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Jean Monnet Working Paper 05/12

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NYU School of Law • New York, NY 10011
The Jean Monnet Working Paper Series can be found at
www.JeanMonnetProgram.org

ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

COURTS AS COMPARATISTS. REFERENCES TO FOREIGN LAW IN THE CASE-LAW OF THE POLISH CONSTITUTIONAL COURT

By Joanna Krzeminska-Vamvaka[*]

Abstract

This paper presents results of an empirical study of over 160 judgments in which the Polish Constitutional Court ('PCC') referred to foreign law. It reveals the scale of comparatist activity and draws conclusions in relation specifically to countries in transition. Because of the pace of transition and its strong international dimension, with the international community deeply involved in the democratisation process, the PCC has been more willing to turn to other jurisdictions than its Western counterparts. The openness towards foreign law persisted and became helpful when the Court had to assert its position vis-à-vis the executive and legislature. Judicial comparativism became a powerful legitimising tool. Despite methodological weaknesses, the comparatist activity demonstrates how the PCC steered a receptive legal system in a country in transition towards a legal system responsive to transnational judicial co-operation and emerging uniformity in a globalizing world.

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Depending on the legal system, judicial comparativism can either be very controversial, broadly accepted or simply unnoticed.[1] This difference in attitudes prompted the current research. In Poland, there is no major legal or political discussion about judicial comparativism, although – as evidenced by this paper – the practice is rather common. On the other hand, there are countries, notably the US, where the subject is highly contentious and where there is quite a discussion as to whether references to foreign law are at all permissible.[2]

This paper explores judicial comparativism, i.e. the practice whereby courts *voluntarily* decide to look at foreign law. It does not deal with cases in which courts are obliged to apply foreign law, notably under the rules of private international law. There are two central questions related to the subject of judicial comparativism: (1) *why* should foreign law be used in interpretation of domestic laws, and (2) *how* should it be used? This paper presents the results of an empirical study of the Polish Constitutional Court's ('PCC') comparatist judgments. It tries to establish what triggered such an approach and how it was used.

[1] B Markesinis, J Fedtke, Judical Recourse to Foreign Law. A New Source of Inspiration? Routlege 2007; A-M Slaughter, A Global Community of Courts, 44 Harvard International Law Journal 194 et seq (2003); V C Jackson, M Tushnet, Comparative Constitutional Law, Foundation Press 1999, p. 153 et seq; J M Smits, Comparative Law and Its Influence on National Legal Systems, in M Reimann, R Zimmermann (Eds.), The Oxford Handbook of Comparative Law, p. 520 et seq; T Koopmans, Comparative Law and the Courts, (1996) 45 International Comparative Law Quarterly 549; J Waldron, "Partly Laws Common to All Mankind": Foreign Law in American Courts, Yale University Press 2012, Kindle Edition; G Canivet, Trans-Judicial Dialogue in a Global World, in: S Muller, S Richards (Eds.), Highest Courts and Globalisation, Hague Academic Press 2010, p. 21.

[2] See in particular the discussion around the following judgments of the US Supreme Court: *Atkins v Virginia* (2002) 536 U.S. 304, *Lawrence v Texas* (2003) 539 U.S. 585, *Roper v Simmons* (2005) 543 U.S. 551; see for example: Markesinis/Fedtke, in ibid, p. 55 et seq; J Waldron, Partly Laws Common to All Mankind. Foreign Law in American Courts, Yale Law School Lectures on International Law, 2008, podcast available in iTunes store (http://www.apple.com/itunes/?cid=OAS-US-DOMAINS-itunes.com); J Waldron, in ibid; J O McGinnis, Foreign to our Constitution, 100 Northwestern University Law Review 303 (2006); R P Alford, Four Mistakes in the Debate on Outsourcing Authority, 69 Albany Law Review 653 (2006); R P Alford, Misusing International Sources to Interpret the Constitution, 98 American Journal of International Law 57 (2004); Prepared Remarks of Attorney General Alberto R. Gonzales at The University of Chicago Law School (9 November 2005), available at http://www.justice.gov/archive/ag/speeches/2005/ag_speech_0511092.html; Sandra Day O'Connor, Remarks at the Southern Center for International Studies (28 October 2003), at http://www.southerncenter.org/OConnor_transcript.pdf.

Initial assumptions

The study started with a relatively modest aim to explore how the PCC drew inspiration from the practice of other EU Member States ('MS') when it dealt with matters of EU law. The pre-accession harmonization process was a huge legislative effort. Then, once in the EU, Poland had to resolve many of the fundamental issues that for years troubled the 'old' MSs, like supremacy or direct effect.[3] The initial aim of the current study therefore was to explore how the PCC drew inspiration from the practice of other MSs when it defined the relationship between the Polish and EU law. From this initial relatively modest aim the study expanded to the uncharted territories of judicial comparativism in Poland. A search of the PCC's database showed that comparative references were quite common with over 160 comparatist judgments during the period of 20 years, from 1991 to 2011. Already a very cursory analysis of those judgments showed that references were made in many different areas of law.

Given such a significant number of comparatist judgments a new assumption followed that it was the process of transition that possibly triggered the PCC's willingness to cite foreign law. After the fall of communism Poland underwent a substantial transformation process. It went from a non-democratic form of government and centrally planned economy to democracy, the rule of law and market economy. Further, from the early nineties the perspective of EU membership triggered the pre-accession harmonization process that considerably stretched the legal system. Intuitively it thus appeared that references to foreign law might be to some extent a transition-related phenomenon. But the statistics again showed a different story.

The number of judgments with reference to foreign law more then quadrupled in absolute terms from 33 between 1991 and 1999 to 133 between 2000 and 2011. Within the second decade comparatist judgments increased by 41% from 55 between 2000 and 2005 to 78 in the following five years. These figures demonstrate that the practice of citing foreign law has been accelerating quite rapidly. It not only increased but also intensified over time, with references becoming not only more frequent, but also more

[3] For analysis of response to those issues by the courts in the new EU Member States see: W Sadurski, 'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union, 14 European Law Journal 1 (2008).

specific (with more in-depth analysis of foreign law) and more visible (with chapters within the PCC's judgments specifically dedicated to the analysis of foreign law).

Judicial comparativism – general remarks

Judicial comparativism fits into the broader debate on judicial activism and adds an interesting international twist to it. By favouring their foreign non-elected counterparts, courts could potentially threaten the principle of separation of powers.[4] In the U.S. debate on judicial comparativism authors often emphasize the undemocratic character of citing foreign law. It is claimed that "*[j]udges in foreign countries do not have the slightest democratic legitimacy in a U.S. context.*"[5] The fear is that judges would be selective in their choices of foreign law and that the lack of normative rules could potentially make those choices arbitrary and result in the so-called 'cherry-picking'.[6]

The main objection to the use of foreign law are social, political, cultural, economic and historical differences between countries. A related argument is that national judges are largely unaware of those complex social, political, cultural, economic and historical backgrounds behind decisions of their foreign counterparts.[7] Richard Posner states that:

> [t]o know how much weight to give a decision of the German Constitutional Court in an abortion case, one would want to know such things as how the judges of that court are appointed, how they conceive of their role, and, most important and most elusive, how German attitudes toward abortion have been shaped by peculiarities of German history, notably the abortion jurisprudence of the Weimar Republic, thought to have set the stage for Nazi Germany's program of involuntary euthanasia.[8]

However, the socio-economic and political differences are not insurmountable. Those differences are generally acknowledged with a proviso that any comparative activity has

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[4] See for example: Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges, The AEI Press Washington D.C. 2003; R A Posner, Foreword: A Political Court, 119 Harvard Law Review 31, 84 et seq. (2005).
[5] Posner, in ibid, p. 88.
[6] Waldron, supra note 1, Kindle Edition, Location 4130 of 8217; Markesinis/Fedtke, supra note 1, p. 61.
[7] Posner, supra note 4, p. 86; for a summary of the problem of cultural differences between legal systems see: P de Cruz, Comparative Law in a Changing World, 3rd Edition, Routledge-Cavendish 2007, p. 222 et seq.
[8] Posner, supra note 4, p. 86.

to take them into account.[9] Although Montesquieu is sometimes viewed as a proponent of a restrictive use of foreign law on account of socio-political, economic and other differences between states,[10] he insisted that comparisons should consider legal systems "*in their entirety*".[11] This means that differences affecting comparability are duly accounted for but are not as such a 'conversation stopper' in the discussion on judicial comparativism.[12]

Further, it can be argued that the transnational judicial dialogue is simply a response to the process of globalisation.[13] Especially those legal problems that transcend borders do call for a harmonized approach. In a globalised economy with supply chains fragmented across borders harmonization substantially decreases transaction costs. New technologies, the speed of information flow, modern ways of communication, Internet, and enhanced travel contribute to a growing assimilation in tastes and customs but also in laws.[14] Jurisdictional borders between countries have become extremely porous.[15] Finally, judicial comparativism demonstrates growing unification and an emerging community of standards when, to an extent, different countries respond similarly to the same problems also by sharing similar values.

Comparative law is a backbone of different unification and harmonization projects and

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[9] O Khan-Freund, On Uses and Misuses of Comparative Law, 37 Modern Law Review 27 (1974).
[10] "[Laws] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government (…). They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs." Charles de Secondat, Baron de Montesquieu, The Spirit of Laws, Halcyon Classic Series 1752, Kindle Edition, Location 251 – 259 of 10328; Waldron, supra note 1, Kindle Edition, Location 4254 of 8217; Khan-Freund, in ibid, p. 7; M Tushnet, The Possibilities of Comparative Constitutional Law, 108 Yale Law Journal 1225, 1238 et seq (1999).
[11] "Wherefore, to determine which of those systems is most agreeable to reason, we must take them each as a whole and compare them in their entirety." Montesquieu, in ibid, Kindle Edition, Location 8627 of 10328.
[12] Waldron, supra note 1, Kindle Edition, Location 4260 of 8217.
[13] U A Mattei, T Ruskola, A Gidi, Schlesinger's Comparative Law, Cases-Text-Materials, Foundation Press 2009, p. 2 et seq.; R B Schlesinger, The Past and the Future of Comparative Law, 43 American Journal of Comparative Law 477 (1995); see also different contributions in S Muller, S Richards (Eds.), Highest Courts and Globalisation, Hague Academic Press 2010, in particular Canivet, supra note 1, p. 25-7, speaking of universalization and internationalization of many legal issues.
[14] Markesinis/Fedtke, supre note 1, p. 139.
[15] Mattei/Ruskola/Gidi, supra note 13, p. 177; Markesinis/Fedtke, in ibid, p. 150.

processes.[16] Those processes might concern specific subjects (e.g. international trade, international sale of goods[17]) or regions (notably the EU). Comparative study lies at the heart of those efforts because:

> the terms of any instruments aiming at international unification or harmonization of legal rules must be fitted into the substantive and procedural law of the participating countries. In consequence, the drafters of such instruments can do their work only on the basis of the most painstaking comparative studies.[18]

The Council of Europe's Convention on Human Rights and Fundamental Freedoms ('ECHR')[19] is a prominent example of core standards for protection of human rights and fundamental freedoms across Europe. Another leading example of harmonization covering different fields of law related to the four fundamental freedoms and the common market is the European Union, comprising 27 Member States.[20] Within international (or supranational) organizations, equipped with their own judicial bodies (EU Court of Justice, European Court of Human Rights), national courts become members of an interconnected community and have to respond to challenges linked to accommodating international (supranational) law in their national legal systems. States' membership in international organizations forces national courts into a dialogue with each other which radiates to fields beyond those covered by the law of international organizations. Also, judges delegated from member states cooperate with each other within judicial bodies of international organizations which are a "*melting point in the creation of universal judicial culture*".[21]

Apart from formal (top-down) unification and harmonization processes, there are many scholarly projects in Europe exploring the common core of legal principles and rules between European states. An important example is the project "Common Core of European Private Law" in which scholars collaborate to develop and then answer common factual questionnaires in order to reveal a common core of principles and rules

[16] Mattei/Ruskola/Gidi, in ibid, p. 70 et seq.
[17] See: United Nations Convention on Contracts for the International Sale of Goods, available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf.
[18] Mattei/Ruskola/Gidi, supra note 13, p. 72.
[19] Available at: http://conventions.coe.int/treaty/en/treaties/html/005.htm.
[20] See: http://europa.eu.
[21] See: Canivet, supra note 1, p. 22.

in a specific field of law in Europe.[22] Another interesting example was project "Fundamental Rights and Private Law in the European Union" exploring the impact of fundamental rights on private law in the selected EU countries.[23] The project followed a bottom-up approach of reviewing existing case law in different countries. Junior researchers worked on a system different from their own under the supervision of native experienced scholars. As a second step common factual questionnaires were developed and answered. The project was unique due to the fact that it bridged public and private law.

Unification and harmonization projects and processes in Europe demonstrate that different countries do share a common legal ground. European legal systems definitively communicate with each other across space and the jurisdictional borders between them are extremely porous.[24] Consequently, judicial borrowings cannot be simply dismissed on the basis of socio-economic and political differences between countries.

This is further corroborated by the growing international co-operation between judges. Such co-operation exists under auspices of the EU (Eurojust,[25] European Judicial Network in Civil and Commercial Matters[26] European Judicial Network in Criminal Matters[27]) and within the Council of Europe (the European Commission for Democracy through Law, better known as the Venice Commission,[28] European Commission for the

[22] See: M Bussani, U Mattei (Eds.), The Common Core of European Private Law Project, Cambridge University Press 2004; main features of the project are also described in Mattei/Ruskola/Gidi, supra note 13, p. 221 et seq.
[23] G Brueggemeier, A Colombi-Ciacchi, G Comande (Eds.), Fundamental Rights and Private Law in the European Union, Cambridge University Press 2010.
[24] Similarly but for a broader geographical coverage: Mattei/Ruskola/Gidi, supra note 13, p. 177.
[25] See: http://eurojust.europa.eu/Pages/home.aspx and http://eurojust.europa.eu/about/legal-framework/Pages/eurojust-legal-framework.aspx. Eurojust stimulates and improves the co-ordination of investigations and prosecutions between the competent authorities in the Member States.
[26] See: http://ec.europa.eu/civiljustice/index_en.htm. The European Judicial Network in civil and commercial matters (EJN-civil) is a flexible, non-bureaucratic structure, which operates in an informal mode and aims at simplifying judicial cooperation between the Member States.
[27] See: http://www.ejn-crimjust.europa.eu/ejn. A network of national contact points for the facilitation of judicial co-operation in criminal matters.
[28] See: http://www.venice.coe.int. The Council of Europe's advisory body on constitutional matters. Established in 1990, it has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage. Initially conceived as a tool for emergency constitutional engineering, it has become an internationally recognised independent legal think-tank. Today it contributes to the dissemination of the European constitutional heritage, based on the continent's fundamental legal values while continuing to provide "constitutional first-aid" to individual states.

Efficiency of Justice,[29] Consultative Council of European Judges[30]). Last but not least, highest courts in different European countries reach out to each other and to foreign audiences by regularly translating their decisions into foreign languages and making them easily available on their websites. Outside Europe, the American Society of International Law within its Judicial Education and Training Network promotes transnational judicial dialogue initiatives. The aim is to strengthen "*networks of national and international judges that focus on comparative judicial practice in the interpretation, domestic application, and enforcement of international law*".[31] Training opportunities for judges are offered by the International Organization for Judicial Training.[32] In the UN, in 1994, the Commission on Human Rights appointed a Special Rapporteur on the Independence of Judges and Lawyers, who monitors the developments with regard to the independence of the judiciary, [33] especially in view of the Basic Principles on the Independence of the Judiciary.[34] Another initiative is the Judicial Integrity Group [35] whose aim is to strengthen the integrity of the judicial systems and which elaborated the so-called Bangalore Principles of Judicial Conduct.[36]

This growing transnational co-operation between judges lays strong foundations for transnational judicial borrowings. However, the practice is still characterized by a high level of spontaneity and is thus unsystematized and undisciplined. The PCC does not formally comment on the methodology used for its comparisons and it is nothing unusual among courts citing foreign law. [37] Of course, judicial comparativism will naturally be target of all the criticism related to the limited role of theory in comparative

[29] See: http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp. The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end.
[30] See: http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp. The Consultative Council of European Judges is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. It is the first body within an international organization to be composed exclusively of judges.
[31] See: http://www.asil.org/judicial-education-and-training-program.cfm.
[32] See: http://www.iojt.org/iojt2/index.html.
[33] See: http://www2.ohchr.org/english/issues/judiciary; see in particular Resolution 8/6 of the Human Rights Council, available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_6.pdf.
[34] See: http://www2.ohchr.org/english/law/indjudiciary.htm.
[35] See: http://www.judicialintegritygroup.org/index.php/jig-group.
[36] See: http://www.judicialintegritygroup.org/index.php/jig-principles.
[37] See: J Waldron, Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity, in: S Muller, S Richards (Eds.), Highest Courts and Globalisation, Hague Academic Press 2010, p. 100-1.

law.[38] Nevertheless normative rules governing the selection of compared systems and cases in which comparisons appear desirable is crucial to make sure that judicial comparativism is not selective.[39] From this perspective the purpose of this paper is twofold (1) to present the reality of the PCC's comparative activity and (2) to determine its methodological underpinnings.

Constitutional Courts in Central and Eastern Europe. Comparative activity and transitional constitutionality

Although, according to the statistics, the PCC's comparative activity does not seem to be exclusively related to transition, it was triggered by both the transition and the pre-accession harmonization processes, which forced the Polish legal system to open up to external influences. The scale of comparatist activity reflects the PCC's self-confidence and its position as trendsetter. Leaving aside the reasons and rationales for comparatist activity, it is clear that the PCC is very open about looking at foreign law. Since the references usually have a persuasive but no normative value, i.e. they are not necessary for any court to reach a decision, every time the court makes an explicit reference to foreign law it also makes a statement that it is willing to engage in a dialogue with its foreign counterparts. Judicial comparativism also in a way reflects the PCC's strong position in the post-communist era and indeed demonstrates that comparative activity can be used for political reasons to reinforce the Court's position domestically, vis-à-vis executive and legislature.[40]

The PCC was established few years before the fall of communism, between 1982 and 1986.[41] The rapid proliferation of constitutional courts throughout the Central and Eastern Europe ('CEE') since 1989 reflected the conviction that constitutional review

[38] G Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harvard International Law Journal 411, 416-8 (1985).
[39] Markesinis/Fedtke, supra note 1, p. 61.
[40] See in this sense Canivet, supra note 1, p. 28.
[41] The work on the establishment of the Constitutional Court begun already in 1981 and the constitutional amendment of 1982 sanctioned the Court's establishment. However, due to a substantial political opposition, afraid of creating an institution that could be potentially difficult to control politically, the Constitutional Court Act was adopted only in 1985. The fist decision was pronounced in 1986. At the beginning, the Court could not ascertain any strong position. Its judgments were not final but subject to parliamentary control. Changes could be introduced only after 1989 alongside the changes to the Constitution. See: http://www.trybunal.gov.pl/eng/index.htm.

was a strong guarantor of democracy and the rule of law.[42] Indeed, the CEE constitutional courts emerged as powerful actors in the transition process. Because their establishment broadly coincided in time with the dismantling of the communist regimes, in a way they became symbols of transition. Their advantage lay in the fact that as new actors they could distance themselves from the communist past. The same was not easy for other political players.

Under the communist regime there was no judicial review of law. The judiciary was not independent. It was an instrument in the hands of the communist regime, at best a peripheral body with limited influence.[43] Counter-majoritarian rulings by a judicial body were simply unthinkable. All that changed with the transition.[44] The judiciary regained its independence. In parallel the judicial review of law was introduced and strong constitutional courts established in the CEE countries.[45]

Poland opted for a centralized model of constitutional review. The PCC has exclusive competence to assess constitutionality of law. Ordinary courts do not have such competence and can refer a question to the PCC, should an issue of constitutionality arise.[46] The control performed by the PCC is abstract, i.e. the challenge to the constitutionality of legislation can be made in the absence of an actual controversy.[47]

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[42] See contributions in W Sadurski (Ed.), Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, Kluwer Law International 2003.

[43] D Skrzypiński, Władza sądownicza w procesie transformacji polskiego systemu politycznego. Studium politologiczne, Wydawnictwo Uniwersytetu Wrocławskiego 2009, p. 77 et seq. See also M Stanowska, A Strzembosz, Sędziowie warszawscy w okresie próby 1981-1988, Instytut Pamięci Narodowej 2005, p. 15 et seq; W Kulesza, A Rzepliński (Eds.), Przestępstwa sędziów i prokuratorów lat 1944 – 1956, Instytut Pamięci Narodowej 2000; R Ludwikowski, Judicial Review in the Socialist Legal System: Current Developments, 37 International and Comparative Law Quarterly 89 1988.

[44] For general analysis see: J Priban, R Roberts, J Young (Eds.), Systems of Justice in Transition. Central European Experiences Since 1989, Ashgate 2003.

[45] W Sadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Springer 2005, p. 104–5; see also H Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, University of Chicago Press 2000; R Prochazka, Mission Accomplished: On Founding Constitutional Adjudication in Central Europe, CEU Press 2002.

[46] According to Article 193 of the Polish Constitution "[a]ny court may refer a question of law to the Constitutional Court as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court."

[47] The institutions competent to initiate abstract constitutional review are (Article 191) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for

The PCC adjudicates regarding the conformity of statutes and international agreements to the Constitution and the conformity of statutes to the ratified international agreements whose ratification required prior parliamentary consent (Article 188 of the Constitution). An individual constitutional complaint is also provided for.[48] The system allows for *ex-ante* review, which means that courts can review the constitutionality of laws before their entering into force. The PCC is also adjudicating disputes over authority between central constitutional organs of the state (Article 189 of the Constitution).[49] Its judgments are universally binding and final.[50]

Different reasons led the CEE constitutional courts to emerge as strong actors in the transition process. Some authors argue that it was linked to the very nature of transition: the fact that the societies needed a neutral player not tainted by the communist system. Political institutions were weak and there was a popular distrust of the legislature, administration and judiciary post transition. The option of having a new institution not tainted by a totalitarian regime seemed quite tempting. [51] The constitutional courts, enjoying the social prestige, independence and authority, were best positioned to manage the difficult balance between the need for continuity and change, a tension which characterized the CEE transitions.[52] Another argument is that the Kelsenian model of constitutional review has an inclusive effect on parliaments because it encourages the majority to take into account the arguments of the minority.

Citizens' Rights (Article 191). Some other institutions can also request an abstract control but only when the challenged act relates to matters relevant to the scope of their activity.

[48] According to Article 79 of the 1997 Constitution "[e]veryone, whose constitutional freedoms or rights have been infringed, can appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution".

[49] The following persons may make application to the Constitutional Court: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control (Article 192).

[50] According to Article 190(4) of the Constitution "[a] judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings."

[51] W Sadurski, Twenty Years After Transition: Constitutional Review in Central and Eastern Europe, The University of Sydney, Sydney Law School, Legal Studies Research Paper No. 09/69, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437843, p. 3.

[52] Ibid, p. 3.

At the same time there is some criticism of this model, mainly because it was adopted with no public debate or deliberation and because the main justification for its adoption was the fact that it was well functioning in established democracies and because it was promoted by the Council of Europe as an important guarantor of democratic consolidation.[53]

The fact remains, however, that the CEE constitutional courts assumed an important role in the transition process. They dealt with the difficult transition-specific agenda: punishing the crimes of the past, 'lustration',[54] (re)construction of private property.[55] The CEE constitutional courts contributed to the stability of the new democracies because the constitutional review had a neutralizing function while solving issues indispensable for the process of democratization.[56]

As will be demonstrated below, in the years following the fall of communism, the comparative activity was used in the process of democratic consolidation in order to reinforce the 'democratic credentials' of Polish law. It therefore served as a source of inspiration and an external legitimising tool. This function of comparative activity is often expected in countries in transition but it carries with it serious dangers of over-reliance on foreign models. However, once those dangers are properly identified and addressed, i.e. foreign models are used with a healthy dose of criticism and adapted to local conditions, judicial borrowings can help to rebuild national legal identity and integrate a transforming legal system into the interconnected world of judicial co-operation and growing global legal uniformity.

International law in the transition process

Apart from the transition-specific agenda the CEE constitutional courts actively joined the process of constitutional internationalisation in Europe. The influence of international law on the legal systems of the CEE countries is yet another feature of the post-Communist transition that might have to an extent prompted the PCC to embrace

[53] Ibid, p. 2.
[54] Unveiling of the activities of the former officers of the communist secret services, and barring them from public offices.
[55] L Solyom, The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary, 18 International Sociology 137-8 (2003).
[56] Ibid, p. 142-3.

judicial comparativism. The fall of communism changed the attitude to international law, most notably to the international human rights treaties. The communist constitutions were notoriously silent about the status of international law in the internal legal order. Only the new post-1989 constitutions defined that status in a way very favourable towards international law, i.e. by ensuring its primacy over conflicting national statutes. In Poland, for example, international treaties ratified with prior parliamentary consent take precedence over conflicting national laws.

The external dimension of the transition process becomes particularly visible with the membership in regional organizations. Almost instantly, all CEE countries became members of the Council of Europe. They also for many years aspired for membership in the EU and were harmonizing their laws accordingly. The external dimension of the transition process had a significant impact on the legislature. The membership in the EU required a huge legislative effort. It prompted an unprecedented legal transformation. Poland had to enact 255 statutes in order to harmonize its law with 1589 EU directives.[57] But it also had an impact on the judiciary because the CEE courts integrated international law into their legal reasoning. In the area of fundamental rights the courts had to work out high standards of protection in a very short period of time. Here, most notably the European Convention on Human Rights became very influential.

The influence of international law on the CEE legal systems after 1989 is an important element in the discussion on judicial comparativism. They go hand in hand. The fall of communism meant that the CEE countries opened up to the external world and to the international law. In fact, international law became an important element of national legal systems. That was expressed not only by the fact that the new CEE constitutions provided for primacy of international law but even more by the fact that international law became a powerful instrument of external legitimization in the hands of constitutional courts. The CEE constitutional courts "*were born into a world of*

[57] Wdrozenie i stosowanie prawa EU, in: 5 lat czlonkostwa Polski w Unii Europejskiej, Komitet Integracji Europejskiej, Warsaw 2009, available at: http://polskawue.gov.pl/files/Dokumenty/Publikacje_o_UE/piec_lat_polski_w_unii_europejskiej.pdf, p. 492; data available also in the Database of National Implementation Measures Notified to the Commission, European Commission, http://ec.europa.eu/eu_law/directives/directives_communications_en.htm.

flourishing international human rights jurisdiction". [58] The proliferation and assimilation of international standards went hand in hand with assimilation of foreign constitutional standards. Laszlo Solyom claims that assimilation of foreign constitutional standards was only natural since the idea of constitutional court itself was imported. In fact, "*the reception of constitutional jurisprudence became more and more rapid with the subsequent generations of courts, although the material to be assimilated had grown substantially*."[59] Laszlo Solyom links the influence of foreign law to the professional education of (Hungarian) judges who spent considerable part of their careers abroad, in particular in Germany. [60] Indeed, the members of the PCC also have scholarly links with abroad, mainly France and Germany.[61] This paper argues that references to foreign law are a by-product of the role that international law assumed in the newly shaped legal systems of the CEE countries. The number of references suggests that the practice goes clearly beyond what was or would be necessary for a CEE court to respond to the challenges of transition and democratic consolidation. The increase and intensification rather demonstrate that the PCC is actively participating in the process of internationalization of constitutional standards and views itself as a member of the international community of courts.

Comparative law in the CEE countries

Comparative law has quite a tradition in Poland, dating back to the interwar period. As the codification and unification processes were underway, law practitioners had to cope on a daily basis with several legal systems in force simultaneously. After 1918, depending on the region and branch of law, up to 5 different legal systems were in force in Poland (French, Austrian, German, Russian, Hungarian). [62] These processes facilitated the development of comparative law in the interwar Poland. During the

[58] Solyom, supra note 55, p. 143.
[59] Ibid, p. 144.
[60] Ibid, p. 145.
[61] For CVs of current and former members of the PCC see: http://www.trybunal.gov.pl/eng/index.htm.
[62] This was due to the pre-war division of the Polish territory; see: J Bardach, B Lesnodorski, M Pietrzak, Historia ustroju i prawa polskiego, Wydawnictwa Naukowe PWN 1994, p. 461 et seq, in particular 552 et seq.

communist times comparative law had been crippled as a discipline[63] and it was only post 1989 that it experienced a revival due to the international dimension of transition with the international community deeply involved in the democratisation process. However, currently, there is still a mismatch between practice and theory of comparative law. Comparative law is extensively used in legislating and – as demonstrated by this paper – also by the PCC, but it is quite underdeveloped in academia.[64]

The danger with comparativism in countries in transition or in the process of rebuilding their legal systems is that the solutions adopted in other countries (especially Western established democracies) might be accepted at face value, without the necessary scrutiny. From that perspective, the CEE countries face some of the risks identified by Guenter Frankenberg, who claimed that comparatists often fail to both properly distance and differentiate themselves from their own legal system. They either perceive the other legal system through the lenses of their own or over-identify themselves with the compared legal system. Guenter Frankenberg stated that "*[a]s long as we understand foreign places as like or unlike our own, we cannot begin to fully appreciate them, or ourselves*".[65] What is crucial is a proper dialogue between the new and the settled knowledge, a dialogue within which their respective claims to completeness and truth are "*mutually questioned and tested*."[66] Guenter Frankenberg's main criticism is that comparisons are guided and controlled by the home legal system of the comparatist: "*[t]he comparatist's own "system" is never left behind or critically exposed in the light of the new (...). The comparatist travels strategically, always returning to the ever present and idealized home systems: Other societies or legal systems are "not yet" developed, but may be considered on their way*".[67] Indeed, other authors postulate as well that comparatists should always disentangle, free themselves

[63] For a more profound analysis see: Z Kuhn, Development of Comparative Law in Central and Eastern Eurpe, in: M Reimann, R Zimmermann (Eds.), The Oxford Handbook of Comparative Law, Oxford University Press 2006, p. 215 et seq.
[64] Ibid, p. 235.
[65] Frankenberg, supra note 38, p. 412.
[66] Ibid, p. 413.
[67] Ibid, p. 433.

from any preconceptions based on their native system.[68] While problems as described by Frankenberg are experienced mainly by comparatists from developed countries, the CEE comparatists face the problem of over-identifying themselves with the compared legal system and accepting foreign models at face value without properly considering how to adapt them to the local conditions. While comparatists from developed countries tend to look at foreign law through the lenses of their own system and try to fit foreign concepts and institutions into what is available at home, those from developing countries are often eager to simply transpose foreign solutions to the domestic ground. In other words, comparatists from developed countries often try to prepare their own national dish with foreign ingredients, while those from developing countries try to prepare foreign national dish with their domestic ingredients. This paper will show that the PCC often used comparative law as legitimizing tool in order to ascertain its position domestically and juggled between over-reliance on Western models and building national legal self-identity.

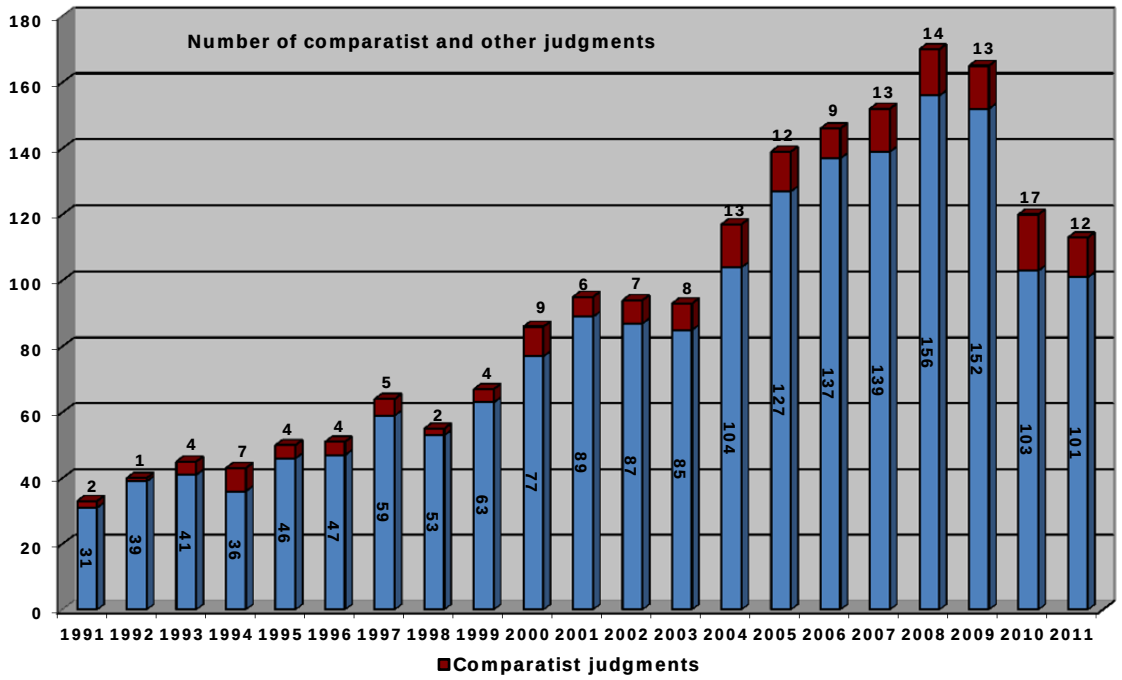
References to foreign law – general remarks

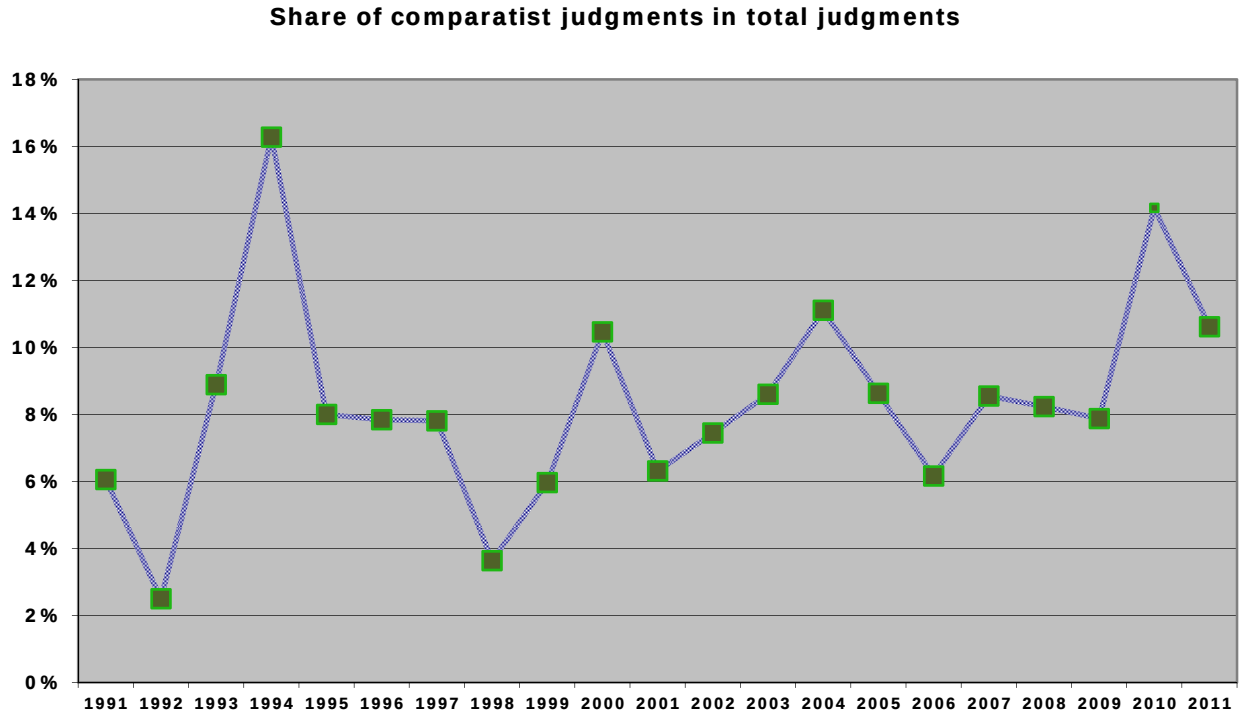
The comparatist judgments are analysed over three periods: (1) 1991 – 1999, (2) 2000 – 2005, and (3) 2006 – 2011. The second decade has been divided in order to better illustrate the trends.

Citations to foreign law have been accelerating in terms of their number and intensifying in terms of their depth (level of detail). The number of judgments with references to foreign law more than quadrupled between 1991 and 1999 and 2000 and 2011 (increased from 33 to 133). The increase in relative terms (in relation to total number of judgments)[69] was less pronounced – by 2 percentage points – from 7% between 1991 and 1999 to 9% between 2000 and 2011. This was due to a substantial increase in the PCC's overall activity. Also, the rhetoric of comparatist judgments changed. While in the first decade references were used predominantly to reinforce the democratic credentials of Polish law, in the second decade the PCC started to see itself as a member of a strongly interlinked community with emerging common standards.

[68] K Zweigert, H Koetz, Introduction to Comparative Law, Clarendon Press Oxford 1998, p. 35.
[69] Number of judgments with reference to foreign law related to total number of judgments.

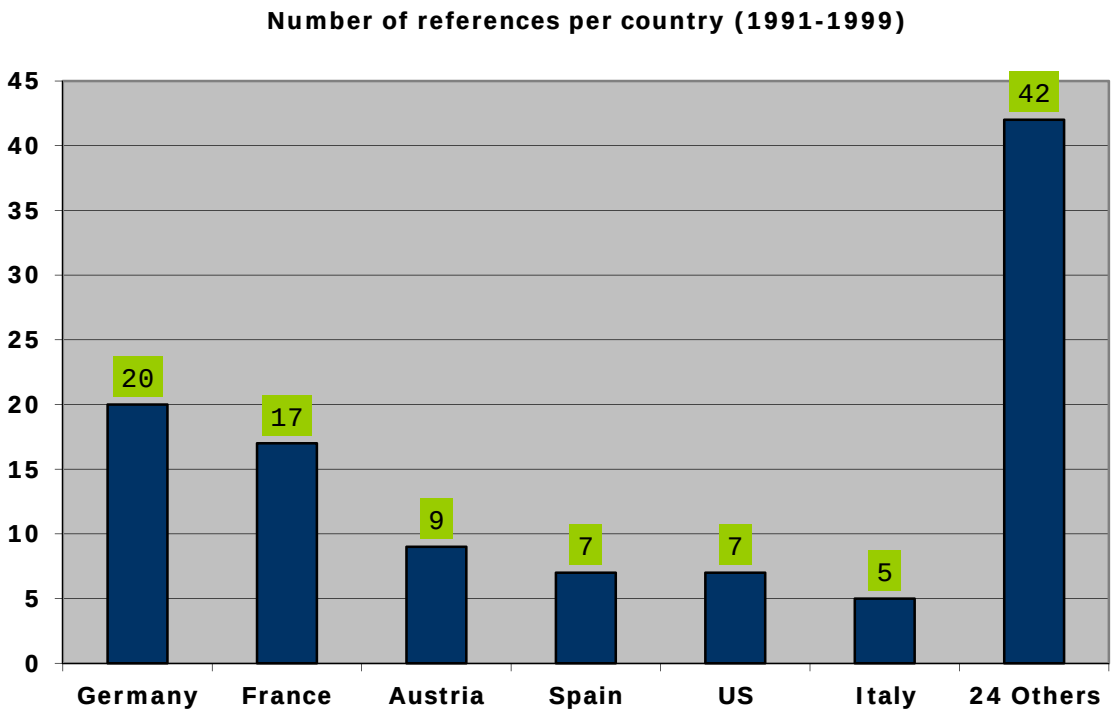
The table below demonstrates the evolution of the number of comparatist and other judgments over the whole period considered, i.e. between 1991 and 2011. The following table shows the share of comparatist judgments in total judgments over the same period.





Between 1991 and 1999 references were made in 33 judgments. In most cases the PCC referred to multiple countries. Judgments with references to one country constituted only 33% of all judgments with reference (11 out of 33). Altogether the PCC referred to 30 different countries.[70] Most references were made to German law (20 or 60% of total judgments with references). France was at a similar level with 17 references (51% of total judgments with references). The third country was Austria with nine (9) references, then US and Spain with seven (7) each and Italy with five (5). The frequency for the remaining countries ranged between 1 to 4 references. Depending on the year the share of comparatist judgments in total judgments ranged between 3% to 16%.[71] On average the share of comparatist judgments in total judgments was 7%.[72] The references were made predominantly to Western countries with only 18 references to CEE countries, however, much dispersed with no more than two references per country.

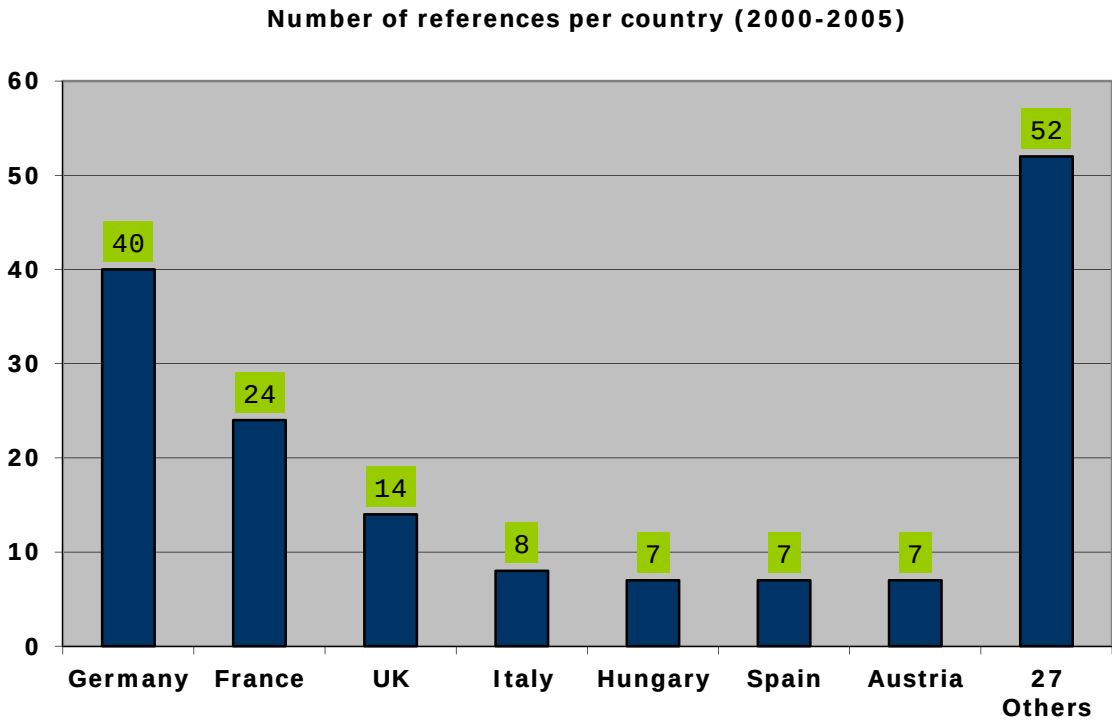
[70] Italy (5), Germany (20), France (17), Austria (9), Spain (7), US (7), Greece (1), The Netherlands (1), Sweden (2), Switzerland (3), Finland (3), Norway (2), Belgium (4), UK (3), Canada (1), Bulgaria (2), Croatia (2), Latvia (2), Slovenia (2), Slovakia (2), Luxemburg (1), Estonia (1), RPA (1), Czech Republic (1), Portugal (1), Romania (1), Hungary (1), Ukraine (1), Russia (1), Japan (1); countries are listed in the order of chronological appearance in judgments.
[71] Number of comparatist judgments divided by total judgments in a given year.
[72] Sum of comparatist judgments divided by sum of judgments between 1991 and 2000.



Between 2000 and 2005 references were made in 55 judgments, an increase of 66% compared to the previous period (1991 – 1999). In most cases the PCC referred to multiple countries. Judgments with references to one country constituted 40% of all judgments with reference (22 out of 55). Altogether the PCC referred to 34 different countries (an increase of 13% compared to the previous period investigated).[73] Most references were made to German law (40 or 72% of total judgments with references). The number of references to French law decreased (24 or 43% of total judgments with references to foreign law). Consequently, while compared to the previous period (1991 – 1999) the relative number of references to Germany increased considerably by 12 percentage points (60% to 72%), while the relative number of references to French law decreased by 8 percentage points (51% to 43%). The characteristic gap between the number of references to Germany and France on the one hand and other countries on

[73] Germany (40), Austria (7), Denmark (3), Finland (2), Luxemburg (1), Norway (1), Sweden (3), France (24), UK (14), Spain (7), Italy (8), Japan (1), US (5), The Netherlands (4), Czech Republic (4), Hungary (7), Belgium (3), Australia (1), Greece (2), Ireland (2), Portugal (2), Switzerland (4), New Zealand (1), Slovenia (1), Slovakia (2), Lithuania (2), Cyprus (1), Malta (1), Estonia (1), Latvia (1), Russia (1), Bulgaria (1), Ukraine (1), Romania (1) ; countries are listed in the order of chronological appearance in judgments.

the other persisted with 14 references to UK (25% of total judgments with references), followed by Italy with eight (8) references and Hungary, Spain and Austria with seven (7) references each. The frequency for the remaining countries ranged between 1 to 5 references. Depending on the year the share of comparatist judgments in total judgments ranged between 6% and 11%.[74] On average the share of comparatist judgments in total judgments was 9%.[75] In relative terms the increase compared to the previous period was by 2 percentage points (from 7% to 9%). Also in this period the references were made predominantly to Western countries, however, the share of references to other countries (like the 'new Member States') increased cumulatively to 24 (an increase of 33% compared to the previous period).[76] It is worth stressing that Hungary was at the forth place when considering the number of references after Germany, France and UK.

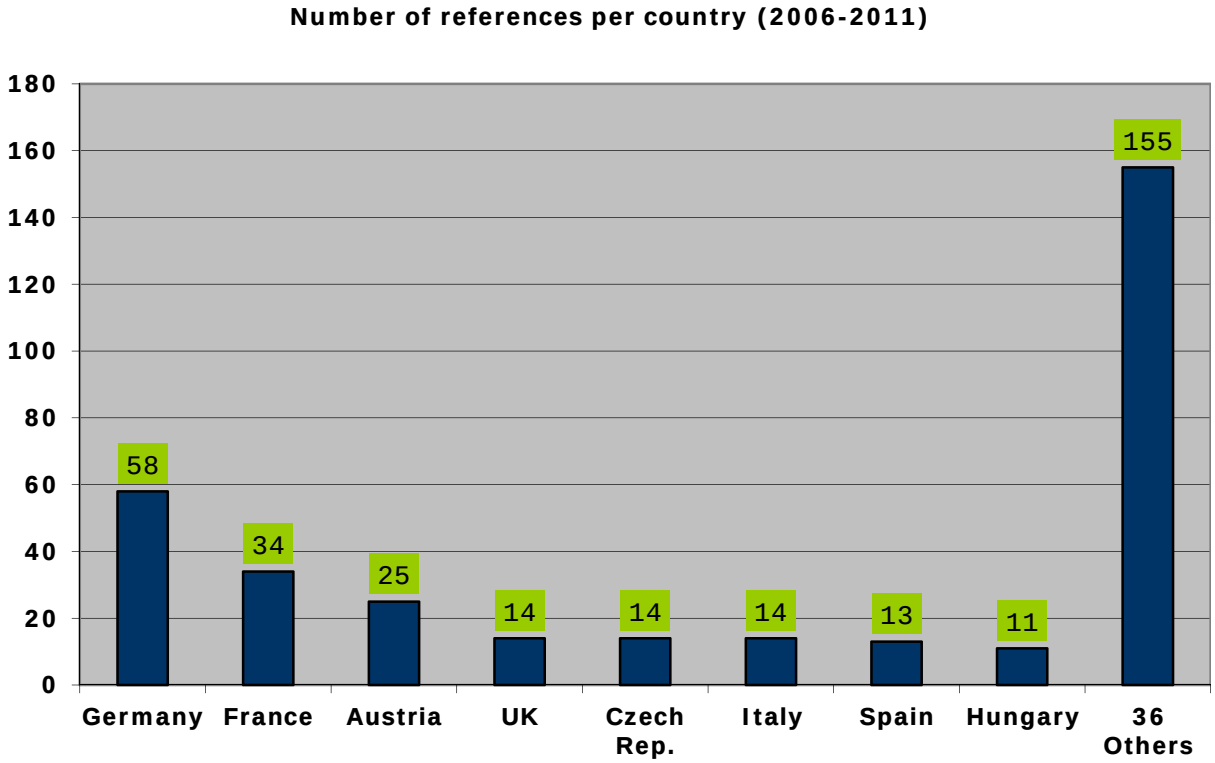


Between 2006 and 2011 references were made in 78 judgments, an increase of 41% compared to the previous period (55 references). In most cases the PCC referred to

[74] Number of comparatist judgments divided by total judgments in a given year.
[75] Sum of comparatist judgments divided by sum of judgments between 2001 and 2005.
[76] This figure cannot be related to total judgments with references as the Court might have referred to two or more countries in one judgment.

multiple countries. Judgments with references to one country constituted 26% of all judgments with reference (21 out of 78). This drop by 14 percentage points when compared to the previous period suggests that the tendency was clearly towards references to multiple countries. Altogether the PCC referred to 44 different countries (an increase of 29% compared to 2000 – 2005).[77] The increase is more than double when compared to that between the 1991 – 2000 and 2001 – 2005 (13%). This demonstrates that the spectrum of countries is broadening. Again, most references were made to German law (58 or 74% of total judgments with references, a slight increase by 2 percentage points when compared to the previous period). References to French law constituted 43% of all references (34 out of 78) and remained stable when compared to the previous period (2001 – 2005). Consequently, while both countries maintained their influence, that of Germany increased while that of France remained stable. The third country in terms of number of references was Austria (25 references), followed by the Czech Republic, UK, and Italy (14 references each). The next country was Spain with 13 and then Hungary with 11 references. Depending on the year the share of comparatist judgments in total judgments ranged between 6% and 14%.[78] On average the share of comparatist judgments in total judgments remained stable compared to the previous period at 9%.[79] The characteristic gap between references to German and French law and those to the law of other countries persisted. Also in this period the references were made predominantly to Western countries, however, the share of references to other countries (like the 'new Member States') increased cumulatively to 105 from 24 in the previous period. It is worth stressing that the Czech Republic was at the fourth place when considering the number of references after Germany, France, and Austria, together with Italy and UK.

[77] Germany (58), France (34), Spain (13), Austria (25), Belgium (9), Switzerland (8), Czech Republic (14), The Netherlands (7), UK (14), Italy (14), US (8), Lithuania (9), Slovakia (9), Hungary (11), Croatia (5), Macedonia (2), Bulgaria (6), Estonia (5), Sweden (6), Latvia (8), Bosnia-Herzegovina (3), Slovenia (4), Cyprus (2), Denmark (8), Finland (4), Greece (6), Ireland (3), Island (2), Norway (7), Portugal (3), Turkey (2), Romania (5), Serbia (3), Luxemburg (1), Japan (1), Russia (4), Albania (4), Belarus (2), Ukraine (1), Malta (3), Moldavia (2), Lichtenstein (1), Georgia (1), Israel (1).
[78] Number of comparatist judgments divided by total judgments in a given year.
[79] Sum of comparatist judgments divided by sum of judgments between 2006 and 2011.



Type of reference – evolution over time

Throughout the two decades investigated foreign law has been used mainly as an external authority (external source of legitimization) and as a source of inspiration. A common feature is that references have always been made to multiple countries. The list of countries extended over time. In the second decade the PCC went beyond Western Europe to the CEE countries. The practice has been intensifying with the analysis of foreign law becoming more in-depth. However, in all periods considered there still were quite a few nominal references with just a short mention of a specific country. The leaders have always been the same – Germany and France – but the percentage of references to those countries in total references changed. Characteristic was the gap between Germany, France and all other countries. Also the gap between Germany and France increased and Germany became a clear leader between 2006 and 2011.

1991 – 1999 – reinforcing the 'democratic credentials' of Polish law

References to foreign law in the PCC's case law are not only very common; they also have quite a history. The practice started soon after the fall of communism. Most of the

references in the nineties were rather general, not detailed. They would just mention a particular country (notably France and Germany)[80] or 'other democratic states'[81] and broadly state a general principle of law. However, already then, the PCC would deepen its analysis of foreign law.[82] This was the time of intense institutional and systemic change in Poland, time of democratic consolidation. In that context the main purpose of references was to stress the 'democratic credentials' of the Polish law, i.e. demonstrate that it was similar to that of the 'other democratic countries'. The references also had some identity building function. By stressing the similarities between Poland and the other European democratic countries, the PCC emphasized that the Polish legal system fully reflected the standards of a democratic state and hence Poland belonged anew to the circle of democratic states.

References in the period between 1991 and 1999 concerned issues related to the functioning of the Parliament,[83] separation of powers,[84] budget,[85] constitutional control

[80] See for example: judgment K 13/90 of 28 January 1991 (immunity of Members of Parliament; reference to constitutions of Italy, Germany France); judgment K 11/90 of 30 January 1991 (religion at school; reference to constitutions of Austria and Germany; the PCC pointed to similar interpretation of the principle of legality by constitutional courts of Austria and Germany); judgment U 10/92 of 26 January 1993 (rules on formation of parliamentary clubs, minimum number of members; France, Germany, Italy, Spain); judgment P 2/92 of 1 June 1993 (right to social security; Greece, France, The Netherlands; judgment K 17/92 of 29 September 1993 (right to social security; Germany, Sweden, Finland, Norway); judgment K 8/94 of 20 December 1994 (rules concerning Members of Parliament; Spain, France, UK); resolution W 17/94 of 11 January 1995 (rights and obligations on persons holding public office; Germany); judgment K 11/94 of 26 April 1995 (rules concerning limitations upon constitutional rights and freedoms, freedom of economic activity; Germany, Austria, Switzerland, Spain); judgment K 7/96 of 7 January 1997 (remuneration of prisoners; France, Germany); judgment K 25/98 of 23 February 1999 (rules concerning legislative process in the parliament; France); all judgments of PCC are available at http://www.trybunal.gov.pl.

[81] Judgment U 6/92 of 19 June 1992 (protection of privacy; reference to constitutional courts of democratic states); resolution W 2/94 of 13 April 1994 (conflict of interest of persons holding public offices; 'Western countries'); decision W 10/93 of 27 September 1994 (local governance; 'European democratic states'); judgment K 11/94 of 26 April 1995 (limitation of constitutional rights and freedoms, freedom of economic activity; 'Western European countries').

[82] See for example: judgment P 1/94 of 8 November 1994 (constitutional rules on budget; Germany); judgment K 3/98 of 24 June 1998 (rules concerning legislative process in the parliament; France); judgment K 33/98 of 26 April 1999; judgment K 1/98 of 27 January 1999 (occupational self-determination, Germany).

[83] Judgment K 13/90 of 28 January 1991 (immunity of Members of Parliament; Italy, Germany France); judgment U 10/92 of 26 January 1993 (rules on formation of parliamentary clubs, minimum number of members; France, Germany, Italy, Spain); judgment K 8/94 of 20 December 1994 (rules concerning Members of Parliament; Spain, France, UK).

[84] Judgment K 19/95 of 22 November 1995 (separation of powers; Germany); judgment K 6/94 of 21 November 1994 (budget and separation of powers; USA).

[85] Judgment P 1/94 of 8 November 1994 (budget; Germany); judgment K 6/94 of 21 November 1994 (budget and the separation of powers; USA).

of local authorities,[86] conflict of interest in relation to persons holding public office,[87] social security,[88] fundamental rights,[89] general principles of law (notably principles of legality[90] and proportionality[91]) but also tax issues,[92] protection of nasciturus.[93] The list demonstrates that recourse to foreign law was made in a broad variety of legal areas and was predominantly used for key issues pertinent to the functioning of a democratic state.

Fundamental rights constituted an important part of the comparative activity. Of course the main source of external authority in that respect were international human rights treaties, notably the ECHR. However, foreign law played an important role as well. Poland had to achieve high standards of protection basically overnight. Undoubtedly the EU conditionality, the perspective of EU membership, was one of the most powerful incentives. Fundamental rights were part of the process as one of the Copenhagen criteria and this increased the pressure to raise the standards of protection. Enacting a human rights charter is just a first step. Developing a body of case-law that sorts out the boundaries of protection is equally important. This immense time pressure was definitely at the cause of the PCC's attitude to judicial borrowings. Before the adoption of the 1997 Constitution, certain concepts pertinent to the protection of fundamental rights – like permissible limitations, principle of proportionality – had no explicit constitutional basis and were developed based on the very general principles of

[86] Judgment K 12/96 of 25 November 1996 (local governance, agricultural organizations; France, Germany, Austria, Spain); decision W 10/93 of 27 September 1994 (local governance; 'European democratic states').
[87] Resolution W 2/94 of 13 April 1994 (conflict of interest of persons holding public offices; 'Western countries'); resolution W 17/94 of 11 January 1995 (rights and obligations on persons holding public office; Germany).
[88] Judgment P 2/92 of 1 June 1993 (right to social security; Greece, France, The Netherlands); judgment K 17/92 of 29 September 1993 (right to social security; Germany, Sweden, Finland, Norway).
[89] Judgment U 6/92 of 19 June 1992 (protection of privacy; Germany, France, Italy); judgment K 21/96 of 24 June 1997 (right to private life versus the right of tax authorities to access personal bank files; France, Germany, Austria, Italy, Spain, Sweden, Norway, Czech Republic, Hungary, USA); judgment K 1/98 of 27 January 1999 (occupational self-determination, Germany).
[90] Judgment K 13/90 of 28 January 1991 (Italy, Germany France).
[91] Judgment K 9/95 of 31 January 1996 (Germany).
[92] Judgment K 17/97 of 29 April 1998 (USA, France, Belgium).
[93] Judgment K 26/96 of 28 May 1997 (France, Germany, Austria, RPA, Italy, UK, Bulgaria, Czech Republic, Croatia, Portugal, Slovakia, Latvia, Romania, Spain, Hungary, Ukraine, Russia, Slovenia, Japan, USA).

democratic state and the rule of law. International law and to some extent foreign law were used as sources of inspiration.[94]

Evolution between 2000 and 2005. From 'democracy' to 'European' rhetoric

Between 2000 and 2004, citations to foreign law continued in judgments concerning more general problems related to the democratic form of government.[95] The nominal references persisted,[96] however, the specificity increased compared to the previous period.[97] References were also used as an external authority in cases concerning issues that attracted considerable domestic attention, e.g. state liability.[98]

Most references, however, were made in cases concerning fundamental rights.[99] An important development was the increase in joint references to foreign law and the

[94] Judgment K 11/94 of 26 April 1995 (rules concerning limitations upon constitutional rights and freedoms, freedom of economic activity; Germany, Austria, Switzerland, Spain).

[95] Judgment Pp 1/99 of 8 March 2000 (rules concerning functioning of political parties; Austria, Germany, Spain, Italy, UK); judgment K 11/01 of 8 October 2001 (persons holding public office, conflict of interest; 'Western countries', USA); judgment K 26/00 of 10 April 2002 (membership of civil servants in political parties; Germany, France, UK, USA).

[96] See for example: judgment P 1/99 of 16 May 2000 (UK, US, France, Belgium); judgment SK 12/99 of 10 July 2000 (France); judgment P 8/99 of 10 October 2000 (Germany); judgment P 4/99 of 31 January 2001 (Germany); judgment K 32/99 of 3 April 2001 (Germany, Italy, Czech Republic, France, Sweden, Hungary); judgment K 11/01 o 8 October 2001 ('Western countries', US); judgment SK 8/00 of 9 October 2001 (Germany); judgment K 20/01 of 27 May 2002 (Germany); judgment P 12/01 of 4 July 2002 (France); judgment K 41/02 of 20 November 2002 (UK, Austria, Australia, Belgium, Finland, France, The Netherlands, Spain, Greece, Ireland, Portugal, Italy, Switzerland, New Zealand); judgment K 14/03 of 7 January 2004 (UK); judgment K 4/03 of 11 May 2004 (UK, USA).

[97] More detailed analysis of foreign law can be found in the following judgments: judgment K 8/98 of 12 April 2000 (France, Germany); judgment K 21/99 of 10 May 2000 (Germany, France, Italy, Spain, US, UK, The Netherlands, Czech Republic, Hungary); judgment K 33/02 of 19 December 2002 (Germany, UK); judgment P 11/02 of 19 February 2003 (Germany, France); decision S 1/03 of 12 march 2003 (Germany, France); decision K 13/02 of 17 July 2003 (Germany, Austria); judgment SK 22/02 of 27 November 2003 (Germany, Switzerland); judgment 24/04 of 12 January 2005 (Ireland, Spain, Italy, Denmark, Austria); judgment K 9/04 of 15 march 2005 (Germany); judgment K 32/04 of 12 December 2005 (Germany).

[98] Judgment SK 18/00 of 4 December 2001 (France).

[99] See for example: judgment P 11/98 of 12 January 2000 (right to property, protection of tenants; Germany); judgment K 26/98 of 7 March 2000 (right of association in the army; Austria, Denmark, Finland, Germany, Luxemburg, Norway, Sweden, France, UK); judgment K 8/98 of 12 April 2000 (right to property; German, France); judgment P 8/99 of 10 October 2000 (right to property; Germany); judgment P 4/99 of 31 January 2001 (right to property; Germany); judgment K 7/01 of 5 March 2003 (dignity; Germany); judgment SK 24/02 of 29 April 2003 (freedom of contract; Slovenia, Slovakia, Lithuania, Italy, Switzerland, Cyprus, Malta, Hungary, Czech Republic, Estonia, Latvia); judgment K 33/03 of 21 April 2004 (freedom of economic activity; France Germany); judgment P 4/04 of 7 September 2004 (right of access to court; Austria, Germany); judgment Kp 1/04 of 10 November 2004 (freedom of association; Germany); judgment P 10/04 of 26 January 2005 (consumer rights, Germany); decision SK

ECHR[100] (although they were present to a limited extent already in the previous period[101]). Another essential development in this period were comparatist judgments linked to the Polish membership in the EU in which the PCC related to the relevant practices of the 'old' MSs.[102]

The joint references to foreign law and the ECHR as well as references to practices of other members of the same international organizations[103] mark a beginning of a new era in the PCC's attitude to judicial borrowings. The PCC moves away from a more receptive attitude and becomes responsive to the transnational judicial dialogue and emerging community of standards. It starts referring more readily to the common European standards[104] or even to foreign courts (the German Federal Constitutional Court) '*adjudicating within common European standards of a democratic state*'.[105]

Evolution 2006 – 2011

One of the most important features of the period between 2006 and 2011 was the increased intensity, specificity and visibility of references. The nominal references became much less frequent.[106] More judgments included chapters devoted to an

48/04 of 11 April 2005 (duty to state reasons; Germany, 'democratic states'); judgment K 32/04 of 12 December 2005 (right to privacy; Germany).

[100] See for example: judgment P 11/98 of 12 January 2000 (right to property, protection of tenants; Germany); judgment K 8/98 of 12 April 2000 (right to property; Germany, France); judgment K 21/99 of 10 May 2000 (right to court; Germany, France, Italy, Spain, USA, UK, The Netherlands, Czech Republic, Hungary); judgment SK 6/02 of 15 October 2002 (right to court; Germany); judgment Kp 1/04 of 10 November 2004 (freedom of association; Germany); judgment K 32/04 of 12 December 2005 (right to privacy; Germany).

[101] Judgment K 26/96 of 28 May 1997 (protection of nasciturus; France, Germany, Austria, RPA, Italy, UK, Bulgaria, Czech Republic, Croatia, Portugal, Slovakia, Latvia, Romania, Spain, Hungary, Ukraine, Russia, Slovenia, Japan, USA); judgment K 1/98 of 27 January 1999 (restrictions on professional activity of family of members of bar and judiciary; France, Germany, UK, Belgium).

[102] Judgment K 24/04 of 12 January 2005 (consultation of national parliaments on EU legislative proposals); judgment P 1/05 of 27 April 2005 (European Arrest Warrant); judgment K 18/04 of 11 May 2005 (Accession Treaty).

[103] See above for judgments concerning membership in the EU, or judgment K 15/98 of 11 April 2000 (membership in OECD); judgment K 30/02 of 26 February 2003 (European Charter of Local Self-Government).

[104] Judgment K 8/98 of 12 April 2000 (Germany, France); judgment SK 26/02 of 31 March 2005 (France); judgment SK 39/05 of 5 October 2005 (France, Germany)

[105] Judgment Kp 1/04 of 10 November 2004 (Germany).

[106] Judgment K 5/05 of 24 May 2006 (Germany, Spain, France); judgment K 28/05 of 7 March 2007 (Croatia, Macedonia, Belgium, France, Bulgaria, Hungary); judgment SK 14/05 of 1 September 2006 (Germany, Austria, Switzerland); judgment P 21/06 of 5 September 2007 (Germany); judgment SK 48/05 of 9 July 2009 (USA, UK, Sweden, The Netherlands); judgment SK 48/05 of 9 July 2009 (US, UK, Sweden, The Netherlands); judgment P 7/09 of 15 March 2009 (France, Germany, Italy, Austria).

extensive and detailed analysis of foreign law[107] (sometimes even with subchapters discussing specific countries[108]). Very detailed analysis could also be found in judgments, which did not have a separate comparative chapter.[109]

In terms of issues concerned a similar pattern continued. Citations to foreign law were made in a broad range of areas and related *inter alia* to the concept of core of rights,[110] the principles of legitimate expectations[111] and legal certainty,[112] protection of fundamental rights (right to assembly,[113] right to privacy,[114] personal freedom,[115] freedom of economic activity,[116] freedom of contract[117]). Some references concerned contentious domestic cases and were used as an external authority (pensions,[118]

[107] Judgment SK 30/05 of 16 January 2006 (Germany); judgment SK 8/03 of 24 July 2006 (Germany, Austria, Belgium, Switzerland, Czech Republic, France, The Netherlands); judgment K 32/05 of 17 March 2008 (France, Estonia, Slovakia); judgment K 42/07 of 3 June 2008 (Germany, France, Hungary, Serbia, Bosnia-Herzegovina, Slovakia); judgment K 38/07 of 3 July 2008 (Germany); judgment K 44/07 of 30 September 2008 (USA, Germany, Israel); judgment K 5/08 of 25 November 2008 (Germany); judgment K 45/07 of 15 January 2009 (Hungary, Germany, Austria, France); judgment K 27/07 of 28 April 2009 (Germany, France); judgment K 6/09 of 24 February 2010 (Germany, Czech Republic, Slovakia, Romania, Estonia, Bulgaria, Latvia); judgment K 17/09 of 16 March 2010 (Denmark, Ireland Norway, Sweden UK, Austria, Croatia, Latvia, Slovenia, Italy, Hungary, France, Romania); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria); judgment P 38/08 of 12 May 2011 (Germany, Spain, Austria); judgment K 11/10 of 19 July 2011 (Germany, Hungary, Albania, Lithuania, Russia, Belarus, Slovakia).

[108] Judgment K 45/07 of 15 January 2009 (Hungary, Germany, Austria, France); judgment K 6/09 of 24 February 2010 (Germany, Czech Republic, Slovakia, Romania, Estonia, Bulgaria, Latvia).

[109] Judgment P 10/06 of 30 October 2006 (Germany, Switzerland); judgment SK 50/06 of 10 July 2007 (Germany).

[110] Judgment K 28/06 of 16 October 2007 (France).

[111] Judgment K 32/05 of 17 March 2008 (France, Estonia, Slovakia).

[112] Judgment SK 96/06 of 1 April 2008 (Germany, Sweden, Spain, Latvia, Lithuania, Hungary, France, Czech Republic, Bosnia-Herzegovina, Bulgaria, Slovenia, Slovakia, Austria, Croatia); judgment Kp 3/09 of 6 October 2009 (Germany, France, The Netherlands, Belgium, Austria, Switzerland); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria).

[113] Judgment P 15/08 of 10 July 2008 (Germany, Austria, Italy).

[114] Judgment K 54/07 of 23 June 2009 (Germany); judgment P 10/06 of 30 October 2006 (Germany, Switzerland).

[115] Judgment U 5/07 of 10 March 2010 (France).

[116] Judgment SK 35/08 of 19 January 2009 (Germany).

[117] Judgment K 47/04 of 27 November 2006 (Germany).

[118] Judgment SK 96/06 of 1 April 2008 (Germany, Sweden, Spain, Latvia, Lithuania, Hungary, France, Czech Republic, Bosnia-Herzegovina; Bulgaria, Slovenia, Slovakia, Austria, Croatia); decision S 2/10 of 15 July 2010 (Belgium, Bulgaria, Lithuania, Latvia, Hungary, Czech Republic, Estonia, Germany, Romania, Slovakia, UK, Austria, Denmark, Malta, Greece); judgment K 63/07 of 15 July 2010 (Belarus, Ukraine, Island, Norway, Germany, Albania, Austria, Bulgaria, Czech Republic, Croatia, Estonia, Greece, Italy, Lithuania, Malta, Moldavia, Romania, Russia, Serbia, Slovakia, Slovenia, Switzerland, UK, Latvia); judgment K 6/09 of 24 February 2010 (Germany, Czech republic, Slovakia, Romania, Estonia, Bulgaria, Latvia); judgment K 17/09 of 16 March 2010 (Denmark, Ireland, Norway, Sweden, UK, Austria, Croatia, Latvia, Slovenia, Italy, Hungary, France, Romania).

relations between administration and judiciary,[119] relations between the state and the church[120]). The joint references to the ECHR and foreign law continued,[121] as well as

references to the practices of other members of the same international organizations, notably the EU. Probably the most important case in the latter group was the constitutional review of the Lisbon Treaty (see below).[122] The PCC continued the rhetoric of 'common standards', European or international,[123] and even spoke of the 'approximation of modern legal systems'.[124]

Contributors to Court's dialogue with foreign courts

Since the practice of citing foreign law is not uncommon but did not stir any major controversy, one could ask whether there is a consensus (political, societal or within the legal community) that references are permissible. The analysis of the PCC's judgments shows that also parties before the Court make references to foreign law and this indeed demonstrates that there is a broader consensus on the issue.

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[119] Judgment K 45/07 of 15 January 2009 (Hungary, Germany, Austria, France).
[120] Judgment U 10/07 of 2 December 2009 (UK, Greece, Norway, Denmark, Germany, Spain, Lithuania, Russia, Albania).
[121] See for example: judgment K 42/07 of 3 June 2008 (Germany, France, Hungary, Serbia, Bosnia-Herzegovina, Slovakia); judgment K 38/07 of 3 July 2008 (Germany); judgment SK 48/05 of 9 July 2009 (UK, Sweden, The Netherlands); judgment SK 46/07 of 6 October 2009 (Germany, France, The Netherlands, Belgium, Austria, Switzerland); judgment U 5/07 of 10 March 2010 (France); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria); decision K 29/08 of 8 March 2011 (Germany, Austria, Spain, Czech Republic, Lichtenstein, France); judgment P 7/09 of 15 March 2011 (France, Germany, Italy, Austria); decision Pp 1/10 of 6 April 2011 (USA); decision SK 21/07 of 6 April 2011 (Germany); judgment P 38/08 of 12 May 2011 (Spain, Germany, France); judgment P 1/10 of 11 July 2011 (France, Germany, Austria, Switzerland, Italy, Russia); judgment K 11/10 of 19 July 2011 (Germany, Hungary, Albania, Lithuania, Russia, Belarus, Slovakia); judgment K 9/11 of 20/07 2011 (The Netherlands, Belgium, France, UK, Germany, Austria, Czech Republic, Denmark, Finland, Ireland, Norway, Portugal, Italy, Sweden, Lithuania, Latvia, Estonia, Georgia, Turkey, Malta, Macedonia, Albania Spain, Moldavia, Serbia); judgment SK 45/09 of 16 November 2011 (Germany).
[122] Judgment K 32/09 of 24 November 2010 (France, Germany, Czech Republic, Latvia, Hungary, Austria).
[123] Judgment K 42/07 of 3 June 2008 (Germany, France, Hungary, Serbia, Bosnia-Herzegovina, Slovakia); judgment K 38/07 of 3 July 2008 (Germany); judgment K 44/07 of 30 September 2008 (USA, Germany, Israel); judgment K 15/07 of 15 January 2009 (Hungary, Germany, Austria, France); judgment K 6/09 of 24 February 2010 (Germany, Czech Republic, Slovakia, Romania, Estonia, Bulgaria, Latvia); judgment U 5/07 of 10 March 2010 (France); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria); judgment K 11/10 of 19 July 2011 (Germany, Hungary, Albania, Lithuania, Russia, Belarus, Slovakia).
[124] Judgment K 38/07 of 3 July 2008 (Germany); judgment K 15/07 of 15 January 2009 (Hungary, Germany, Austria, France).

In most cases the PCC used the comparative analysis and materials seemingly on its own initiative. The source of the comparative materials and indeed the very idea to use comparative approach are not identified. There are rare cases where the PCC orders a specialist opinion, which either contains comparative analysis or concentrates entirely on foreign law. Such an opinion can be prepared by the Court's Research Office.[125] In other cases the Court requests external experts, like for example the Institute of National Remembrance,[126] institutional[127] or individual experts[128].

Interestingly in quite a few cases other parties before the Court used and suggested comparative method: amicus curiae (e.g. Helsinki Foundation),[129] the Ombudsman,[130] the Sejm (the lower house of the Polish Parliament),[131] the Attorney General,[132] the Minister of Finance.[133] In some cases references to foreign law were made by the complainant.[134] Also dissenting judges refer to foreign law.[135]

This demonstrates a broader consensus among many actors involved in the proceedings before the PCC to engage in a dialogue on foreign law. Interestingly, the appropriateness of comparative method as such is not disputed and parties simply present analysis of foreign law. Although the role of parties to the proceedings before the courts is often viewed as a safety net for discovering patently unhelpful and inappropriate comparisons,[136] the PCC judgments unfortunately do not evidence any polemic with the

[125] Judgment 58/03 of 24 July 2006; judgment P 24/06 of 26 November 2007.
[126] Judgment K 6/09 of 24 February 2010.
[127] Judgment K 21/99 of 10 May 2000 – the PCC requested Prime Minister, Interior Minister, and Army Chief to collect information on procedures in other NATO members; judgment K 5/08 of 25 November 2008 – specific request to have an analysis concerning access to the files of the Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik ('BStU') in a case concerning access to the files of the Polish Institute of National Memory.
[128] Judgment K 21/99 of 10 May 2000; judgment K 5/08 of 25 November 2008.
[129] Judgment SK 30/05 of 16 January 2006.
[130] Judgment K 26/98 of 7 March 2000; judgment P 25/02 of 21 June 2005; judgment K 28/06 of 16 October 2007; judgment K 15/98 of 11 April 2000; judgment K 24/07 of 22 July 2008.
[131] Judgment SK 46/07 of 6 October 2009.
[132] Judgment U 10/92 of 26 January 1993; judgment 1/98 of 27 January 1999; judgment K 15/98 of 11 April 2000; judgment K 1/07 of 2 July 2009.
[133] Judgment K 17/97 of 29 April 1998; judgment K 32/99 of 3 April 2001; judgment K 41/02 of 20 November 2002.
[134] Judgment SK 10/03 of 13 January 2004; decision SK 69/06 of 17 July 2007.
[135] Judgment U 12/92 of 20 April 1993; judgment W 1/95 of September 1995;judgment K 26/96 of 28 May 1997; judgment K 25/07 of 18 July 2007; judgment K 39/07 of 28 November 2007; judgment K 10/09 of 13 July 2011.
[136] De Cruz, supra note 7, p. 226; Waldron, supra note 1, Kindle Edition, Location 4194 of 8217.

Court's choices. The account of parties' references to foreign law is very brief, whereas parties could play a vital role in disciplining the PCC's comparative activity. The use of foreign law should be more 'adversarial' in the sense that the Court should encourage parties to comment on the reliability, 'transplantability' or inspirational value of foreign law it intends to use.[137] Especially in view of some methodological weaknesses of the PCC's comparative activity, discussed below, the role of parties to the proceeding could be instrumental to scrutinize the PCC's choices of compared legal systems and cases subject to comparative analysis.

Despite the broader (apparent) consensus among parties before the PCC, there are some hints of disagreement with external actors. In one of its judgments the Polish Supreme Court openly criticised references to foreign law made by the PCC.[138] The issue concerned the so-called interpretative rulings, i.e. a category of the PCC's rulings in which a specific *interpretation* of a legal provision established by courts might be held unconstitutional and not the legal provision as such. Since the competence to render interpretative rulings is not explicit, the issue has been highly contentious in Poland and led to a dispute between the two Polish highest courts: the PCC and the Supreme Court. Interestingly, the PCC used *inter alia* foreign law to justify its practice. In reply, the Supreme Court stated that:

> When issuing interpretative rulings the Constitutional Court refers to the standards and traditions developed by constitutional courts of other states. These are not reasons which could justify the practice of handing down interpretative judgments. The Polish law neither provides for nor allows rulings based on constitutional practice of other European courts, which, after all, do not work and have not decided on the basis of the same legislation. The fact that constitutional courts in Europe have similar, or even more nuanced decision-making formulas, does not justify duplication of those formulas that have no basis in the Polish constitutional or statutory order. The practice of constitutional courts of other states should not be uncritically transposed, reproduced, or copied.[139]

[137] Markesinis/Fedtke, supra note 1, p. 147-8.
[138] Resolution of the Polish Supreme Court III PZP 2/09 of 17 December 2009, available at http://www.sn.pl/orzecznictwo/index.html.
[139] Ibid, point II.7, p. 12.

Source of knowledge on foreign law

The majority of references are based on original materials (materials in original language), like commentaries (mostly in German and French language).[140] There are also many secondary references through comparative scholarship in the Polish language.[141]

The claim concerning the limited accessibility of foreign law is one of the leading objections towards judicial borrowings. Such limited accessibility relates both to the access to foreign materials and the language barrier.[142] However, this sort of argument is no longer valid primarily in view of the international training and education that judges receive (especially in Europe).[143] Further, there are more and more initiatives aimed at disseminating knowledge about foreign legal systems and courts' decisions. The Network of the Presidents of the Supreme Courts of the European Union[144] has created a Common Portal of National Case Law.[145] It allows to simultaneously search databases of several Supreme Courts of Member States. The judgments are not translated. It is basically a search engine which feeds on what judgments and decisions are available on the websites of different Supreme Courts. Besides, the webpage of the network provides links to websites of Supreme Courts of Member States and translations of certain judgments into English or French. The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union also has a database.[146] As already mentioned different high courts across Europe translate their judgments (at least the important ones) and make those translations available on their websites. There are also

[140] See for example: judgment P 1/94 of 8 November 1994; judgment K 9/95 of 31 January 1996; judgment K 3/98 of 24 June 1998; judgment K 8/98 of 12 April 2000; judgment K 9/04 of 15 March 2005; judgment SK 39/05 of 5 October 2005; judgment P 10/06 of 30 October 2006; judgment SK 50/06 of 10 July 2007; judgment P 19/07 of 4 September 2007; judgment K 44/07 of 30 September 2008; judgment K 45/07 of 15 January 2009.
[141] Judgment K 8/94 of 20 December 1994; resolution W 17/94 of 11 January 1995; judgment K 7/96 of 7 January 1997; judgment K 21/96 of 24 June 1997; judgment K 3/98 of 24 June 1998; judgment K 26/00 of 10 April 2002; judgment P 10/04 of 26 January 2005; judgment P 24/06 of 26 November 2007; judgment K 24/07 of 22 July 2008; judgment Kp 3/09 of 28 October 2009; judgment SK 26/08 of 5 October 2010.
[142] Posner, supra note 4, p. 85-6.
[143] Canivet, supra note 1, p. 33 et seq.
[144] http://www.network-presidents.eu.
[145] http://www.reseau-presidents.eu/rpcsjue.
[146] http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.html.

quite a few initiatives aiming at disseminating knowledge about foreign decisions run by universities. Here one could mention the translations of foreign law available on the webite of the Institute for Transnational Law of the School of Law of the University of Texas at Austin.[147] Other projects include GlobaLex run by the Hauser Global Law School Program at the New York University Law School,[148] Center for German Legal Information ,[149] or German Law Archive.[150]

Despite the danger that the information on foreign law might not be precise and up-to-date, it is a wider dialogue and exchange of ideas that the advocates of judicial comparativism call for and not the "*transplantation of specifics*".[151] Depending on the subject matter before the court many comparisons, especially those in the field of constitutional law, do not require an excessive level of detail. However, what is crucial is a broader comparative debate in the legal community, notably the scrutiny of the court's comparative choices by parties to the proceedings.

Specificity, intensity and visibility of reference

Specificity, intensity and visibility of references are key concepts in the current analysis. Intensity refers to the level of detail in the analysis of foreign law. Undoubtedly, the level of detail will vary considerably, from a simple mention of a particular principle or provision to a more profound analysis of foreign law. The level of intensity, i.e. the level of detail, will also be reflected in the length of comparative analysis. The visibility of references relates to the presentation and the level of exposition of comparative analysis in the Court's judgments. While originally the PCC would intertwine the analysis of Polish with that of foreign law, later on judgments would include separate chapters devoted exclusively to comparative analysis.

Finally, specificity is a more formal concept, which refers to how precise the reference is and what is the type/source of foreign materials. A non-specific reference would just

[147] http://www.utexas.edu/law/academics/centers/transnational/work_new.
[148] http://www.nyulawglobal.org/globalex/index.html#.
[149] http://www.cgerli.org/index.php?id=61.
[150] http://www.iuscomp.org/gla.
[151] Markesinis/Fedtke, supra note 1, p. 144.

mention a country, e.g. "*constitution of Germany*"[152], "*similar interpretation can be found in the case law of the Constitutional Courts of Austria and Germany*"[153], "*in this respect the Polish law is similar to that of other European countries (Germany, France, Sweden, Norway)*"[154]. A specific reference would either refer to a specific judgment of a foreign constitutional court,[155] to a specific provision of a foreign constitution[156] or foreign legislation[157], or to a specific analysis of a particular problem in the foreign scholarship.[158] The level of specificity will vary. Some judgments will refer to a specific decision of a foreign court or a specific provision of foreign legislation, whereas some others will include excerpts of foreign rulings.[159] Every detailed judgment will typically be specific[160] but not every specific judgment will be detailed[161]. The degree of specificity will also depend on the types of issues before the Court. The highest degree of specificity seems to apply to cases concerning limitations upon fundamental rights. In such cases the Court, when balancing the conflicting rights, looks for inspiration abroad. A high degree of specificity is not to be expected in cases in which the Court makes very general comparative remarks like for example when it compares general institutional settings and arrangements. In the case P 11/02, for example, the Court compared, in general terms, the systems of constitutional review in Poland and Germany. It noted that in Poland, unlike in Germany, only the legal acts on the basis of which decisions were taken and not the interpretation of those acts as applied by the courts could be challenged.[162]

[152] See for example: judgment K 13/90 of 28 January 1991.
[153] See for example: judgment K 11/90 of 30 January 1991.
[154] See for example: judgment K 17/92 of 29 September 1993.
[155] See for example: judgment U 6/92 of 19 June 1992.
[156] See for example: judgment P 1/94 of 8 November 1994.
[157] See for example: judgment W 14/95 of 24 April 1996.
[158] See for example: judgment K 9/95 of 31 January 1995,
[159] See for example: judgment K 26/96 of 28 May 1997, judgment K 33/98 of 26 April 1999.
[160] There will be some exceptions to this rule, e.g. P 11/02 of 19 February 2003 where the analysis is rather detailed but not specific in the sense that the PCC does not quote any source materials.
[161] See for example: judgment P 8/99 of 10 October 2000 or P 4/99 of 31 January 2001, where the PCC refers to specific provisions of the German constitution but does not provide any detailed analysis of German law beyond that.
[162] Judgment P 11/02 of 19 February 2003.

The first very specific reference was included in the case U 6/92 where the PCC referred to a judgment of the German Federal Constitutional Court ('GFCC').[163] The case concerned the protection of dignity and privacy. In another from the early comparative cases the PCC referred to specific provisions of the German constitution and to a leading commentary to the German constitution (in German).[164] In the case W 14/95 the Court quoted specific provisions of different foreign statutes,[165] and in the case K 26/96 excerpts from judgments of the GFCC.[166]

With time the references became more and more specific. The PCC would quote several judgments of foreign courts, even excerpts from those judgments in original language.[167] High level of specificity went hand in hand with high level of detail (intensity) and greater length of comparative analysis. Between 2000 and 2005, specificity and intensity of references increased but it was not until the last period considered that the Court gave the comparative analysis full visibility by more systematically including separate chapters devoted to the examination of foreign law.[168] Nevertheless, detailed analysis can be found in many judgments that do not have a separate comparative chapter.[169] Indeed, sometimes the analysis of foreign law can be very detailed and

[163] Judgment U 6/92 of 19 June 1992.
[164] Judgment P 1/94 of 8 November 1994.
[165] Resolution W 14/95 of 24 April 1996.
[166] Judgment K 26/96 of 28 May 1997.
[167] Judgment SK 22/02 of 27 November 2003; for similar level of specificity and quotations in German see judgment K 9/04 of 15 March 2005.
[168] Judgment SK 30/05 of 16 January 2006 (Germany); judgment SK 8/03 of 24 July 2006 (Germany, Austria, Belgium, Switzerland, Czech Republic, France, The Netherlands); judgment K 32/05 of 17 March 2008 (France, Estonia, Slovakia); judgment K 42/07 of 3 June 2008 (Germany, France, Hungary, Serbia, Bosnia-Herzegovina, Slovakia); judgment K 38/07 of 3 July 2008 (Germany); judgment K 44/07 of 30 September 2008 (USA, Germany, Israel); judgment K 5/08 of 25 November 2008 (Germany); judgment K 45/07 of 15 January 2009 (Hungary, Germany, Austria, France); judgment K 27/07 of 28 April 2009 (Germany, France); judgment K 6/09 of 24 February 2010 (Germany, Czech Republic, Slovakia, Romania, Estonia, Bulgaria, Latvia); judgment K 17/09 of 16 March 2010 (Denmark, Ireland Norway, Sweden UK, Austria, Croatia, Latvia, Slovenia, Italy, Hungary, France, Romania); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria); judgment P 38/08 of 12 May 2011 (Germany, Spain, Austria); judgment K 11/10 of 19 July 2011 (Germany, Hungary, Albania, Lithuania, Russia, Belarus, Slovakia); judgment K 45/07 of 15 January 2009 (Hungary, Germany, Austria, France); judgment K 6/09 of 24 February 2010 (Germany, Czech Republic, Slovakia, Romania, Estonia, Bulgaria, Latvia).
[169] Judgment K 5/05 of 24 May 2006 (Germany, Spain, France); judgment K 28/05 of 7 March 2007 (Croatia, Macedonia, Belgium, France, Bulgaria, Hungary); judgment SK 14/05 of 1 September 2006 (Germany, Austria, Switzerland); judgment P 21/06 of 5 September 2007 (Germany); judgment SK 48/05 of 9 July 2009 (USA, UK, Sweden, The Netherlands); judgment SK 48/05 of 9 July 2009 (US, UK, Sweden, The Netherlands); judgment P 7/09 of 15 March 2009 (France, Germany, Italy, Austria).

intertwined with the analysis of Polish law.[170]

The fact that references become more and more specific is a sign that the Court intensified its analysis of foreign law and enhanced the comparative approach. Specific references also increase the legitimacy of comparative approach. The quotations can be more easily identified and verified. This enables a more concrete polemic with the Court's approach on the appropriateness of using a particular country, the comparability of that country to Poland, or the limits of 'transplantability' of specific foreign solutions to the Polish conditions.

Role of comparative analysis and its impact on Court's decisions – general remarks

The impact of comparative analysis on the PCC's decisions is difficult to measure or to quantify. However, every reference to foreign law (even a very nominal one) plays its role in the Court's judgment because every such reference is a result of the Court's conscious decision to demonstrate that it had looked at foreign law.

As indicated above, between 1991 and 1999, the 'democracy' rhetoric prevailed and so the references were a legitimising tool in the transition process. In the majority of cases the Court would state that the other countries solved the same problem in a similar fashion. However, already in this period references were made to multiple countries and the Court would indicate that it was looking for a 'standard' or 'typical solution'.[171] In that sense foreign law was both a source of inspiration and a legitimizing tool. It is characteristic that the Court looks for standards within the community of European democratic systems. The impact on decisions, however, is more implicit. In one judgment only the Court stated that comparative analysis *convinced* that a specific approach was the correct one.[172]

[170] Judgment SK 50/06 of 10 July 2007 (Germany).
[171] Judgment P 1/94 of 8 November 1994; judgment K 26/96 of 28 May 1997; judgment SK 9/98 of 25 May 1999.
[172] Resolution W 14/95 of 24 April 1996 point II.2.

In the following years, 2000 to 2005, the comparative analysis played a similar role but as already indicated the 'democracy' rhetoric was progressively replaced by the 'European' rhetoric. As the references became gradually more specific and detailed their impact on the Court's decisions, although still mostly implicit, became more visible. Nonetheless, the Court would simply *compare* indicating similarities and differences between legal systems. However, the 'standard-discerning' function of the comparative activity clearly came to the forefront. Within the reference to multiple countries the Court would more readily speak of 'standards'[173] or would even refer to "*the German Federal Constitutional Court adjudicating within common European standards of a democratic state*".[174] Compared to the previous period, the Court would in more instances bridge more explicitly the comparative analysis with its decision. In the case K 8/98, for example, it would state that the comparative remarks constituted an appropriate background for its analysis and that they *justified* a specific legal interpretation.[175] In the case K 13/02 the Court stated explicitly that the comparative analysis was an "*indirect confirmation*" of its view, due to the qualities of compared countries, i.e. their stability and long experience with the constitutional review of law.[176]

The same role and impact of the comparative analysis continued from 2006 to 2011. In particular the 'standard-discerning' function[177] intensified including decisions speaking of 'approximation of modern legal systems'.[178] In some cases the PCC established a direct link between the comparative analysis and its final conclusion.[179]. In the case P 10/06 it stated that:

> the comparative analysis *leads to a clear conclusion* [emphasis added – JKV] that Article 212 (1) and (2) of the Polish Criminal Code are neither novel nor

[173] See for example: judgment K 8/98 of 12 April 2000; judgment K 11/01 of 8 October 2001; judgment SK 18/00 of 4 December 2001; judgment P 10/04 of 26 January 2005; judgment SK 26/02 of 31 March 2005; judgment SK 39/05 of 5 October 2005; judgment K 32/04 of 12 December 2005.
[174] Judgment Kp 1/04 of 10 November 2004.
[175] Judgment K 8/98 of 12 April 2000, point III.
[176] Decision K 13/02 of 17 July 2003.
[177] See for example: judgment SK 58/03 of 24 July 2006; judgment K 45/07 of 15 January 2009; judgment SK 52/08 of 9 June 2010; judgment P 38/08 of 12 May 2011; judgment P 1/10 of 11 July 2011; judgment K 10/09 of 13 July 2011, judgment K 11/10 of 19 July 2011.
[178] Judgment K 38/07 of 3 July 2008.
[179] Judgment K 11/10 of 19 July 2011.

> exceptional when compared with other countries. By no means can it be considered a legal relic of the totalitarian state.[180]

In the case P 7/09 the Court stated that a comparison with developed market economies *confirmed its conclusion* that the specific provisions of Polish law constituted a relic of planned economy.[181] In the case K 32/05, based on comparative analysis, the Court held that in view of protection of acquired rights and legitimate expectations the constitutionality of acts interfering with the existing legal relationships depended on whether the legislator created adequate procedural guarantees, protective and temporary provisions. The Court then stated that the Polish Constitution imposed the same standard on the Polish legislator.[182]

As evidenced by the foregoing examples, the impact of comparative law on the PCC's decisions can be quite important and it is often explicitly articulated by the Court.

Methodology of comparisons

The PCC does not explicitly comment on the methodology used for its comparisons. It is nothing unusual,[183] but highly desirable for courts that do choose to take recourse to foreign law. Normative rules governing the selection of compared systems and cases in which comparisons appear desirable are crucial to make sure that those choices are not selective.[184] Of course, judicial comparativism will naturally be target of all the criticism related to the limited role of theory in comparative law.[185]

In judgments with non-detailed comparative analysis the PCC simply presents the results of comparison (e.g. "similar approach can be found in the case law of constitutional courts of other countries") but does not provide any insight into the process of comparison. In many cases the PCC is simply juxtaposing foreign and domestic provisions. This is typical for specific but non-detailed comparisons (e.g. "compare for example Article XYZ of the German Constitution", or "differently Article

[180] Judgment P 10/06 of 30 October 2006.
[181] Judgment P 7/09 of 15 March 2011, point III.2.2.
[182] Judgment K 32/05 of 17 March 2008.
[183] See: Waldron, Treating Like Cases Alike in the World, supra note 37, p. 100-1.
[184] Markesinis/Fedtke, supra note 1, p. 61.
[185] Frankenberg, supra note 38, p. 416-8.

XYZ of the German Constitution"). Methodology can be encoded from those judgments in which the comparative analysis is more detailed. In those cases the PCC mainly adopts the functional method.[186]

Despite the on-going criticism,[187] functionalism is the most widespread method in comparative law. It was laid down in the seminal work of Konrad Zweigert and Hein Koetz.[188] Functionalism presupposes that "*legal system of every society faces essentially the same problems, and solves these problems by quite different means, though very often with similar results*."[189]

There are two central questions within the functional method (1) what function does the rule under scrutiny fulfill in the domestic system, and (2) which institution, legal or otherwise, fulfills the function under scrutiny in the foreign system?[190] Konrad Zweigert and Hein Koetz stated that: "Instead of asking, 'What formal requirements are there for sales contracts in foreign law?' it is better to ask, 'How does foreign law protect parties from surprise, or from being held to an agreement not seriously intended?"[191]

Guenter Frankenberg criticized functionalists for reducing law to "*a formal technique of conflict resolution, stripping it of its political and moral underpinnings*" and trying "*to cope with the problem that social and economic conditions, apparently similar in relevant respects, have actually produced different legal solutions*."[192] He pleaded that "*[i]nstead of continuing the endless search for a neutral stance and objective status (…), instead of presupposing the necessity, functionality and universality of law (…), critical comparisons must call for a rigorous analysis of and tolerance of*

[186] See for example: judgment P 11/02 of 19 February 2003; decision S 1/03 of 12 March 2003.
[187] See for example: Frankenberg, supra note 38, p. 411; for more recent account of functionalist method see: R Michaels, The Functional Method in Comparative Law, in: M Reimann, R Zimmermann (Eds.), The Oxford Handbook of Comparative Law, Oxford University Press 2006.
[188] Zweigert/Koetz, supra note 68, p. 34: "The basic methodological principle of all comparative law is that of functionality." Guenter Frankenberg defined functionalism in the following way: "[c]omparative functionalists (…) analyze the living law in its two basic elements: in books and in action. Legal texts and institutions represent solution for the problems of life in organized societies. The legal system in general and its institutions and norms answer to social needs or (organized) interests. Society constitutes the environment for law – law conceptualized as a sub-system of the social system. Broadly speaking, social life either determines the law or the law influences social development." See: Frankenberg, in ibid, p. 435.
[189] Zweigert/Koetz, supra note 68, p. 34.
[190] De Cruz, supra note 7, p. 237.
[191] Zweigert/Koetz, supra note 68, p. 34-5.
[192] Frankenberg, supra note 38, p. 437.

ambiguity."[193] Comparatists should "*develop a fresh enthusiasm in analyzing law as an omnipresent and ambiguous phenomenon, and in focusing on what the dominant discourse leaves out, suppresses and marginalizes*," [194] so that "*disruptions and heterogeneity, lost struggles and marginal events will have to be brought to the light*." [195] In Frankenberg's view "*[l]aws can no longer be seen as mere technical solutions to social problems or natural outcomes of history. Each rule or doctrine or case has to be regarded as a place where a variety of distinct social processes intersect*."[196]

Although Guenter Frankenberg claimed that "[t]*here is nothing outside legal texts and institutions for functionalists*", the functional analysis does take into account the broader context.[197] Konrad Zweigert and Hein Koetz referred to works of Ernst Rabel and recognized that comparatists had to consider everything that affected law, e.g. history, economy, development, religion.[198] Functionalists look not only at 'law in books' but also at 'law in action', i.e. the results of application of legal rules and even at non-legal solutions.[199]

Lack of broader contextual analysis is one of the main methodological weaknesses of the PCC's comparative activity. However, as the references to foreign law became more and more detailed, the contextual analysis was also included more often. The lack of contextual analysis is often combined with a rather kaleidoscopic enumeration of foreign provisions regulating a specific issue. It happens that the problem subject to comparative analysis is not properly posed. In the individual complaint that gave raise to the case SK 58/03, for example, the PCC assessed the level of protection of detainees in view of a very long period of provisional detention in that specific case. The question that formed the basis of comparative analysis was: 'Do other countries specify the maximum duration of provisional detention?' Instead, the PCC should have asked: 'How do different legal systems ensure the protection of rights of detainees, in view in

[193] Ibid, p. 441.
[194] Ibid, p. 453-4.
[195] Ibid, p. 453.
[196] Ibid, p. 454.
[197] Ibid, p. 437.
[198] Zweigert/Koetz, supra note 68, p. 36.
[199] Michaels, supra note 187, p. 364-5; Zweigert/Koetz, in ibid, p. 35.

particular of the time of provisional detention?' Instead of a kaleidoscopic enumeration of different foreign provisions concerning the maximum duration of provisional detention, a more systemic analysis would have been appropriate, i.e. a broader analysis of criminal law and criminal procedure law concerning the conditions of prolongation of provisional detention against the background of procedural guarantees of individual rights. Lack of broader contextual analysis and insufficient problematization are also symptomatic in the group of cases (discussed below) where the PCC considered that historical differences did not warrant a comparison.[200] From the point of view of methodology, in the case K 39/07 for example, the Court did not ask how the compared countries ensured the independence of the judiciary but simply stated that judicial immunity was not guaranteed explicitly in their constitutions. Further, the PCC dismissed comparisons on the basis of a very general distinction between 'established' and 'young' democracies stating that constitutional guarantees of judicial immunity were necessary in the later. Instead the Court should have engaged into a broader contextual analysis and should have cast its net wider, looking possibly for other solutions adopted in the compared countries to deal with the specific issue of independence of the judiciary.

Broader context will depend on the type of rules compared. With regard to the level of transplantablility of legal rules and institutions Otto Freund-Khan used a metaphor of transferring part of a living organism (kidney) and part of a mechanism (carburetor).[201] He stated that the risk of rejection would only be associated with the former and not the latter and further elaborated that:

> [t]he kidney and the carburetor are the terminal points of a continuum, and any given legal rule or institution may be found at a different point of it. In some cases the only question is whether the job of mechanical insertion has been properly performed and, if it has been, the new piece of machinery will work, one thinks of situations like the adjustment of shipowner's liability to international standards. But there are degrees of transferability. In most cases one must ask what chances there are that the new law will be adjusted to the

[200] Judgment K 26/00 of 10 April 2002; judgment K 33/02 of 19 December 2002, judgment K 39/07 of 28 November 2007.
[201] Khan-Freund, supra note 9, p. 5-6.

home environment and what are the risks that it will be rejected.[202]

Distance from the organic and from the mechanical end of the continuum in Otto Khan-Freund's metaphor will in some cases depend on the political, cultural, economic and historical factors. The impact of context upon comparisons will depend on the type of rules compared. It has been claimed that Zweigert's and Koetz's presumption of similarity works well for non-political areas of private law (business dealings, commercial and property transactions), but becomes problematic for value laden issues like non-marital cohabitation or homosexual relationships.[203] Also, in constitutional comparative law historical, political, or social context will presumably play a more vital role.

Mark Tushnet distinguishes three methods in comparative constitutional law: (1) normative universalism, (2) functionalism, and (3) contextualism. The last method has two versions (3)(a) simple contextualism and (3)(b) expresivism.[204] Normative universalism and functionalism both see constitutional ideas migrate across borders either because "*they attempt to capture the same normative value*" or because "*they attempt to organize a government to carry out the same task*".[205] Universalists consider that certain principles (e.g. some human rights, judicial independency, and separation of powers) run through different legal systems as a common thread.[206] According to Roger Alford "*[n]atural law is perhaps the most coherent rationale for recognizing the validity of comparative analysis in constitutional adjudication*."[207] Jeremy Waldron recently put forward a concept of ius gentium, principles shared by different countries that happened to solve the same problems in a similar fashion independently of each other.[208] Functionalism claims that legal provisions create

[202] Ibid, p. 6.
[203] De Cruz, supra note 7, p. 239.
[204] M Tushnet, Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights, Princeton University Press 2008, p. 5; additional form distinguished by Tushnet was bricolage but it relates more to the process of law creation; in relation to the interpretation of law bricolage shows that constitutions and constitutional structures result from compromises rather than carefully integrated design, see Tushnet, The Possibilities of Comparative Constitutional Law, supra note 10, p. 1285 et seq.
[205] Tushnet, Weak Courts, Strong Rights, in ibid, p. 5.
[206] Ibid, p. 5-6.
[207] R Alford, In Search of a Theory for Constitutional Comparativism, 52 UCLA Law Review 639 (2005).
[208] Waldron, supra note 1.

arrangements "*that serve particular functions in a system of governance*".[209] Different provisions might serve the same functions in different legal systems. Comparative study makes it possible to see how domestic legal system can use a mechanism developed elsewhere to improve the way in which a specific function is performed at home.[210] Simple contextualism and expresivism see some difficulties in constitutional ideas being transferred transnationally. Simple contextualism asserts that "*constitutional ideas can be understood only in the full constitutional and doctrinal context within which they are placed*."[211] Contextualism requires that the comparative analysis be always placed within the broader view of the context in which foreign law operates.[212] Expresivism, as a form of contextualism, considers constitutional ideas to be expressions of a particular nation's self-understanding which guided decisions of foreign courts.[213] According to Mark Tushnet, the problem with contextualism is that it may tend to confirm that what might have appeared as false necessity is indeed necessary because of the complete context in which it is placed and because it is so strongly embedded in a particular nation's legal culture and history.[214] Further, although expresivism may raise objections to the use of foreign law, the strength of those objections should not be overrated in particular in view of the fact that a particular nation's self-understanding is not cast in stone but subject to discussions and confrontations.[215] National character can be expressed by learning from others.[216]

The PCC used expresivist arguments in order to exclude comparisons ('exclusioniary' expresivist arguments), notably in cases where the process of democratic consolidation called for specific solutions not necessary in established democracies (see discussion

[209] Tushnet, The Possibilities of Comparative Constitutional Law, supra note 10, p. 1226.
[210] Ibid, p. 1226.
[211] Tushnet, Weak Courts, Strong Rights, supra note 204, p. 5.
[212] Ibid, p. 12.
[213] Ibid, p. 5 and 12-3; Tushnet, The Possibilities of Comparative Constitutional Law, supra note 10, p. 1269 et seq.
[214] Tushnet, Weak Courts, Strong Rights, supra note 204, p. 13.
[215] Tushnet, The Possibilities of Comparative Constitutional Law, supra note 10, p. 1269 et seq. Tushnet states for instance with regard to free speech doctrine in the US that: "There is no single profound national commitment to a well-specified free speech principle, only a history of repeated confrontations over (…) the meaning of our national commitment to free speech." In fact, the type of democracy that U.S. democracy claims to be "allows any vision of the nation to prevail in public discourse. And to preserve that possibility our democratic order cannot bar anything from public discussion." Tushnet, The Possibilities of Comparative Constitutional Law, supra note 10, p. 1276, 1279.
[216] Tushnet, in ibid, p. 1281.

below).[217] But expresivist arguments that form part of a broader contextual analysis within the functionalist method might also serve as explanations why specific solutions have been adopted in other countries and do not have to be per se exclusionary ('explanatory' expresivist arguments). As indicated above, the lack of a more systematic and systematized contextual examination is one of the main methodological weaknesses of the PCC's comparatist activity. Expresivist arguments within a broader contextual analysis could validate the Court's comparative analysis for example by explaining why despite some differences specific foreign solutions can inspire the interpretation of domestic law.

Expressivist arguments have also a very specific role to play in countries in transition. In the case K 31/06 the Court stated that specific electoral system is a result of a compromise shaped over time that has to be related to the circumstances of a particular country.[218] Expresivist arguments have a particular value for countries in transition. They encourage identity searching and thus help mitigate the risk of uncritical transposition of Western standards. A broader contextual analysis of differences between countries forces increased self-understanding. This also demonstrates why it is important that comparative analysis takes into account not only the similarities but also differences and why comparisons should also be contrastive.[219]

Impact on decisions: suggesting a change in law

In quite a few cases the PCC used foreign models to suggest a change in the Polish law and so the impact of comparative analysis on its decision was very strong. In the case K 21/99, for example, the Court assessed the procedures for adoption of a security clearance decision. It held such *procedures* unconstitutional in part in which they did not foresee a possibility to appeal a negative decision.[220] The Court assessed also the general level of access to the file and rights of defence of the person subject to the

[217] Judgment K 26/00 of 10 April 2002; judgment K 33/02 of 19 December 2002, judgment K 39/07 of 28 November 2007.
[218] Judgment K 31/06 of 3 November 2006.
[219] G Dannemann, Comparative Law: Study of Similarities or Differences? in: M Reimann, R Zimmermann (Eds.), The Oxford Handbook of Comparative Law, Oxford University Press 2006, p. 383, Mattei/ Ruskola/Gidi, supra note 13, p. 144.
[220] Judgment K 21/99 of 10 May 2000.

proceedings. It considered that the level of protection of personal data within the security clearance procedure was insufficient. The role of comparative analysis was very significant. The Court stated that:

> [t]he comparative analysis (...) *does not leave any doubt* [emphasis added – JKV] that the level of protection of personal data not used in the security clearance procedure is much higher [in other countries – JKV] then the level awarded under the Polish law. *This cannot be indifferent* [emphasis added – JKV] for the assessment of the status of person subject to the security clearance procedure.[221]

Similar examples of a strong impact of comparative argument can be found in cases where foreign law was used to question the model of constitutional review in Poland and notably the fact that only the legal acts as such but not their interpretation or application by courts can be challenged. In Poland, the constitutional complaint cannot be lodged against a judgment but only against the legal norm on the basis of which the judgment was rendered. Quite a few cases became incentives for the PCC to plead for a mechanism to scrutinize the interpretation and application of law by ordinary courts.[222] On these occassions the Court would typically refer to Germany, where the aim of constitutional review is not only to remove from legal circulation any unconstitutional norms but also to control individual cases of interpretation and application of law by ordinary courts. In the Court's view such possibility should be foreseen in exceptional and specifically determined situations of grave violations of law and is supported by constitutional provisions and comparative arguments.[223] The Court also issued a decision in which, after presenting foreign law, it urged the Parliament to foresee a possibility of challenging not only a legal norm as such but also its interpretation in a court's judgment.[224] It is interesting that the arguments were mostly mentioned obiter. Obviously the impact that the Court intended to produce was systemic and extended well beyond the individual cases.

[221] Ibid, point III.2.
[222] Judgment P 11/02 of 19 February 2003; decision SK 48/04 of 11 April 2005; judgment SK 7/06 of 24 October 2007; decision K 2/07 of 11 April 2007.
[223] Judgment P 11/02 of 19 February 2003, point IV.5.
[224] Decision S 1/03 of 12 March 2003.

An obiter statement suggesting a change in law was made on several occassions. For example the Court would state that "*a similar problem in other European countries led to an increase in procedural guarantees.*"[225] In the case S 3/10 the Court scrutinized regulation concerning the activities of real estate developers and remarked that Poland was the last country in which relations between developers and their customers were not regulated. The Court remarked that there was a loophole in the legal system and persons concluding contracts with developers that later become insolvent were not protected (did not have access to the real estate).[226] In the case SK 50/06 the Court criticized the Polish provisions concerning observation in a psychiatric facility and pointed out that they were not as precise and clear as those in other countries, e.g. in Germany, stressing that the German solutions have been in operation since half the century.[227] The relevant provisions were struck down as unconstitutional.

Why a comparative approach? Constitutional Court commenting on its comparative activity

The Constitutional Court developed a rather spontaneous approach to comparativism and since the practice did not sparkle much controversy, over the years, there are just a few hints in the Court's judgments 'justifying' or commenting on why the comparative approach should be used at all. From that point of view the PCC's approach to judicial comparativism is unsystematized and undisciplined. The Court can be criticised for 'cherry-picking', both *between* and *within* cases. The first aspect of cherry-picking concerns the question why particular cases are more suitable for comparisons than others, while the second aspect deals with choices of foreign legal systems and materials within a specific case.[228]

[225] Judgment S 2/06 of 25 January 2006; judgment K 32/04 of 12 December 2005 (police obligation to inform person monitored after conclusion of monitoring operations).
[226] Decision S 3/10 of 2 August 2010.
[227] Judgment SK 50/06 of 10 July 2007.
[228] Waldron, supra note 1, Kindle Edition, Location 4130 of 8217.

With regard to the first aspect, one of the most outspoken opponents of the use of foreign law in the US, Justice Scalia of the US Supreme Court, stated in *Roper v. Simmons*[229] that:

> [t]o invoke alien law when it agrees with one's own thinking and ignore it otherwise, is not a reasoned decision-making, but sophistry.[230]

The argument was that the US Supreme Court would not be eager to invoke foreign law in all instances in which US law differs from laws of other countries. Indeed, the criticism that courts are selective in their choices of a foreign system is made quite often. The adversarial system of justice is put forward as a counter-argument alongside the possibility of appealing court decisions or issuing separate/dissenting opinions.[231] Still, the adversarial system of justice and the role of parties cannot be the sole answer and a systematized approach would have to be established. Despite the scale of the PCC's comparative activity such a systematized approach is missing. On occasion the PCC comments as to why it cites foreign law but often those comments are not very informative or at least do not provide a real clarification as to why comparative approach has been chosen in a particular case. The clarifications do not sufficiently distinguish that case from others.

Between 1991 and 1999, most of the judgments with comparative reference simply presented foreign law to demonstrate its similarity with Polish law. The PCC used comparative remarks to reinforce its conclusion. It would state for example that the constitutional courts in other countries have reached the same conclusions[232] or that a particular solution could also be found in other legal systems.[233] Otherwise, the Court would use foreign law to demonstrate examples of particular solutions to specific

[229] 543 U.S. 551 (2005).
[230] *Roper v Simmons*, 543 U.S. 551, 627 (2005) (Scalia J. dissenting).
[231] Waldron, supra note 1, Kindle Edition, Location 4165 of 8217, drawing a parallel with the system of scrutinizing precedents.
[232] Judgment K 11/09 of 30 January 1991; judgment U 6/92 of 19 June 1992; judgment K 11/94 of 26 April 1995; judgment K 33/98 of 26 April 1999; judgment W 10/93 of 27 September 1994; judgment K 11/94 of 26 April 1995.
[233] Resolution W 17/94 of 11 January 1995; judgment K 33/98 of 26 April 1999.

problems[234] or would state that it is worthwhile, useful or helpful to cite foreign law or opinions of foreign constitutional courts.[235]

Despite this predominantly spontaneous approach to comparativism, already in the early years, the Court gave some methodological hints as to why comparisons should be made. The PCC would state that it was looking for a 'typical solution' or standard.[236] Those judgments are first ones to evidence the 'standard-discerning' function of the Court's comparative activity which increased and intensified over the years, but for which the strongest evidence has always been the fact that the Court would refer to multiple legal systems.

As from 2000 the Court started to explicitly refer to 'comparative analysis'.[237] Except for cursory statements (still prevailing) that comparative analysis would be worthwhile or useful,[238] the Court on occasion made more elaborated statements with regard to its comparative activity. In the case K 8/98, for example, the comparative comments were considered necessary as an introduction as "*they constitute an appropriate background for the analysis (…) in the case at hand*".[239] In other cases the Court stated that "*the stance of scholarship as well as that of other constitutional courts seems important*"[240] or that "*before detailed analysis of the case the Court considers it necessary to make some comparative comments*".[241] In the case SK 58/03 the Court stated that comparative analysis seemed "*useful (…) in particular in order to establish whether it is possible nowadays to determine more or less precise regulatory standard*".[242] Finally,

[234] Decision U 5/94 of 6 December 1994; judgment K 8/94 of 20 December 1994.
[235] Judgment K 19/95 of 22 November 1995.
[236] Judgment P 1/94 of 8 November 1994; judgment K 26/96 of 28 May 1997; judgment SK 9/98 of 25 May 1999.
[237] Judgment K 8/98 of 12 April 2000; judgment K 21/99 of 10 May 2000; judgment K 41/02 of 20 November 2002; judgment P 11/02 of 19 February 2003; judgment K 30/02 of 26 February 2003; decision K 13/02 of 17 July 2003; judgment K 37/04 of 27 November 2006; judgment K 42/07 of 3 June 2008; judgment K 38/07 of 3 July 2008; judgment K 5/08 of 25 November 2008; judgment K 17/09 of 16 March 2010; judgment P 1/10 of 11 July 2011; judgment K 9/11 of 20 July 2011; judgment SK 6/10 of 21 September 2011;
[238] Judgment K 24/00 of 21 March 2001; judgment P 25/02 of 21 June 2005; judgment K 47/04 of 27 November 2006; judgment SK 50/06 of 10 July 2007; judgment P 22/07 of 28 April 2009; judgment K 27/07 of 28 April 2009; judgment SK 26/08 of 5 October 2010; judgment SK 6/10 of 21 September 2011.
[239] Judgment K 8/98 of 12 April 2000.
[240] Judgment SK 44/03 of 25 May 2004.
[241] Judgment K 17/09 of 16 March 2009.
[242] Judgment SK 58/03 of 24 July 2006, point III.4.

in the case K 42/07 the Court stated that due to the importance of the case before it, it was necessary to supplement its considerations by comparative analysis also due to the fact that the provisions of the Polish Constitution concerning rights of defence implemented the minimum standards laid down by the ECHR.[243]

Probably the strongest justification for the use of foreign law are statements explicitly linking the 'standard-discerning' function of comparative analysis with the process of 'approximation of the modern legal systems'. Such was the case in the judgment K 38/07 where the PCC included a chapter entitled 'standards in view of comparative analysis'.[244] Similar reference to approximation of modern legal systems was made in the case K 45/07 where the comparative analysis was considered a helpful, although secondary, argument.[245] Those statements also mark a shift in the PCC's attitude towards foreign law from a receptive to a responsive one. The Court positions itself within the (European) community of courts in which common standards are being elaborated. Although in most of the judgments the comparative analysis is simply conducted without much commentary as to why, the 'standard-discerning' function is always there mainly because of the consistent practice of referring to multiple legal systems. Further, comparative analysis becomes more and more visible due to an increased use of chapters devoted specifically to the analysis of foreign law.

Choice of a specific legal system

With regard to the second aspect of cherry-picking, the opponents of citing foreign law fear that choices of foreign systems and materials are purely subjective and arbitrary, making the use of foreign law undisciplined and unsystematized.[246] Such an undisciplined and unsystematized use of foreign law makes those choices result oriented, i.e. the court looks for authority that supports its own view, while ignoring counter-arguments.[247] However, given the vastness of comparative material potentially available it would be difficult in general to find an objective test that would prove beyond any doubt that the choice made by the court was the most appropriate one. Of

[243] Judgment K 42/07 of 3 June 2008, point III.4.
[244] Judgment K 38/07 of 3 July 2008, point III.4.
[245] Judgment K 45/07 of 15 January 2009, point III.A.2.4.
[246] De Cruz, supra note 7, p. 225 et seq.; Waldron, supra note 1, Kindle Edition, Location 4017 of 8217.
[247] Waldron, in ibid, Kindle Edition, Location 4018 of 8217.

course a clear methodology and techniques that govern the choice in a systematized and transparent manner do help to discover patently unhelpful and inappropriate comparisons. [248] This notwithstanding it has been noted that some degree of arbitrariness does exist in areas unrelated to judicial borrowing, like the citation of precedents in general for example.[249]

As already mentioned, one of the characteristic features of the PCC's approach to comparative analysis is the shift from the 'democracy' to the 'European' rhetoric. Consequently, the primary consideration mentioned by the Court in its comparative remarks, in terms of features of countries chosen for comparison, are general features like 'democratic' or 'European'. Especially between 1991 and 1999 the 'democracy rhetoric' prevailed with the PCC speaking of 'democratic states' [250] or 'rules of democracy'[251]. The 'democracy' rhetoric persisted throughout the years but was much less pronounced as from 2000 as it was gradually replaced by the 'European' rhetoric.

Sometimes the Court would caution about the choice of a particular legal system stating that the choice had to be appropriate.[252] However, the justifications provided are not very informative. On occasion, the PCC would refer to 'developed countries'[253], 'modern legal systems'[254], 'Western European countries'[255], 'stable or established democracies'[256], 'countries with advanced level of the rule of law'[257], 'countries with longer tradition of market economy'[258], 'countries with longer experience',[259] 'representative democratic

[248] Frankenberg, supra note 38, p. 433-4; see also in general terms: De Cruz, supra note 7, p. 226.
[249] Waldron, supra note 1, Kindle Edition, Location 4038-9, 4073, 4148 of 8217, other examples are the Supreme Court's practice of choosing for itself the cases it will review, the courts' use of scientific evidence; see also Ch McCrudden, A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights, (2000) 4 Oxford Journal of Legal Studies 512 et seq
[250] Judgment K 13/09 of 28 January 1991; judgment U 6/92 of 19 June 1992; judgment W 10/93 of 27 September 1994.
[251] Judgment U 10/92 of 26 January 1993.
[252] Judgment K 45/07 of 15 January 2009; judgment 38/07 of 3 July 2008.
[253] Judgment P 2/92 of 1 June 1993
[254] Judgment W 17/94 of 11 January 1995; judgment K 45/07 of 15 January 2009.
[255] Judgment 7/96 of 7 January 1997.
[256] Judgment K 4/02 of 20 November 2002; judgment P 10/06 of 30 October 2006; judgment U 5/07 of 10 March 2010.
[257] Judgment P 4/04 of 7 September 2004.
[258] Judgment P 7/09 of 1 March 2009.
[259] Judgment K 31/06 of 3 November 2006.

states'.[260] In the case U 12/92 the dissenting judge spoke of 'countries that are role models'.[261] Sometimes the level of similarity (closeness) between the foreign and Polish legal systems was crucial.[262] The problem before the Court might also determine the choice of the country: EU Member States,[263] signatories to the ECHR,[264] 'countries of our region'.[265] Finally, there are few cases in which the Court would refer to a specific legal system because it influenced the Polish legal system,[266] or legal systems of other democratic states.[267]

In the majority of cases the PCC conducts a so-called micro-comparison, that is, it deals with specific legal institutions and individual concrete problems and compares rules used to solve those problems or particular conflicts of interests. What is missing is a broader view of a specific legal system, i.e. a combination of micro- and macro-comparison.[268]

Given the dominance of Germany and France as reference countries in the PCC's case law, it would have been useful to see a reference judgment with macro-comparison setting out the reasons why – at macro level – those countries dominate and what are the more systemic reasons that make them a good reference for micro comparisons. Notably, such a macro-comparison could have set out in more detail the systems of constitutional review in those countries. Such a general macro-comparison could underline the 'baseline of similarity' or – given differences in the level of development of legal systems – set out the reasons why the law of those countries should be used as an inspiration. While the fact that the PCC relies on multiple legal systems and thereby on a consensus among a larger number of countries is good, the number of reference

[260] Judgment P 1/10 of 11 July 2011.
[261] Judgment U 12/92 of 20 April 1993.
[262] Judgment K 45/07 of 15 January 2009; judgment SK 30/05 of 16 January 2006.
[263] Judgment SK 96/06 of 1 April 2008; judgment P 38/08 of 12 May 2011.
[264] Judgment K 42/07 of 3 June 2008; judgment P 38/08 of 12 May 2011.
[265] Judgment K 39/07 of 28 November 2007; judgment K 6/09 of 24 February 2010.
[266] Judgment SK 18/00 of 4 December 2001; judgment P 12/01 of 4 July 2002; judgment K 66/07 of 24 November 2008; judgment SK 25/08 of 22 June 2010.
[267] Judgment K 45/07 of 15 January 2009, point III.A.2.4.
[268] Distinction based on Zweigert/Koetz, supra note 68, p. 4-5. Macrocomparison does not concentrate on individual problems and their solutions but on "methods of handling legal materials, procedures for resolving and deciding disputes, or the roles of those engaged in the law." Microcomparison on the other hand "has to do with specific legal institutions or problems, that is, with the rules used to solve actual problems or particular conflicts of interests."

countries sometimes becomes overwhelming and so makes a more systematized macro or contextual analysis simply too burdensome. A right balance is needed for the comparative analysis to remain disciplined and meaningful. If the number of countries becomes too large, the comparative analysis easily becomes just a juxtaposition of domestic and foreign provisions, a kaleidoscopic enumeration of 'law in books', which is just a first step to a fully-fledged and meaningful comparison.

In search of a standard (typical or common solution)

As already stated, one of the most characteristic features of the PCC's comparative activity is that the vast majority of references are made to multiple countries. Indeed, on several occassions, the PCC would state explicitly that the comparative analysis was needed in order to discern a standard (typical or common solution).

One of the first more explicit methodological hints with regard to the 'standard-discerning' aspect of the PCC's comparative activity can be found in the case P 1/94 where the Court stated that the comparative analysis did not allow it to detect any 'typical regulation'. [269] Later on, the Court started referring to the 'European standards', [270] 'solutions typical for the majority of European legal systems', [271] 'a standard in European states', [272] 'standards of modern developed European democracy' [273] or 'typical regulation'. [274] Progressively, in parallel to including comparative chapters or even subchapters devoted to specific countries, the PCC also started providing a more detailed summary of foreign law describing a specific standard:

> the constitutional courts of other states make the legality of acts interfering with the established legal relations dependent on whether the legislator has provided adequate procedural safeguards, protective and transitory provisions. The

[269] Judgment P 1/94 of 8 November 1994.
[270] Judgment K 26/96 of 28 May 1997 (the Court explicitly stated that the level of protection of unborn child in Poland did not correspond to 'European standards'); judgment K 8/98 of 12 April 2000 (the Court stated that perpetual usufruct, as a form of land possession, complied with the 'European standards').
[271] Judgment P 10/04 of 26 Jaunary 2005.
[272] Judgment SK 39/05 of 5 October 2005.
[273] Judgment U 5/07 of 10 March 2010.
[274] Judgment K 10/09 of 13 July 2011.

Polish Constitution imposes the same standard on the Polish legislator.[275]

On some occasions the Court would explicitly state that the aim of comparative analysis was to determine regulatory standards in a specific area.[276] In the case SK 58/03 the Court stated that

> it seems expedient to analyze the maximum time of provisional detention in the selected European countries, in particular in order to establish whether it is nowadays possible to determine more or less precise standards of regulation in that area.[277]

The comparative analysis might not only lead the Court to determine a common (mostly European) standard in a specific area but also to establish that no such standard exists and different countries adopt different solutions.[278] In the case SK 14/05 the Court stated that:

> examples based on foreign legal systems, German, Swiss, or Austrian, lead to the conclusion that there are theoretically at least several possible solutions which could be considered (...).[279]

The 'standard-discerning' function of the PCC's comparative activity is reflected not only in the Court's explicit statements to that effect but also in the fact that in the vast majority of cases the PCC refers to multiple countries. Obviously, especially when citations to foreign law are used as an external authority to reinforce the legitimacy of a particular approach, a broader international consensus clearly enhances such an authority. However, the 'standard-discerning' aspect of the PCC's comparative activity above all clearly demonstrates the Court's willingness to actively participate in a 'standard-setting' dialogue within the European community of courts. Especially the shift from the 'democracy' to the 'European' rhetoric demonstrates how the PCC steered a receptive legal system in a country in transition towards a legal system responsive to the emerging legal uniformity in Europe.

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[275] Judgment K 32/05 of 17 March 2008, point III.3.4.; see also judgment K 6/09 of 24 February 2009 with a comparative summary of foreign regulation.
[276] Judgment K 45/07 of 15 January 2009.
[277] Judgment SK 58/03 of 24 July 2006, point III.4.
[278] Judgment S 1/03 of 12 March 2003; other examples are judgment K 43/03 of 21 September 2004, or judgment K 34/03 of 21 September 2004, judgment K 24/04 of 12 January 2005.
[279] Judgment SK 14/05 of 1 September 2006, point III.8.

The 'standard-discerning' function of the PCC's comparative activity focuses on similarities between legal systems and is thus an example of integrative comparative method.[280] A European lawyer is very familiar with this type of comparison. On a grander scale integrative comparison might aim at unification or harmonization of legal systems.

Within the field of protection of fundamental right the 'standard of protection' refers to the level of protection afforded to a particular right, including the extent of possible limitations. Further, standard means something that is established or widely used and it that sense is a notion equivalent to 'typical or common solution'. Depending on the case, the PCC either discerns a common principle, shared in several European legal systems or a common core (although no reference is made to the common core methodology[281]). Broadly speaking a 'standard' is determined at different levels of specificity. It is either a more general principle or a specific rule that can principally be transposed into the domestic legal system.

Another possible interpretation is that the PCC applies ius gentium as defined by Jeremy Waldron, i.e. principles shared by world community that embody the wisdom and experience of the world's legal systems.[282] The concept rests on the assumption that several legal systems, independently of each other, have resolved similar problems or disputes in a similar fashion. Ius gentium is a body of principles that complements and interacts with domestic law; it originates in municipal legal systems but its legal effects transcend those systems.[283] Ius gentium express "*the legal wisdom of the world [that] consists (…) in accumulated experience*."[284] Jeremy Waldron based his concept on the quote from Justinian Institutes: "*All peoples who are ruled by laws and customs use partly their own laws and partly laws common to all mankind to govern themselves*".

The exact reach of ius gentium is not clear. It is not clear whether the concept would work across the board for a variety of legal issues or would be limited to more

[280] Mattei/Ruskola/Gidi, supra note 13, p. 69; by contrast 'contrastive comparison is focused on differences between legal systems.
[281] On the common core methodology see: Mattei/Ruskola/Gidi, in ibid, p. 95 et seq.
[282] Waldron, supra note 1, Kindle Edition, Location 4387 of 8217.
[283] Ibid, Kindle Edition, Location 1376 of 8217.
[284] Ibid, Kindle Edition, Location 4396 of 8217.

fundamental questions, like fundamental rights or death penalty for example. That is: would it work in both constitutional and private law or rather in the former only. If the net is cast too wide, it would be a daunting task to establish which issues are covered by a global consensus and on which ius gentium is silent. If ius gentium should reflect a global consensus on specific issues, intuitively one would think that consensus would be reversely proportional to the geographical reach of any comparative enquiry. Another problem is how to define consensus, i.e. what is the share of countries required to support a specific solution.[285] The question becomes all the more important if ius gentium are recognized to have some normative force.[286] Jeremy Waldron proposes to limit our reliance on foreign law to the laws of free and democratic countries committed to the rule of law.[287] He claims furthermore that the growth of ius gentium has been "*sporadic, contingent, and often regionally concentrated*"[288] making something less than 100 per cent consensus acceptable.

The PCC indeed relies on multiple legal systems and tries to find what those several systems have in common. Its comparative practice therefore does come close to applying ius gentium but geographically limited to European ius gentium. The reach of the notion of 'approximation of modern legal systems' used by the Court is also not clear but from a European perspective would probably be labeled loosely as bottom-up harmonization process. A possibility would also be to distinguish different levels of consensus in terms of its geographical reach and number of countries supporting a specific solution. Such limitation would most probably weaken the normative force of the common principles or at least vary such force depending on the strength of the consensus.

Similar (global) problems

A comparative approach seems particularly appropriate and has a strong appeal when different legal systems face similar problems in similar socio-economic environments.[289]

[285] Ibid, Kindle Edition, Location 4424 et seq of 8217.
[286] Ibid, Kindle Edition, Location 1318, 1376 of 8217.
[287] Ibid, Kindle Edition, Location 4441 of 8217.
[288] Ibid, Kindle Edition, Location 4850 of 8217.
[289] See: Markesnis/Fedtke, supra note 1, p. 125; Smits, supra note 1, p. 520; Koopmans, supra note 1, p. 549.

A similar approach might be suitable despite undoubted differences between legal systems. An example here is the case K 44/07 in which the PCC held unconstitutional a provision of the Polish Aerial Law concerning shooting down of a civil aircraft that either posed a threat to national security or had been used for an unlawful activity in particular in a terrorist attack. The Court had to strike a difficult balance between the state security and human rights protection (human life and dignity). It stated that terrorism became a global problem especially following the events of 9/11 in the USA; however, fighting terrorism did not justify more lenient standards when assessing the scope of possible limitations upon fundamental rights. International acts (UN and Council of Europe resolutions and declarations) as well as judgments rendered in several countries 'confirmed' that terrorism did not call for any 're-interpretation' of fundamental rights. The PCC held that similar conclusions could be reached on the basis of the Polish Constitution.

The PCC referred in particular to a judgment of the GFCC in which the German Aerial Security Law was challenged.[290] The contested law authorized the use of arms against a passenger aircraft but only if such an action constituted the only way of preventing a direct threat to human life. The PCC referred to the fact that the German law was very controversial both before and after its adoption and that it was finally challenged. In a controversial and highly debated judgment the GFCC found the law unconstitutional (contrary to the constitutional provisions on protection of human life and dignity). Interestingly, the PCC emphasised in the first place the controversy surrounding the German law stressing that also the German public was divided on the issue. The Court therefore used foreign law and a public debate surrounding it as a source of legitimization to engage with its constituency, in particular with its opponents.

The Polish law was held unconstitutional on several grounds. The Court pointed to the shortcomings of the legislative technique in particular the use of imprecise terms like 'unlawful act' or 'terrorist attack'. Such shortcomings were unacceptable in view of the fact that the human life was at stake. The primary reason for striking down the contested provision, however, was its incompatibility with the constitutional guarantees

[290] BVerfGE 115, 118.

of protection of human life. The goal of public security advanced by the legislator could not justify the sacrifice of human life. Foreign and international law (ECHR) were quoted notably in relation to the assessment of the conformity of the contested provision with the constitutional guarantees of protection of human dignity. The Court used the arguments of the GFCC concerning the depersonalization of the passengers and the crew of the civil aircraft. It stated that the civilians became objects of a rescue action whose aim was to prevent hypothetical and more remote threats. Consequently, the PCC concluded that the passengers were in a specific situation not only because of the acts of terrorists but also because the state failed to protect them.

In conclusion the PCC again engaged with its constituency and in particular showed understanding towards concerns expressed by its opponents. It stressed that the judgment would not undermine the fight against terrorism and that on balance the contested provision of the Aerial Law violated the *European* standards of protection of human life and dignity. The foreign law was partially used as a source of inspiration but mainly as an external authority (source of legitimization) in a highly contentious domestic case. Interestingly, the Court once again referred to the 'European standards' as established by the ECHR and implemented by other countries. It therefore used a combination of international and foreign law to refer to the community of standards, which serves as an external authority reinforcing its conclusion.

Dealing with communist past

A good example of how a common past can be an incentive to use the comparative method is the case K 5/08.[291] It concerned access to the files of the former communist secret service held by the Polish Institute of National Remembrance (Instytut Pamieci Narodowej, 'IPN').[292] At issue was the freedom of academic research. Provisions regulating access to the IPN's files required that a person not formally affiliated with a

[291] Judgment K 5/08 of 25 November 2008.
[292] See: http://www.ipn.gov.pl. The Polish Institute of National Remembrance preserves the memory of the losses suffered as a result of WW II and in the post-war period and the citizens' efforts to fight Nazism and Communism. It has the duty to prosecute crimes against peace, humanity and war crimes and works towards compensation for damages, which were suffered by repressed and harmed people. It is also responsible for gathering, assessing, disclosing and custody of the documentation created between 1944 and 1989 by Polish security agencies.

research institute had to present a recommendation from a university researcher in order to access the IPN's files for research purposes.

The Court formally requested an opinion concerning access to the files of the BStU (*Bundesbeauftragten für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*[293] – a German counterpart of the IPN). After considering the comparative material, the Court pointed out that in Germany, similarly as in Poland, the conditions of access for researchers were special but at the same time similar.[294] However, the comparative analysis became an incentive for the PCC to remark on the insufficient in its opinion guarantees of protection of privacy of persons whose names were mentioned in the IPN's files. The Court pointed out that in Germany researchers or journalists could be granted access only after an explicit consent of the persons concerned by the documents. An explicit consent was required, not only a simple notification. The PCC therefore used the comparative material not only as a source of legitimization for the point of contention before it but also in order to make more systemic statements obiter.

Because the communist past is not distant, the issues before the Court are typically controversial and require a delicate balance of conflicting interests. Since these types of cases attract considerable public attention, the PCC typically makes an extra effort to engage with and persuade its domestic constituency. A good example here is the case K 6/09,[295] which concerned pension rights of former members of the communist security organs. The Court referred to many countries: Czech Republic, Slovakia, Romania, Bulgaria, Estonia, and Lithuania. The comparative analysis is extremely detailed, lengthy and visible with separate chapters concerning specific countries. The main conclusion was that different countries adopted different solutions but that there was a general trend of limiting the privileges of functionaries of the former security services. Once again the Court used the comparative argument as an external authority to reinforce its conclusion. Clearly, however, the main reason behind the recourse to foreign law was to demonstrate that other countries with similar past also struggled with

[293] See: http://www.bstu.bund.de; in charge of storing the documents of the former security service of the German Democratic Republic.
[294] Judgment K 5/08 of 25 November 2008, point III.5.2.5.
[295] Judgment K 6/09 of 24 February 2010.

similar uneasy issues. Hence, by providing the evidence of like-minded decisions in other countries, the PCC enhanced the legitimacy of its decision towards its domestic constituency that it sought to persuade.[296]

The EU cases

An important aspect of the PCC's comparative activity are references to other EU MSs in cases concerning EU law, notably the supremacy of EU law. The comparative aspect of the PCC's judgments concerning EU law is very visible because of the controversy and debate that those judgments sparkle. Next to comparative judgments with joint references to foreign law and the ECHR, the EU related comparative judgments demonstrate that comparative activity goes hand in hand with Poland's opening up towards international law and international community, notably due to its membership in international organizations. Those types of references demonstrate well the interlinkages between international law and recourse to foreign law in the PCC's decisions.

It seems only natural that in solving problems related to Poland's EU membership the PCC looks at how those same problems were solved in other ('old') EU MSs. Again, the recourse to foreign law is strongly underpinned by the 'standard-discerning' function of the PCC's comparative activity and might lead the Court to establish either commonalities or divergent positions among MSs.

Divergent positions were found in relation to the participation of national parliaments in the EU legislative process.[297] The Court condemned the government for failure to consult the upper house of the Polish parliament in respect of the government's position in the Council of the European Union. In terms of comparative analysis the Court remarked at the outset that different MSs adopted different models of such participation, i.e. the impact of national parliaments on the negotiating mandate of the government differed in different countries. The Court referred to Ireland, Spain, Italy, UK, Germany, Denmark, and Austria, but provided more detailed analysis of the German, British, Danish and Spanish models. Spain was mentioned as a country with

[296] For the discussion on this type of quotations to foreign law see: Slaughter, supra note 1, p. 201.
[297] Judgment K 24/04 of 12 January 2005.

the most similar political system. The comparative analysis was very detailed. However, although Spain is mentioned as country with the most similar political system the analysis of the Spanish system is the most cursory and does not really reflect fully the mode of co-operation between the parliamentary commissions responsible for EU matters and the executive. The analysis of other systems is more detailed but appears somewhat formalistic as it presents only the relevant procedures. What is missing is a more in-depth analysis of how the mode of co-operation fits within the broader parliamentary and political culture of a specific country. The PCC could potentially cast its net wider and mention the reality of parliamentary co-operation in the selected countries. Once again a broader contextual analysis is missing.

Another quite important EU case concerned the European Arrest Warrant ('EAW').[298] Here, the Court concluded that the EAW did not conform to the Polish Constitution (the problem was that the constitutional prohibition of extradition of own citizens was unconditional, i.e. foresaw no exceptions). The Court held that in order to comply with the EU law the Constitution would have to be changed. It pointed out that for many years in the EU a change of constitution was used as a means of ensuring the implementation of EU law in the national legal orders. It referred to Germany, France and Spain and used the comparative argument as a legitimizing tool, in order to reinforce its own conclusion.

The two landmark cases that caused most controversy in relation to the Polish EU membership were cases challenging the constitutionality of the Accession[299] and the Lisbon Treaty.[300] In the former case the main concern was that the Accession Treaty constituted a threat to national sovereignty.[301] Interestingly, the comparative argument was used to reassure those concerned about preserving Poland's sovereignty vis-à-vis the EU. The Court stated that:

> neither Article 90 (1) nor Article 91 (3) constitute a basis to transfer to an international organization (or its institution) the competence to legislate or take

[298] Judgment P 1/05 of 27 April 2005.
[299] Judgment K 18/04 of 11 May 2005 (a case with rather weak applications lodged by group of the Polish anti-EU MPs).
[300] Judgment K 32/09 of 10 November 2010.
[301] Judgment K 18/04 of 11 May 2005.

> decisions which would violate the Constitution of the Republic of Poland. In particular, those rules cannot serve as a basis to transfer competence which would lead to a situation in which Poland could no longer function as a sovereign and democratic state. On this issue the Constitutional Court presents views similar, in general, to those presented by the German Federal Constitutional Court (see judgment of 12 October 1993, 2BvR 2134, 2159/92 Maastricht) and the Supreme Court of Denmark (see judgment of 6 April 1998 in the case I 361/1997 Carlsen versus Prime Minister of Denmark).[302]

In the Lisbon Treaty case the PCC conducted a very detailed analysis of judgments of other MSs that dealt with the Treaty of Lisbon. The judgment includes detailed comparative sub-chapters dealing specifically with those judgments. Also in this case the recourse to foreign law is made in order to reinforce the Court's own conclusion and to reassure the public concerned about preserving Poland's sovereignty vis-à-vis the EU. The Court stated that:

> [t]he European constitutional courts view the provisions of the Lisbon Treaty as consistent with their national constitutions as regards guaranteeing their sovereignty and national identity. This is clearly reflected in the judgment of the German Federal Constitutional Court (...), which stated that (...) the European Union was an association of sovereign states and not a federation. The Member States of the Union, as an international organization, retain full sovereignty and they are the 'masters of the treaties'. The development of the Union cannot go beyond the point at which the Member States would begin to lose their constitutional identity (...). As a vital part of the European constitutional traditions, the constitutional courts of the Member States share the view that the constitution is of fundamental significance as it reflects and guarantees the state's sovereignty at the present stage of the European integration, and also that the constitutional courts play a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the identity of the European Union.[303]

In the group of cases with EU related reference to foreign law,[304] the Accession Treaty and the Lisbon Treaty cases definitively stand out due to their 'sovereignty' aspect and

[302] Ibid, point III.4.5.
[303] Judgment K 32/09 of 10 November 2010, point III.3.8.
[304] Judgment K 24/04 of 12 January 2005 (co-operation of Council of Ministers with both chambers of Parliament in EU matters); judgment SK 30/05 of 16 January 2006 (obligation to refer questions for preliminary ruling); decision P 37/05 of 19 December 2006 (competence to adjudicate on conformity of EU secondary law with Polish statutes); judgment Kp 3/08 of 18 February 2009 (reference for preliminary ruling in III pillar); decision Kpt 2/08 of 20 May 2009 (representation of MSs at meetings of

hence a strong reassuring function of the recourse to foreign law. For most other cases the comparative analysis was mainly a legitimizing tool reinforcing the Court's approach. It is indeed only natural that the Court looks at experiences of 'older' MSs when faced with issues of EU law. However, in cases with high political stakes, where concerns over national sovereignty become an issue, the PCC uses references to the practices of the 'older' MSs not only as a source of inspiration. By underlying the limits of EU powers and limits of integration, it joins forces with other EU Constitutional Courts to assert its position and resist pressure in the process of balancing power between national judiciaries and the EU Court of Justice.[305]

Combined references to foreign law and the ECHR and the approximation of modern legal systems

Another important and interesting dimension of the PCC's comparative activity are joint references to foreign law and the ECHR. In this type of references the analysis of foreign law and the ECHR is intertwined. The number of joint references has been increasing over the years.[306] They go hand in hand with the 'standard-discerning' function of comparative activity and the Court's references to approximation of modern legal

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the Council of the EU); judgment Kp 3/09 of 6 October 2009 (elections to the European Parliament); judgment SK 26/08 of 5 October 2010 (European Arrest Warrant).

[305] Canivet, supra note 1, p. 28.

[306] Judgment K 26/96 of 28 May 1997 (protection of nasciturus; France, Germany, Austria, RPA, Italy, UK, Bulgaria, Czech Republic, Croatia, Portugal, Slovakia, Latvia, Romania, Spain, Hungary, Ukraine, Russia, Slovenia, Japan, USA); judgment K 1/98 of 27 January 1999 (restrictions on professional activity of family of members of bar and judiciary; France, Germany, UK, Belgium); judgment P 11/98 of 12 January 2000 (right to property, protection of tenants; Germany); judgment K 8/98 of 12 April 2000 (right to property; Germany, France); judgment K 21/99 of 10 May 2000 (right to court; Germany, France, Italy, Spain, USA, UK, The Netherlands, Czech Republic, Hungary); judgment SK 6/02 of 15 October 2002 (right to court; Germany); judgment Kp 1/04 of 10 November 2004 (freedom of association; Germany); judgment K 32/04 of 12 December 2005 (right to privacy; Germany); judgment K 42/07 of 3 June 2008 (Germany, France, Hungary, Serbia, Bosnia-Herzegovina, Slovakia); judgment K 38/07 of 3 July 2008 (Germany); judgment SK 48/05 of 9 July 2009 (UK, Sweden, The Netherlands); judgment SK 46/07 of 6 October 2009 (Germany, France, The Netherlands, Belgium, Austria, Switzerland); judgment U 5/07 of 10 March 2010 (France); judgment SK 52/08 of 9 June 2010 (Spain, Germany, Austria); decision K 29/08 of 8 March 2011 (Germany, Austria, Spain, Czech Republic, Lichtenstein, France); judgment P 7/09 of 15 March 2011 (France, Germany, Italy, Austria); decision Pp 1/10 of 6 April 2011 (USA); decision SK 21/07 of 6 April 2011 (Germany); judgment P 38/08 of 12 May 2011 (Spain, Germany, France); judgment P 1/10 of 11 July 2011 (France, Germany, Austria, Switzerland, Italy, Russia); judgment K 11/10 of 19 July 2011 (Germany, Hungary, Albania, Lithuania, Russia, Belarus, Slovakia); judgment K 9/11 of 20/07 2011 (The Netherlands, Belgium, France, UK, Germany, Austria, Czech Republic, Denmark, Finland, Ireland, Norway, Portugal, Italy, Sweden, Lithuania, Latvia, Estonia, Georgia, Turkey, Malta, Macedonia, Albania Spain, Moldavia, Serbia); judgment SK 45/09 of 16 November 2011 (Germany).

systems. In fact, it is within this type of reference that the Court made its most influential statements about approximation of modern legal systems and expressed its commitment to engage in the transnational judicial dialogue.

Judicial dialogue within the ambit of the ECHR is facilitated by the fact that the Convention provides a common platform on the basis of which standards of protection of fundamental rights can be further developed. It combines the doctrine of margin of appreciation, leaving the signatory states a margin of freedom in developing their standards of protection, and stipulates a binding minimum standard.[307] Indeed, in cases with joint references, the standard of protection established under the ECHR will constitute a starting point of the Court's analysis. A parallel reference to foreign law seeks to establish how other countries, signatories to the Convention, built upon that minimum standard. In the case Kp 1/04,[308] for example, the Court first presented the general standard of protection of freedom of association and assembly under the ECHR. It stressed that the Convention protects also those demonstrations that shock or disturb persons opposed to the ideas that they seek to promote. In parallel, the PCC cited the *Brokdorf* decision of the GFCC,[309] where it was held that the authorities could prohibit a demonstration only as a last resort and only in cases of an imminent and serious danger to the public. The PCC reiterated that opinion and then stated that the GFCC reached its conclusion in application of the common European democratic standards.[310] The judgment demonstrates therefore the PCC's responsive attitude to the transnational judicial dialogue within an emerging community of standards. The PCC views itself as part of the European community of courts and joins the process of developing standards of fundamental rights protection on the basis of the ECHR.

The main reason to cite foreign law in combination with the ECHR is to see how other countries, members of the same community, have been implementing or aligning to the common standards existing or emerging in that community. In the case K 42/07 the

[307] J.H.H. Weiler, Prologue: Global and Pluralist Constitutionalism – Some Doubts, in: Grainne de Burca, J Weiler (Eds.), The Worlds of European Constitutionalism, Cambridge University Press 2011, Kindle Edition, Location 371 of 9798.
[308] Judgment Kp 1/04 of 10 November 2004.
[309] BVerfGE 69, 315.
[310] Judgment Kp 1/04 of 10 November 2004.

PCC considered that *due to the importance of the issue before it*, comparative analysis was necessary.[311] It stated that:

> the provisions of the Constitution concerning the rights of defence transpose the minimum standards (...) set out in Article 6(3)(c) [ECHR – addition JKV] (...) and Article 14(3)(d) [ECHR – addition JKV] (...). It is therefore interesting to see how those standards are understood in other countries, in particular European, as well as to see how the rights of defence are understood in the case law of the ECtHR.[312]

The judgments with joint reference to the ECHR and foreign law demonstrate that the degree of openness towards judicial comparativism will often be linked with the degree of openness towards international law. The Court considers standards developed by different countries and looks at the European community of courts rooted in the system of the ECHR. It relies first and foremost on the ECHR, and then, as reinforcement or supplementary source, looks at national systems of countries signatories to the ECHR.

Furthermore, the PCC considers that the analysis of foreign law stems from the '*approximation of modern legal systems*',[313] but is nevertheless conscious about differences between legal systems and differences in context.[314] It stated that:

> [t]he aim of [comparative analysis – addition JKV] is to establish standards (...). Such standards could constitute an important although secondary argument in the case. References to foreign law as well as to public international law, stemming from the process of approximation of the modern legal systems, have to be made while keeping in mind the differences in context.[315]

Indeed, the Court stressed that despite differences in context, modern democratic legal systems share the same principles. This statement clearly demonstrates the meaning of the 'standard-discerning' function of the comparative activity. From among different

[311] Judgment K 42/07 of 3 June 2008.
[312] Ibid, point III.4.
[313] Judgment K 38/07 of 3 July 2008, point III.4.
[314] Ibid point III.4: "the analysis (...) of foreign law, as well as public international case law – which stems from the approximation of the modern legal systems – is conditioned on specific requirements and has to be made keeping in mind the contextual differences. The Constitutional Court has already pointed to requirements which condition the use of non-textual interpretation methods (...). Those methods have a subsidiary role towards textual and logical methods. However, even if the textual and logical method lead to a clear meaning of the text, the interpretation may go beyond that meaning."
[315] Judgment K 45/07 of 15 January 2009, point III.2.4.

legal systems the Court tries to discern a common core, a standard, an essence of a specific regulation, which despite differences in context remains common for those different countries. The analysis of the ECHR and foreign law is blended and normally combined in chapters entitled either 'international standards' or 'standards based on comparative analysis'.

The system of ECHR is a hierarchical system based on vertical co-operation between the ECtHR and the national judiciary.[316] The proliferation of fundamental rights discourse throughout the European continent influenced the patterns of judicial activity. The fundamental rights rhetoric did not only proliferate the international and supranational relations but also different areas of law within the domestic systems, even those that traditionally remained 'immune' from the fundamental rights influence. The fundamental rights challenged the traditional private-public divide.[317] Courts are at the frontline to accommodate these new developments and demands. Mitchel Lasser speaks even of a competition and pressure to "*jump on the fundamental rights bandwagon or be left intellectually and institutionally behind*."[318] As demonstrated by the example of the PCC, the proliferation of the fundamental rights discourse also encourages domestic courts to explore new channels of communication, i.e. horizontal channels as between themselves. A horizontal multilateral judicial dialogue, beyond the minimum standards laid down by the Convention, could potentially change the dynamics of the ECHR system by creating some bottom-up instead of only top-down pressures.

When not to compare? Historical differences

Different historical conditions might also be a reason why comparison with a specific country would not be useful or appropriate. The following cases constitute the rare examples in which the PCC explicitly referred to extra-legal factors which make a particular comparison inappropriate. Still the division line is rather blunt: young and established democracies. The PCC seems to rely on the mere fact that a specific country

[316] Weiler, supra note 307, Location 371 of 9798.
[317] For an extensive account of impact of fundamental rights on private law in the EU see: Brueggemeier/Colombi-Ciacchi/Comande, supra note 23.
[318] M Lasser, Separation of Powers and an Internationalized Judiciary, in: in: S Muller, S Richards (Eds.), Highest Courts and Globalisation, Hague Academic Press 2010, p. 160; also M Lasser, Judicial Transformations. The Rights Revolution in the Courts of Europe, Oxford University Press 2009.

is an 'established democracy' without deepening its analysis with regard to either other legal safeguards possibly existing in those countries or non-legal phenomena that influence the state of law. In the case K 39/07 the PCC dealt with the issue of judicial immunity and pointed out that:

> [i]t cannot be claimed that without judicial immunity judges will not be independent, as there are countries which do not foresee such immunity (e.g. Austria, Germany, France, USA). However, these are countries with developed democracy, firm division of powers and high legal and political standards. These features minimize the risk that political power is abused to remove a judge from office solely because of the content of their judgments.[319]

The Court stressed that in young democracies, where the division of powers was still in the process of being formed and the effectiveness of the state apparatus not yet fully achieved, the existence of judicial immunity was an important element of judicial independence and an indispensable condition of the rule of law and a guarantee of fair trial. The dissenting judge pointed out that:

> [i]n Poland, similarly as in other countries of our region, it is considered necessary to guarantee judicial immunity in the Constitution. It is often justified by bad experiences related to the former political system.

In another case, K 26/00, the Court remarked that in young democracies the membership of civil servants in political parties could potentially lead to a negative public perception of the government and the state. It thus noted that:

> the comparison of the legal status of civil servants in Poland with that in other countries, where the requirement of political neutrality is not always combined with prohibition of membership in political parties, cannot constitute a decisive argument in the assessment of the compatibility of Article 69 (5) of the Civil Service Act with the Constitution and international treaties. It is worth noting that even if the legislation of those other countries, e.g. France, Germany, UK, USA, allows civil servants to be members of political parties, it prohibits the membership in organs of those parties.[320]

In the Bug river claims case (K 33/02), the PCC mentioned how Germany dealt with the compensation for properties left in areas excluded from its territory after World War II.

[319] Judgment K 39/07 of 28 November 2007.
[320] Judgment K 26/00 of 10 April 2002.

However, the PCC stated that "*it has to be remembered that moral and political reasons make it difficult to compare Poland with Germany*".[321] The PCC referred to the judgment of the GFCC in which it was held that the German Constitution did not guarantee the right to full compensation for the lost property. Although the PCC turns to the part of its audience, which, due to historical reasons, might not have been pleased with any comparison with Germany, it nevertheless carries out such a comparison, which reinforces its own conclusion.

This group of cases demonstrates that the PCC is critical when assessing the 'transplantability' of foreign solutions to Polish conditions. It correctly reasons that particular historical circumstances might sometimes warrant different solutions. It is anyhow interesting that even in such cases where the comparative analysis would not have any impact on the PCC's decision, nevertheless the Court engages in a comparative dialogue. This group of case also illustrates the limits of judicial comparativism. Despite the emergence of transnational uniformity, recourse to foreign law needs to respect the differences between legal systems and the principles of legal pluralism.[322]

The cases, however, are rather weak from the methodological point of view. The PCC dismissed comparisons on the basis of a very general distinction between established and young democracies and did not engage into a broader contextual analysis, looking possibly for other safeguards of judicial independence or political neutrality of administration. Further, the fact that notably France and Germany are mentioned as those 'established democracies' which for specific aspects cannot be compared with Poland creates a contradiction at macro-level since they have such a strong position as reference countries across the PCC's case-law. This once again calls for a more systematized and disciplined approach to comparisons at macro level.

Conclusions

Citations to foreign law increased and intensified over the years. They substantially increased in absolute terms. The increase relative to the overall number of judgments is less pronounced due to a significant increase in the Court's activity over the years. Next

[321] Judgment K 33/02 of 19 December 2002.
[322] In this sense within a broader discussion see: Slaughter, supra note 1, p. 203.

to this quantitative change there is a clear qualitative evolution in terms of increased specificity, intensity and visibility of comparative analysis. Such increased specificity, intensity and visibility have an important legitimizing function. They allow for an increased and intensified public scrutiny of the suitability of recourse to foreign law and the 'transplantability' of specific foreign solutions to the Polish law.

Despite the increase and intensification of comparative activity, methodological weaknesses persist. Given the large number of citations, it would be quite important to provide clarity with regard to the methodology of comparisons. Of course judicial comparativism will naturally be target of all the criticism related to the limited role of theory in comparative law[323] and judges cannot be asked to do the impossible, in view in particular of their time constraints.[324] Nevertheless, methodological clarity would enhance the much needed transparency and legitimacy of comparative activity.

First and foremost, the use of foreign law is unsystematized and undisciplined at macro level between and within cases (cherry-picking). In particular, the lack of macro-analysis of countries that dominate as reference countries, i.e. Germany and France, is unfortunate whereas it would be beneficial to corroborate the comparisons at micro-level.

In judgments with non-detailed comparative analysis the PCC simply presents the results of comparisons (e.g. "similar approach can be found in the case law of constitutional courts of other countries") but does not provide any insight into the process of comparison. In many cases the PCC is merely juxtaposing foreign and domestic provisions. This is typical for specific but non-detailed comparisons (e.g. "compare Article XYZ of the German Constitution", or "differently: Article XYZ of the German Constitution"). Methodology can be encoded from those judgments in which the comparative analysis is more detailed. In those cases the PCC mainly adopts the functional method. It happens, however, that the problem that should form the basis of the comparative analysis is not posed well and the citation to foreign law takes the form of a kaleidoscopic enumeration of foreign provisions.

[323] Frankenberg, supra note 38, p. 416-8.
[324] Zweigert/Koetz, supra note 68, p. 36.

Probably one of the biggest methodological weaknesses in the PCC's comparative activity is the lack of a broader contextual analysis. This drawback applies at macro as well as micro level. Mere juxtaposition of foreign and domestic provisions or a kaleidoscopic enumeration of foreign provisions without a broader context make the comparison superficial. However, as the analysis of foreign law became more and more detailed, the contextual examination has been included on a more regular basis.

A broader contextual analysis and expresivist arguments play an important role in countries in transition or countries that are still in the process of building their legal self-identity. Those countries are often exposed to the risk of uncritically accepting all what is 'Western'. While comparatists from developed countries tend to look at foreign law through the lenses of their own system and try to fit foreign concepts and institutions into what is available at home, those from developing countries are often eager to simply transpose foreign solutions to the domestic ground. In other words, comparatists from developed countries often try to prepare their own national dish with foreign ingredients, while those from developing countries try to prepare foreign national dish with their domestic ingredients. From that perspective a broader contextual analysis of foreign law and expresivist arguments within functional analysis are crucial for the process of self-understanding.

The lack of a wider critical discussion about the use of comparative method and appropriateness of the Court's choices in terms of compared countries and cases chosen for comparative analysis is also unfortunate. The use of foreign law should be more 'adversarial' in the sense that the PCC should encourage parties to comment on reliability, 'transplantability' or inspirational value of foreign law it intends to use.[325] Especially in view of some methodological weaknesses of the PCC's comparative activity, the role of parties to the proceeding could be instrumental to scrutinize the PCC's choices of compared legal systems and cases subject to comparative analysis.

While the fact that the PCC relies on multiple legal systems and thereby on a consensus among a larger number of countries is good, the number of reference countries sometimes becomes overwhelming and so makes a more systematic macro or contextual

[325] Markesinis/Fedtke, supra note 1, p. 147-8.

analysis simply too burdensome. A right balance is needed for the comparative analysis to remain disciplined and meaningful. If the number of countries becomes too large, the comparative analysis easily becomes just a juxtaposition of domestic and foreign provisions or a kaleidoscopic enumeration of 'law in books', which is just a first step to a fully-fledged and meaningful comparison.

Contrary to what the opponents of judicial comparativism often impute, foreign law is in no way a binding authority.[326] To assume otherwise would be indeed patently wrong at least on a wholesale basis. Recourse to foreign law is used as persuasive authority and legitimising tool but always as a secondary argument meant to reinforce a particular approach. Even if the normative force of Jeremy Waldron's ius gentium is recognized,[327] it would have to be varied depending on different levels of consensus.

While the citations to foreign law might be a source of inspiration, notably to fill in gaps or to provide evidence of how specific solutions work in practice elsewhere, the broader underlying consideration in applying judicial comparativism is the courts' desire to engage in a dialogue. As Anne-Marie Slaughter put it "*[t]he practice of citing foreign decisions reflects the spirit of genuine transjudicial deliberation within a newly self-conscious transnational community*" [328] and "*[t]he emergence of global judicial relations is rooted in the pluralism of multiple legal systems, but driven by the expression of a deeper common identity*".[329] This is definitively confirmed by the evident 'standard-discerning' function of the judicial comparativism as applied by the Polish Constitutional Court and the practice of referring to multiple legal systems to discover international consensus. Indeed, despite the need-based roots of judicial comparativism in Poland linked to the process of post-communist democratization, the awareness of transnational cross-fertilization and desire to engage in a dialogue continue to drive the PCC to cite foreign law. The international dimension of the transition process triggered judicial comparativism that quickly became an important tool in the hands of the powerful PCC. It is true that the PCC used foreign law to fill in gaps and to reinforce its position vis-à-vis executive and legislature by persuading its

[326] Ibid, p. 125.
[327] Waldron, supra note 1, Kindle Edition, Location 1318, 1376 of 8217.
[328] Slaughter, supra note 1, p. 202.
[329] Ibid, p. 219.

domestic constituency. However, the intensity and extent of the practice demonstrates that the PCC clearly went beyond this need-based instrumental use of foreign law and steered a receptive legal system in a country in transition towards a legal system responsive to the process of judicial co-operation and emerging uniformity in a globalizing world.