[Review of:]

Michal Bobek, **Comparative Reasoning in European Supreme Courts**, Oxford: Oxford University Press, 2013, pp. 310

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

What has been variously called "judicial dialogue," "judicial cross-fertilization," or "constitutional conversations" has received overwhelming attention from scholars over the past twenty years, and has ended up becoming a research topic whose borders and methodological premises have been deemed to be largely blurring. Whereas books and articles worldwide investigated almost every aspect and perspective of the phenomenon, taking into account even many peripheral constitutional jurisdictions and the underlying channels of judicial communication, a certain diffuse dissatisfaction as to its supposed identifying characteristics has progressively arisen. In particular, many doubts have been raised as to the capacity of this judicial exchange to convey an effective dialogue rather than many parallel "constitutional monologues," in which the function of comparative reasoning is alternatively merely ornamental or confirmative of a decision relying upon other reasons: the rare exceptions are merely a restatement of the rule. This perception has been reinforced by the largely lacking methodology of this comparative reasoning, often likened to "cherry-picking" rather than to a forum for reflexive constitutional engagement. On a deeper level, these critical stances have called into question the more enthusiastic narratives about a "world community of judges," and, in so doing, highlighted the difficulty of representing the phenomenon at stake as a sort of "counter-globalization" spreading human rights and the rule of law through comparative judicial reasoning in spite of massive economic precommitments imposed upon political bodies by financial markets and institutions.

Despite intense comparative reflection and countless publications and meetings, the ongoing debate has until now largely failed to assess a shared methodology, since the different manifestations of comparative judicial reasoning, mainly when referring to human rights adjudication in constitutional courts, are strictly linked to a huge number of legal, institutional and social factors, whose systemic influence and interaction have been until now largely undervalued.

Among these factors, one may recall the influence displayed by the common law/civil law divide (or what remains of it) and, in a similar vein, by the direct/indirect access to constitutional courts. Whereas in the former models judges are more likely to engage in comparative reasoning, in the latter ones they are deemed hostile because of the influence of more formal ways of reasoning, and the abstractness of their review. Other factors influencing the comparative bias are, for example, the judicial appointment procedure and the traditional "style" of decisions: whereas bureaucratic models of the judiciary tend to insulate judges from pressures and arguments stemming outside the realm of national law, professional models are deemed to enhance the judges' effort to find the "right" argument, even abroad. In so doing, the decisions taken in the latter ones are more

inclined to use an inductive-discursive style, while in the former they rely mainly upon a deductive-demonstrative way of reasoning, which is basically hostile to extra-systemic factors.

These as yet dispersed elements, and many others, are now convincingly unified and furthered in the reviewed volumes.

Michal Bobek's book is a critical and detailed analysis of the practice of judicial comparisons in five European legal orders (England and Wales, France, Germany, Czech Republic and Slovakia), with a particular focus on the case-law of Supreme Courts endowed with the function of constitutional review. The volume is divided into three parts: starting from a preliminary setting of the *a priori* conditions capable of fostering or hindering the use of comparative law by courts (Part I), the Author analyzes national case-law on the basis of a common approach (Part II) and, in the end, establishes commonalities and the key-elements of a unified approach to the topic at stake (Part III). It thus has both empirical and theoretical ambitions, in that its main objective is not to offer *a theory* of judicial engagement with foreign law, but rather to propose a model of inquiry grounded in the outcomes of national case-law and aimed at systematizing these within the existing theoretical framework (p. 2).

Focusing its analysis on the cases of non-mandatory use of foreign law by judges, which is deemed to be the only hypothesis in which a truly comparative attitude is at work, the book first investigates the (general, institutional and procedural) conditions leading to a proliferation of such arguments. Among these, which are deeply examined and discussed within a realist and pragmatic perspective, the Author challenges the traditional idea according to which the field of fundamental rights (and of public law in general) is less open to comparative reasoning because of its historical and political rootedness. This politicality, in particular, is conceived as the proper nature of the debate carried out by constitutional courts, which is by its nature placed at a high level of abstraction. This feature, jointly with human rights' growing claims to universality, makes this field "paradoxically more open to comparative exchange and, at the same time, more vulnerable to challenges and arguments against comparisons," because of a certain impressionism of expressions like "shared values" or "European traditions" through which comparative judicial reasoning is often deployed (pp. 62-3). Additionally, this assumption might be reinforced by observing that politicality could also, and more deeply, be intended here as the connection between fundamental rights and the basic value choices historically enshrined in the different constitutions, which makes political actors - at least in Continental Europe - counterparts to the enjoyment of rights while at the same time being the most relevant instruments of their protection (mainly in the field of social and economical rights). Because of this strict intertwining, the frequent claim to universality of fundamental rights and the enthusiasm for constitutional borrowings, which Bobek correctly deals with very cautiously, seem sometimes to conceal the renaissance of a liberal approach aimed at opposing "the" individual or "the" social (intended to be the proper field of rights, open to comparative

engagement by judges) and "the" political (as the field of arbitrary limitation, enclosed within the national boundaries).

Analysis of national orders confirms that the practice of constitutional borrowings is, at least in Europe, far from evolving towards a fully-fledged model of judicial interactions, and is rather oriented towards solving specifically national problems, first of all the need to fill the *lacunae* in law and to adapt the legal system to major societal changes. These functions are deemed not to be in conflict with a traditional, positivistic, approach to legal and constitutional interpretation, since the recourse to foreign law by judges is seen as one extra-systemic argument among several, which enables the judge to act (in part) as legislator, even within the realm of principles and values expressed by that law. This pragmatic and moderately positivistic approach leads Bobek to correspondingly identify the main traits of the influence of comparative law on constitutional adjudication, in that it is: 1) persuasive and not binding; 2) subsidiary and confirmative, coming into play when the main compelling arguments have been exhausted; 3) additional and not *per se* sufficient as the basis for a decision; 4) defendable and selective, within the ambit of inspiring arguments (pp. 212 ff.).

These outcomes are to be seen neither as a systematic underrating of the relevance of judicial comparisons, as if they were only the occasional and erratic digressions of exuberant judges, nor as evidence of a practice which simply decorates, and sometimes obscures, the real grounds for the decision. Bobek explores in detail the contribution, both explicit and implicit, of comparative reasoning, starting from the assumption that every judicial decision is, at the same time, an act of both discovery (in that it deals with the solution to be given to the case) and of representation (in that the solution is to be conveyed with good and convincing reasons). Whereas in the former the contribution of comparative law lies in the adequacy of the solution developed abroad in order to solve the case at stake, in the latter the evidence of this role fades because of the resistance to relying directly on a foreign rule or a foreign precedent. On the other hand, the (mainly hidden) practice of judicial comparisons is associated with the proper dynamics of adjudication and must therefore be considered and correctly evaluated in this light. From this standpoint, the lacking methodology which is often associated with judicial comparative reasoning should be reconsidered, since it is not fruitful "to mechanically project the aims of (scholarly) scientific research and corresponding precision required therein into the judicial use of comparative arguments" (p. 242) and one should always bear in mind that the choice of comparative arguments is mainly "selective" and driven by quality, not quantity (p. 247). These conclusions are particularly convincing because they offer an insight into the complex nature of judicial comparisons, which are shaped by both an institutional matrix (i.e. the role of the judge within the system and the judge's relationships with other institutional actors) and a jurisdictional one, regarding the impact of the decision on the legal system as a whole.

More specifically devoted to an empirical assessment of the reality of transjudicial communication in a global dimension is the volume edited by Tania

Groppi and Marie-Claire Ponthoreau. The Authors have coordinated, on behalf of the International Association of Constitutional Law, a group of researchers that has thoroughly surveyed the practice at stake in sixteen legal orders, classified on the basis of their judges' greater or lesser engagement with comparative reasoning. Included in the first group are common law or mixed system countries (Australia, Canada, India, Ireland, Israel, Namibia and South Africa), whereas in the second group the focus is on the prevalently civil law system (Austria, Germany, Hungary, Japan, Mexico, Romania, Russia and Taiwan), with the important exception of the United States. According to the Introduction, the goal of the research "is to assess, beyond the vast amount of theoretical scholarship, the reality and true extent of transjudicial communication between courts by looking directly at case law" (p. 3), and for this purpose the individual contributions combine a quantitative and a qualitative analysis. It must however be emphasized that "quality" is conceived here as the proper role played by judicial comparisons within a scheme of legal reasoning which, based on mainly statistical elements, distinguishes between an inspiring function (comparative arguments operate as "range of potential choices"), a probative function ("even there our solution is applied"), and a negative function (e.g. a "not to be followed" precedent) (p. 9).

On these premises, from the country reports in the first part of the volume the main conclusion to be drawn is that comparative reasoning flourishes either in contexts which are bound by deep historical and legal connections (as in the Commonwealth countries) or that need to regain legitimacy after a problematic past (South Africa and Namibia) or, lastly, that seek to develop and reinforce human rights in problem areas (as with Israel and the case of terrorism). Moreover, the insightful and detailed analysis shows a clear and continuous centrality of some jurisdictions acting as "exporters" of reasoning and arguments, above all the United States Supreme Court, the European Court of Human Rights and, albeit for limited aspects, Germany's *Bundesverfassungsgericht*. The countries examined in Part II, whose jurisdictions are closed or at any rate variously "hostile to judicial comparisons," show on the contrary a more articulated typology, ranging from the more blatant nationalistic jurisdictions (such as Russia) to courts whose foreign influence remains hidden (Japan) or confined to separate opinions (Taiwan and Romania). The overall impression is, in the words of Stefan Martini, *rapporteur* for Germany, that in all these cases the "dialogue between legal orders is rather a distorted and delayed one, resulting in a series of monologues that are reacted to by other monologues" (p. 252).

The outcomes of the research confirm a trend according to which common law jurisdictions appear more willing to engage in judicial comparisons since their methodology and style of reasoning (inductive, adversarial, discursive), much more than other institutional factors (such as the form of judicial review), pave the way for extra-systemic arguments to enter domestic legal reasoning.

While this volume shares with the research of Michal Bobek the skeptical view that the surveyed practice is far from establishing the premises for a "legal

cosmopolitanism" and operates rather as a strategic instrument called upon to set boundaries and a judicial cooperation limited to a restricted group of countries ("a closed circle, from which most of the non-English speaking countries are left outside in the cold," p. 429), the reviewed volumes significantly differ as to the evaluation of the methodology used by courts, because Groppi and Ponthoreau, unlike Bobek, strive for a greater transparency and carefulness in the selection of foreign cases to be cited in accordance with criteria of scientific evidence (p. 423). This is indeed a crucial point whose solution calls into question the limits and strategies of the empirical methodology used in the volumes.

Although the individual contributions offer an insightful and detailed analysis of the most relevant institutional problems affecting the practice of judicial comparisons, their prevalently realistic and pragmatic (Bobek) and quantitative (Groppi-Ponthoreau) approaches leave some reasoning and argumentative problems of this practice unanswered. The recourse to judicial comparisons is certainly entrenched with a broad range of problems and issues, which are connected to both functional and institutional arrangements, such as those thoroughly examined in the reviewed volumes: age of the tribunal, personality of judges, style of decisions, geopolitics of reference, and so on. At the same time, the evaluation of this practice should not be detached from the properly qualitative issues that a judge (and a constitutional court in particular) has to deal with, in that he or she is called upon to solve a concrete question, with reference to concrete interests within a concrete normative framework, in a given time and with particular institutional feedbacks (e.g. with reference to political actors or to the judiciary). These aspects, which go beyond the functional issue of the probative or decisive role played by comparative arguments in judicial reasoning, therefore involve a broader and more complex notion of 'quality', which should call for a deeper consideration of the concrete claims the judges have to deal with and, consequently, for an analysis of the interactions and influences between extra-systemic arguments, facts of the case, normative and factual contexts, historical trends, precedents and concrete solution provided by judges.

Albeit from different perspectives, the volumes on the contrary share the assumption that whenever a judge refers to comparative law, he or she is dealing more or less with *facts* (foreign precedents, norms, doctrines) that need to be managed *as such* within a process of interpretation, for example by evaluating separately – as Bobek does (p. 248) – their function and their origin in order to assess the viability and the fruitfulness of the legal import. "Function" here means compatibility with the domestic legal system (*ibid*.) in terms of abstract correspondence with some basic premises of the legal order, whereas no space is given to compatibility of the foreign solution with the broader (factual, normative, axiological) context of the concrete claim at stake. In this light, it would be interesting to enlarge the perspective of inquiry and to highlight the underlying strategy of judicial decisions referring to comparative arguments, in terms of enhancing, modifying or obscuring concrete claims of recognition of fundamental

rights. Moreover, this factual dimension is strictly intertwined with an approach to legal (and constitutional) interpretation which, in the same functional vein, differentiates within the same activity between a *cognitive* and a *deciding* moment: even though comparative references can play a role in the former (since they offer a panorama of solutions), they are almost irrelevant in the latter. This approach has a long-standing tradition in legal realism but, at the same time, risks ignoring that the channels of comparative interaction follow several and largely unpredictable itineraries, which can be grasped only insofar as a "certain" comparative attitude is considered a vital part of a constitutional interpretation. I fully agree, with Bobek, that "the current use of non-mandatory foreign authority in the European supreme courts is minimal" (p. 282) or, with Groppi and Ponthoreau, that "very few doubts are left regarding the existence of growing horizontal communication between the various constitutional systems" (p. 430). At the same time, moving from the inherence of comparative reasoning to the proper realm of interpretation, it should be highlighted that, at least in the European field, this scarcity need not be overdramatized, and is also comprehensible, since the need to refer to comparative law, for most Constitutional courts, is largely satisfied by the dialogue and the reference to European supranational systems and courts, which act in this light as a "vector" of comparative reasoning.

Aside from this, the reviewed volumes deserve special attention, since they offer, in a different but converging perspective, a broad and thoroughly elaborated set of data, inputs and new systematizations, which every scholar interested in the theory and practice of comparative law should deeply consider and further discuss.