, Warszawa 2000
- Mak E., *Judicial Decision-Making in a Globalised World. A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford-Portland 2015.
- Matczak M., *Poland's Constitutional Tribunal under PiS control descends into legal chaos*, VerfBlog, 2017/1/11, <https://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/> [access: 01.08.2018].
- Osiatyński W., *Paradoxes of constitutional borrowing*, "International Journal of Constitutional Law" 2003, no. 2.
- Paprocka A., *Wpływ orzecznictwa ETPCz na rozumienie konstytucyjnych praw i wolności w Polsce – kilka uwag na marginesie orzecznictwa Trybunału Konstytucyjnego*, in *XV lat obowiązywania Konstytucji z 1997 r. Księga jubileuszowa dedykowana Zdzisławowi Jaroszowi*, ed. M. Zubik, Warszawa 2012.
- Prokop K., *Polish Constitutional Law*, Białystok 2011.
- Reitz J.C., *How to Do Comparative Law*, "American Journal of Comparative Law" 1998, no. 4, p. 620 *et seq.*
- Rosenfeld M., *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in *The Oxford Handbook of Comparative Law*, ed. M. Rosenfeld, A. Sajó, Oxford 2012.
- Rosenkrantz C.F., *Against borrowings and other nonauthoritative uses of foreign law*, "International Journal of Constitutional Law" 2003, no. 2.
- Sadurski W., *'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union*, "European Law Journal" 2007.
- Sadurski W., *Constitutionalism and the Enlargement of Europe*, Oxford, 2012.
- Śledzińska-Simon A., *Poland's Constitutional Tribunal under Siege*, VerfBlog, 04.12.2015, <https://verfassungsblog.de/polands-constitutional-tribunal-under-siege/> [access: 01.08.2018].
- The Use of Foreign Precedents by Constitutional Judges*, ed. T. Groppi, M.C. Ponthoreau, Oxford-Portland 2013.
- Tushnet M., *Some reflections on method in comparative constitutional law*, in *The Migration of Constitutional Ideas*, ed. S. Choudhry, Cambridge 2006.
- Wendel M., *Comparative Reasoning and the Making of a Common Constitutional Law – The Europe-Decisions of National Constitutional Courts in a Transnational Perspective*, "NYU Jean Monnet Working Paper 2013" no. 25.
- Zumbansen P., *Comparative Law's Coming of Age? Twenty Years after Critical Comparison*, "German Law Journal" 2005, no. 7.

SUMMARY

**An Argument from Comparative Law in the Jurisprudence
of the Polish Constitutional Tribunal**

The use of references to foreign law and jurisprudence by the constitutional courts around the world currently gains more and more attention from scholars. The admissibility and usefulness of conducting such a horizontal dialogue between various jurisdictions raises controversies in other countries, but not in Poland, where no significant academic discussion on the legal basis and justification for using comparative arguments in constitutional jurisprudence has been conducted. The reasons for this lack of controversy seem to lie in the roots of the 1997 Constitution, and the way in which the Polish legal system is constructed. The Polish Constitutional Tribunal is quite prone to using comparative references in its reasoning. However, it rarely clearly indicated their role or significance for the resolution of the case before it. The analysis of the case-law of the Tribunal indicates that references to foreign law concern constitutional provisions, legislation, and the judgments of other constitutional courts. The purpose of the references stresses the universality of particular constitutional norms and deciphering their meaning, as well as gathering data significant for the assessment of the proportionality of a national law, as well as at drawing inspiration from the decisions taken by foreign courts. However, the persuasive use of a comparative argument demands that the methodological problems which can be noticed in the case-law should be addressed. They involve in particular: the need to justify the choice of comparative material that is analysed, the fragmented nature of the analysis, and the lack of a clear indication what role these kind of arguments have in constitutional argumentation.

Keywords: constitutional law, the Constitutional Tribunal, constitutional adjudication, comparative law, comparative interpretation

ADA PAPROCKA, Institute of Law Studies, Polish Academy of Sciences, ul. Nowy Świat 72, 00-330 Warszawa, Poland, email: ada.paprocka@gmail.com.