Introduction

1. The Topic

Doing comparative law in courts today is a tricky business. A practice that has been used by adjudicators for centuries and for decades found itself outside of any sustained scholarly attention has been witnessing a veritable boom in interest in the last two decades or so. The current scholarly debate includes legions of articles, typically with words like 'dialogues', 'comparative', 'transnational', 'global', 'community', 'rise', 'new order', and so on in their titles. These articles frequently pick up on a few cases, commonly from the area of human rights adjudication, and on the basis of a few often ornamental references to foreign cases contained in these decisions conclude that courts are talking to each other. They also axiomatically postulate that the use of foreign law by courts is a new phenomenon and that the number of references to foreign law is steadily rising. Eventually, some of these writings even announce that this new phenomenon signifies the twilight of the positivistic Kelsenian or Hartian tradition and trumpet the birth of something new, with, typically, a new terminological label attached thereto.

This book puts these claims to the test in relation to supreme national jurisdictions (ie supreme and constitutional courts) in Europe today. It has two elements: empirical and theoretical. The *empirical* research assesses the practice of the supreme jurisdictions in England and Wales, France, Germany, the Czech Republic, and Slovakia in relation to the quantitative aspects of their use of comparative arguments. The *theoretical* element comprises two levels: first, at the level of the national legal systems studied, the mainstream doctrinal views concerning the role and legitimacy of comparative reasoning by the courts are analyzed. Second, the national doctrines serve as the starting point for determining the common denominator for a positivistic approach to comparative reasoning by courts. Both elements, practical as well as theoretical, are then used to discern reasons and justifications for the current practice of the use of comparative arguments in the highest courts across Europe.

The aim is to close the gap between the mainstream scholarly writings on the issue of the use of comparative arguments by the courts and the actual current practice. National judges, who might wish to draw some inspiration from comparative materials, find it difficult to identify a reasonable ground (and theoretical foundation) for judicial comparisons in today's literature. Doing comparative law in courts means navigating between the proverbial Scylla and Charybdis: the Scylla

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of militant comparativists or the global transnational legal prophets, who suggest that there must be 'dialogues' in every case, and the Charybdis of claims that comparative reasoning should never be employed by courts, either because the judges always get it wrong anyway (the soft version) or because they lack any constitutional legitimacy to do so and such practice is therefore undemocratic (the hard version).

Scholarly contributions that often just restate the somewhat odd and for Europe not entirely relevant issues raised in the currently fashionable US debate on foreign law in courts fail in both of the two essential tasks legal scholarship arguably ought to provide. First, it should seek to give a faithful account of the practice, to classify, and to systemize. Secondly, once having ascertained the empirical basis, it may formulate some normative statements, which can provide for guidance in future cases.

Such a vision of the role of the legal scholarship might be called 'legalistic', 'formalistic', 'black-letter-focused', or any other disdainful label the respective legal tradition works with. However, that it is precisely what is lacking in the current debate on the use of comparative arguments in courts. The absence of any sober, practice-oriented, and constructive groundwork may be said to be a considerable shortcoming of the idealist and purely normative global-community-of-courts debate. Moreover, very little attention is also paid to the fact that judicial work takes place under considerable constraints, relating not just to time, resources, language barriers, etc, but above all to the national legal tradition and the expected format of the judicial deliberation process and its product, the decision. One may thus encounter profound studies on the costs and benefits of engaging in judicial dialogues or structural/institutional/political analyses of the process in a comparative (constitutional) perspective, without the author, who is about to argue about the depth of the discursive choices of courts as political actors, being aware of the fact that there are statutory requirements and conventions as to how a judicial decision in a legal culture has to look; that there is a centuries-long tradition of acceptable judicial method in statutory interpretation and/or work with previous case law; and that any decision failing to meet these standards will be quashed on appeal/cassation/via a constitutional complaint. In short, before developing grand theories, it may be useful to look at what is genuinely going on and why.

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2. The Approach

This book offers no grand theories. It designs no new groundbreaking approaches or paradigms. It just observes, compares, and seeks to systematize within the existing theoretical frameworks. The appropriate methodological labels could thus be said to be comparative, descriptive, empirical, and, on the level of overall philosophical approach, realist and pragmatic. The work is inductive. It has no prior preconceptions or normative visions as to how judges should approach foreign law. Instead, it looks at what the judges are doing and whether that activity can be conceptualized within the present theoretical and dogmatic categories of a given

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legal system. On the basis of these studies, a common (positivistic) ground for judicial use of foreign non-mandatory arguments is identified, which is able to explain what judges are doing in terms of comparative reasoning and why they are doing it.

At the same time, however, it is suggested that such an approach is novel in many ways. First, the book integrates both an empirical and a theoretical study of the phenomenon of the judicial use of comparative law, put into the historical and cultural context of the jurisdictions studied and the overall European evolution. In one volume, empirical questions (who refers to whom, how often, and how) are integrated with theoretical ones (how does the respective legal system justify recourse to foreign, extra-systemic arguments), thus achieving a complex picture.

Secondly, the approach is deeply comparative, focusing on how and why various systems compare. In all countries studied, the author relied on primary sources (judgments, scholarly writings, etc) in the original languages. Added to these five systems were selected materials relating to further European legal systems, such as Poland, Hungary, Italy, and Switzerland. These systems are not discussed in the form of a free-standing study. Their experience and scholarly works emerging from them are nonetheless taken into consideration within the general parts of the argument. It may be thus suggested that the overall picture presented offers a truly European outlook.

At the same time, the study has a distinct Continental touch. It focuses mainly on four Continental civil jurisdictions (France, Germany, the Czech Republic, and Slovakia), with the English case study functioning, in several aspects, as a counter-example. The theoretical chapters in the third part of the book can also be said to be strongly influenced by Continental legal theory (in particular German and French, but also Swiss), which chiefly seeks to conceptualize the operation of a system of law based on codes and statutes. In contrast, the mainstream up-to-date focus with respect to the use of comparative arguments by courts has been on common law jurisdictions around the world; civilian legal systems have so far been out of the limelight. The European Continental experience in engaging with foreign inspiration, especially if viewed in its historical evolution, provides instructive parallels but also contrasts with the recent debates on the same phenomenon in the United States and other former British colonies around the world.

Thirdly, the book puts the assembled data on comparative reasoning in the respective courts into the wider context of the normal function of the jurisdictions studied, quantitatively as well as qualitatively. It therefore gives a perhaps somewhat dull but certainly a more realistic picture of the actual practice of comparative reasoning by courts than the discussion of just a few isolated cases torn out of the context of the normal day-to-day judicial function of a court within a legal system. In providing such a picture, the author was able to draw on his past practical experience as legal secretary to the Chief Justice at the Supreme Administrative Court of the Czech Republic, and head of the Research and Analytical Department at the same court. This meant not only being the person entrusted with entertaining foreign relations of a supreme jurisdiction, but also carrying out a number of comparative studies commissioned by judges for their decision-making and

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discussing such inspiration in judicial deliberations. Experience in such a privileged position, together with the ability to rely on judicial contacts and networks over Europe, access to judges for conducting interviews, and access to materials, allowed unique insider knowledge to be assembled and evaluated in the book.

Finally, the overall approach sought was nonetheless a detached and critical one. This book seeks neither to praise nor to censure, but to understand how and why. Such an approach is crucial, surely once a substantial part of the current discussion on comparative law in courts tends to be influenced by the author's political convictions as to how 'international' or 'open-minded' judges should be, rather than by the real state of affairs.

3. The Structure

The book is subdivided into three parts. The first part introduces a framework for the judicial reference to foreign law. The *first chapter* provides a historical and contextual introduction into the debates on comparative law in courts. It critically reviews the two key assumptions of the current debates, unreservedly asserted in most of the recent writings in a mantra-like style: that the use of comparative inspiration by courts is a novelty and that its frequency is rising.

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The *second chapter* maps the landscape of various types of the foreign in domestic courts. It looks into the domestic normative authority a national judge has for considering foreign law in various types of cases. On the basis of this criterion, the chapter distinguishes three types of the use of the foreign law before national courts: mandatory uses, advisable uses, and voluntary uses. The particular interest of this study lies in the latter two categories, namely advisable and voluntary uses, which for ease of reference are conflated into one category of non-mandatory references.

The *third chapter* is concerned with the factors influencing the quantity and the quality of the use of the non-mandatory foreign inspiration in the process of domestic adjudication. The factors include a range of general, institutional, procedural, and human factors. In the closing part of the chapter, two subject-specific factors are discussed. First, does it have any impact on the potential use of foreign inspiration whether the legal issue in question pertains to the area of private or public law? Second, is it of consequence whether the case deals with constitutional issues and/or human rights?

The second part of this book contains five country studies: on England and Wales, France, Germany, the Czech Republic, and Slovakia. The case studies are introduced by a short chapter dealing with methodological issues (*chapter four*). It sets out the research design with respect to the case studies and discusses the potential inaccuracies emerging. The second part is closed by a chapter evaluating the basic quantitative as well as qualitative findings (*chapter ten*). It also provides the starting point for the theoretical discussion in part three. Both of these shorter chapters thus serve as gates: chapter four for opening the case studies and chapter ten for closing them.

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The aim of the third part is to systemize, to explain, and to offer a theoretical common denominator for the practice of the systems studied. *Chapter eleven* defines the theoretical playing field for the judicial use of comparative inspiration from the point of view of the positivistic legal theory distilled from the legal systems studied. It suggests that the use of extra-systemic, non-mandatory arguments is warranted in the case of judges behaving as de facto legislators. These are instances where domestic law is either lacking or it is considered to be outdated and in need of a societal update. Eventually, the chapter also seeks to outline the positivistic limits to the external appearance of comparative arguments used by courts in Europe today.

Chapter twelve deals with the impact a particular legal style has on the representation of foreign inspiration in a judicial decision. It conceptualizes a range of strategies a judge might be pursuing by reading and/or quoting foreign materials. It also tries to explain the reasons for judicial silence, ie why it might be better, for various reasons, not to (fully) disclose the comparative inspiration in a judgment.

Chapter thirteen discusses, against the background of the theoretical conclusions of the previous chapters, four of the frequently levied objections against the judicial use of foreign inspiration: its legitimacy, methodology, purpose, and the lacking of predictability. It explains how and why the judicial use of comparative inspiration and/or invoking of foreign authority differ from a scholarly comparative study and where the proper yardsticks for judicial uses of foreign inspiration ought to lie.

Finally, *chapter fourteen* deals with the deviations: with the odd cases of over-use, under-use, or non-use of comparative inspiration in certain systems at certain times. It maps how and why the default tolerant openness towards the use of comparative inspiration might for political reasons become distorted, and the legal domain pushed by the political domain either towards over-using or non-using comparative inspiration in judicial decisions. The legal transition in post-communist Central Europe provides an example in the former category; the current US debate on the use of foreign law in the US courts an instance of the latter.

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