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REPORT

"THE EXPERIENCE OF THE CONSTITUTIONAL TRIBUNAL OF POLAND: DECISION DRAFTING AND COMPARATIVE LEGAL RESEARCH"

**by
Mr Marcin NOWAK
(Liaison officer, Adviser, Constitutional Court, Poland)**

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Speaking about drafting decisions is not an easy task for someone who has never clerked for a Constitutional Court Judge. Although I am aware of the general methodological approach taken by Law Clerks employed at the Polish Court, I prefer to narrow down the subject of this paper and write about what I am dealing with on a day-to-day basis, namely comparative legal research. Having in mind the formula of this workshop, I decided to give my presentation a slightly practical flavour and adopted the following structure of the text: after a brief description of the process of decision drafting at the Polish Constitutional Court (1), I shall try to answer, albeit in very general terms, the following questions: (2) What is comparative law? (3) Does the Constitutional Court of Poland resort to comparative research in its decision drafting? (4) Why does the Constitutional Court of Poland resort to comparative legal research in its decision drafting? (5) How does the Constitutional Court of Poland resort to comparative legal research in its decision drafting? and finally, (6) What is the scope and what are the effects of resorting to comparative legal research in the decision drafting process of the Polish Court?

1. Drafting decisions at the Polish Constitutional Court.

The process of drafting decisions at the Constitutional Court of Poland after the case has been assigned to a particular Judge-*rapporteur* can be divided into three stages. The first stage, which one may call the preliminary stage, includes research and drafting related to the admissibility of issuing a ruling on the merits of the case. At this stage particular attention is being paid to such negative premises leading to a discontinuation of proceedings as *res iudicata* (*res judicata*), *ne bis in idem*, the lack of legal standing of the parties to proceedings, the loss of binding force of the normative act under constitutional review or the withdrawal of the application, question of law or complaint. As each of the 15 Judges of the Constitutional Court of Poland collaborates with two (sometimes three) Law Clerks, who under § 19.1.5 of the Court's by-laws[1] are obliged to execute tasks individually and directly assigned by the Judges of the Court, at this stage it is common practice that it is exactly the Law Clerk who shall conduct research on the admissibility of ruling on the merits of the case, and it is the Law Clerk who shall present the Judge with a draft concerning the outcome of this research.

Should there be no basis to discontinue proceedings in the case, a new stage of decision drafting commences, which one may call the analytical stage. The process of decision drafting at this stage consists of research on issues such as defectiveness of the legislative process which led to the adoption of the normative act under constitutional review, of previous Polish constitutional case-law, of case law of the Supreme Court (or the Supreme Administrative Court), as well as financial consequences of the future ruling. It is also at this stage that the Judge-*rapporteur* will decide whether to enhance the scope of the research and to include comparative argumentation in the draft of the future decision. It is up to the Judge whether to assign the tasks related to the analytical stage of decision drafting entirely to one Law Clerk, or divide them among the Law Clerks, or to deal with some or all of them by herself or himself.

The final stage of decision drafting, which may be called the jurisprudential stage, starts when the draft is presented to other Judges sitting in the same panel on deliberations. The initial text may be altered or even replaced by a new one, especially in the case when the report of the Judge-*rapporteur* does not gain the required majority of votes and a second Judge-*rapporteur* is being designated. In this case the new *rapporteur* may prepare a completely new draft, or use the existing report as a point of departure, especially when the controversies did not relate to the outcome of constitutional review of the norm in question[2].

[1] trybunal.gov.pl/o-trybunale/akty-normatywne/statut-biura-trybunalu/.

[2] One should not forget about the "Principles of Decision Drafting" (*Zasady redagowania tekstów orzeczeń Trybunału Konstytucyjnego*), approved by the President of the Court and suggested for internal use.

2. What is comparative law?

In 1748 Montesquieu in his *Spirit of Laws* expressed the opinion that "[a]s the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law"[3]. A completely different aim was set for comparative law by the Paris Congress of Comparative Law of 1900, namely to discover the *droit commun législatif*, or the common stock of solutions, and thus to bring the different systems of law closer together[4]. Already in 1937 Prof. Dr. Ernst Rabel stated that "In fact comparative law has as many different aims as legal science itself; it would be impossible to enumerate them, and we need not attempt it"[5].

There is no need to attempt to enumerate the aims of comparative law here. If it was impossible in 1937, it certainly is impossible today, given the fact that there are at least four major approaches towards legal micro-comparison (comparative legal history, the study of legal transplants, the comparative study of legal cultures and, last but not least, functionalism, in all of its possible concepts[6]).

Nevertheless, in order not to remain completely in the vague, it seems useful to propose a preliminary definition of comparative law in the context of drafting decisions at the Polish Constitutional Court. Since comparative interpretation may by synchronic or diachronic, universalist or dialogical, ornamental or fundamental, explicit or implicit, this definition must be sufficiently wide in order to take into account the differences in "comparative sensitivity" of the Court, of the panel and of the Judge. This paper will thus concern any act of comparison in the reasoning, except for references made to the Court's own case-law, to the case-law of other Polish courts, or to Polish law in general.

3. Does the Polish Constitutional Court resort to comparative legal research?

Between 1986 and July 2013, the Court referred to the case-law of 14 foreign Constitutional Courts (or Equivalent Bodies) in 46 rulings[7]. Only between July 2011 and July 2013, the Court referred to the case-law of the European Court of Human Rights or to the case-law of the Court of Justice of the European Union in 19 judgments[8]. But the Court also refers to foreign legal provisions – between 1986 and February 2009, only the Basic Law of the Federal Republic of

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[3] Charles-Louis de Secondat, Baron de la Brède et de Montesquieu: *De l'esprit des loix*, Genève 1748, translated into English by Thomas Nugent in 1752, p. 613. Source: www.efm.bris.ac.uk/het/montesquieu/spiritoflaws.pdf.

(*Comme les lois civiles dépendent des lois politiques, parce que c'est toujours pour une société qu'elles sont faites, il serait bon que, quand on veut porter une loi civile d'une nation chez une autre, on examinât auparavant si elles ont toutes les deux les mêmes institutions et le même droit politique*).

Source: classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_6/de_esprit_des_lois_6.html.

[4] K. Zweigert, H. Kötz: *An Introduction to Comparative Law. Third Edition. Translated by Tony Weir.* Clarendon Press, Oxford 1998, p. 59.

[5] *Ibidem*, p. 61. Conf. also E. Rabel: *Die Fachgebiete des Kaiser Wilhelm-Instituts für ausländisches und internationales Privatrecht*, [in:] *25 Jahre Kaiser Wilhelm-Gesellschaft zur Förderung der Wissenschaften* III (1937) 77, reprinted in: E. Rabel: *Gesammelte Aufsätze* III (ed. Leser, 1967) 180, p. 79.

[6] R. Michaels: *The functional Method of Comparative Law*, [in:] M. Reimann, R. Zimmermann: *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford 2006, pp. 340-382. Conf. also B. Jaluzot: *Méthodologie du droit comparé : Bilan et prospective*, 2005, 57 RIDC 29, pp. 38 ff; A. Somma: *Al capezzale del malato? Riflessioni sul metodo comparatistico*, 2005, 23 Rivista critica del diritto privato, pp. 401-447; *idem*, *Tecniche e valori nella ricerca comparatistica*, 2005, pp. 3-71.

[7] Conf. an updated version of the analysis ZOS.430.42.2011[4], available at the Constitutional Court Office.

[8] *Ibidem*.

Germany has been referred to in 32 rulings of the Court[9]. It is thus rather obvious that the Polish Court does resort to comparative legal research in its decision drafting process. For the sake of completeness it should be noted that the Court issues about 60-80 judgments per year (with 33 judgments in 1998 and 104 judgments in 2006).

4. But why does the Polish Constitutional Court resort to comparative legal research?

It is difficult to give a simple answer to such a difficult question. The statistical data quoted above indicates that there is no open rejection of comparative interpretation at the level of the entire Court[10]. If the propensity to resort to comparative law of the adjudicating panel of five or three Judges[11] can be summarised as the net propensity to resort to comparative law of the members of the panel, the problem may be reduced to the analysis of the propensity to resort to comparative law by the Judge-*rapporteur*. In Poland there is no legal provision, such as Section 35.1 of the 1993 Constitution of the Republic of South Africa, or Section 39 of the 1996 Constitution of the Republic of South Africa, which explicitly allows judges to consider foreign law when interpreting the Constitution (in the case of the Republic of South Africa, the Bill of Rights)[12]. It would also be problematic to fit Poland into one of the possible classifications of countries resorting to comparative interpretation in their constitutional case-law[13]. Nevertheless one might try to indicate several reasons why the Judge might want to use comparative interpretation.

First of all, the Court will almost certainly conduct comparative research (even if its results are not used after closing of the analytical phase of the decision drafting process) whenever a norm of international law[14], including EU law and the ECHR, is indicated as higher-level norm for the review by the applicant[15]. In such a case the Court will analyse the jurisprudence of the organ vested with the power of interpretation of the applied higher-level norm for the review[16], or of a norm not directly applied by the Court, but the interpretation of which is significant for the case[17]. Comparative research might also be initiated when the higher-level norm for the review is a provision of the Polish Constitution, by reason of the novelty, complexity or importance of the constitutional problem. In that case the Court will analyse the case-law of foreign Constitutional Courts (or Equivalent Bodies) who have already dealt with a similar constitutional problem in the past[18].

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[9] Conf. the analysis ZOS.430.13.2009, available at the Constitutional Court Office.

[10] Comp. with the provocative article by V. Zeno-Zencovich: *Il contributo storico-comparativo nella giurisprudenza della Corte costituzionale italiana: una ricerca sul nulla?* Diritto Pubblico Comparato ed Europeo, No. 2005-4, 193.

[11] Article 25.1.2 of the Constitutional Tribunal Act of 1997. Source: http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitutional-tribunal-act/.

[12] www.gov.za/documents/constitution/1996/constitution.pdf.

[13] G.F. Ferrari, A. Gambaro: *The Italian Constitutional Court and Comparative Law. A Premise*. Comparative Law Review, Associazione Italiana Diritto Comparato, 2010, No. 1(1), p. 15 ff. Conf. also B. Markesinis, J. Fedtke: *Judicial Recourse to Foreign Law, A New Source of Inspiration?* Studies in Foreign and Transnational Law, University of Texas at Austin, Austin 2006, p. 23 ff.

[14] Under Article 188.2 of the Constitution, the Court shall adjudicate regarding the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute. Source: trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/.

[15] Conf. the judgment of 7 May 2014, K 43/12 (Pension Age Increase), trybunal.gov.pl/s/k-4312/.

[16] Conf. the judgment of 21 January 2014, P 26/12 (Compensation for work overtime), http://otk.trybunal.gov.pl/orzeczenia/teksty/otk/2014/P_26_12.doc, where Article 4.2 of the European Social Charter was invoked.

[17] Conf. the jurisprudence of the European Court of Human Rights relating to Article 1 of Protocol 1 of the ECHR quoted in the judgment of 24 February 2010, K 6/09 (Old-age pensions of former communist secret service agents), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2010/K_06_09.doc, CODICES POL-2010-2-004 (www.codices.coe.int).

[18] Conf. the judgment of 27 April 2005, P 1/05 (European Arrest Warrant), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2005/P_01_05.doc, CODICES 2005-1-005 (www.codices.coe.int).

But comparative research might also focus on the legal norm under constitutional review, particularly in cases where the constitutionality of a transposition of an EU directive (or of a directly applicable provision of EU law) has been challenged. In such a case it might be interesting how other EU Member States implemented the directive, whether and how its norms were scrutinised by European Constitutional Courts[19] and, in the latter case, whether directly applicable provisions of EU law were subject to constitutional review[20]. In this case it may also be the novelty, complexity or importance of the constitutional problem which might incline the Judge to commence comparative research on the object of constitutional review[21].

Finally, it might be the persuasive authority[22] of a foreign Constitutional Court[23], the persuasive authority of foreign legal doctrine or simply the long history of the particular legal institution[24] which may render comparative interpretation attractive for the Judge. The Polish Constitutional Court issued its first ruling in 1986 and the current Constitution entered into force in 1997, while certain other Constitutional Courts gained their jurisprudential experience over a considerably longer timespan.

5. How does the Polish Constitutional Court resort to comparative legal research?

It is entirely up to the Judge-*rapporteur* to decide whether and how to resort to comparative law in the decision drafting process, namely who shall conduct the research, what shall be the object of the research and how the research shall be performed.

The Judge may decide to manage the research by him- or herself, assign this task to the relevant Law Clerk(s), ask for a comparative report of the Department of Jurisprudence and Studies of the Constitutional Court Office[25] or ask for a friend-of-the-court brief[26].

There is no rigid code of conduct in this regard, although the standard procedure appears to be to ask the Department of Jurisprudence and Studies of the Court Office for a comparative report. Between 2003 and May 2014 it has prepared 125 comparative reports[27], which amounts to about a dozen reports per year. As noted above, the Court issues about 60-80 judgments per year (with 33 judgments in 1998 and 104 judgments in 2006). A typical comparative report of the Department consists of a brief presentation of foreign legal provisions and constitutional case-law, of an analytical part and of a *résumé*. The report does not have to relate to a particular case brought before the Court, although this will usually be the case. It is not

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[19] As in the case of the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, especially in the context of the case K 23/11, currently pending before the Polish Court.

[20] Conf. the judgment of 16 November 2011, SK 45/09 (Brussels I), available in English at http://trybunal.gov.pl/fileadmin/content/omowienia/SK_45_09_EN.pdf.

[21] As in the joined cases P34/13 and K 52/13, currently pending before the Court, concerning ritual slaughter.

[22] P. Glenn: *Persuasive Authority*, McGill Law Journal, 1987, Vol. 32, No. 2, 261-298.

[23] Among the 46 rulings issued between 1986 and July 2013 including references to foreign jurisprudence, case-law of the German Federal Constitutional Court was quoted 42 times, whereas case-law of other Constitutional Courts (or Equivalent Bodies) was relied on 1-4 times. Source: updated version of the analysis ZOS.430.42.2011[4], available at the Constitutional Court Office.

[24] Conf. the comparative analysis concerning the institution of *emphyteusis*, from Roman law to modern times, in the judgment of 12 April 2000, K 8/98, otk.trybunal.gov.pl/orzeczenia/teksty/otk/2000/k_08_98.doc, issued *en banc*.

[25] Each analysis of the said Department is available through the intranet of the Court.

[26] Friend-of-the-court briefs prepared during the period of 1986-2002 are available in Polish at otk.trybunal.gov.pl/skorowidze/opinie/tabela.htm, although not all of them concern comparative law.

[27] Source: Database *ZOS – Notatki* (v 1.3.2003), available in the Court's intranet.

uncommon that those reports are subsequently quoted by name in the final ruling of the Court[28], or otherwise used in the decision drafting process[29].

The Department is capable of producing comparative reports based on sources in English, French, German, Spanish, Italian, Russian, and – to a limited extent – Norwegian, Swedish and Japanese. It will closely follow the instructions of the Judge-*rapporteur* concerning the desired scope of the research. Unless instructed otherwise, researchers shall concentrate on at least one legal system belonging to the Germanic legal family, on at least one legal system belonging to the Romanistic legal family and on at least one Central European legal system. A typical approach could thus include Austria, Germany, France, Italy, the Czech Republic and Lithuania, but non-standard queries could be limited to one particular legal system (especially if an analysed institution existed only there), while other researches could concern dozens of jurisdictions[30] (not necessarily European). In the case of German and French law, the Department conducts an in-depth analysis of foreign legal provisions and constitutional case-law, whereas in the case of other legal systems, the report will usually include only milestone rulings. In this context, direct contact with other Liaison Officers is particularly helpful when doubts arise as to the completeness of the results of the research. Recourse is made to the Court's own resources, to case-law databases of foreign Constitutional Courts, to the CODICES[31] database of the Council of Europe, to case-law databases run by Universities, such as *Das Fallrecht*[32] of the University of Bern and to the Forum of the Venice Commission.

6. What is the scope and what are the effects of resorting to comparative legal research by the Constitutional Court?

In 1999 an attempt was made to classify the modes of comparative constitutional interpretation according to their scope, their effect on domestic constitutional culture and the legitimacy of the normative claims that each mode entails, into universalist interpretation, dialogical interpretation and genealogical interpretation[33]. The category of genealogical interpretation does not always have to be well suited for the Polish legal order. Even if claims of ancestry and inheritance may be occasionally valid[34], one still would have to establish the *prima facie* relevance of foreign provisions or case-law. Nevertheless, it might be interesting to give examples of universalist interpretation and of dialogical interpretation in the abovementioned sense in Polish constitutional case-law.

Universalist interpretation, with its relatively modest scope of application, relies on strong normative claims, and it can be invoked to the most "universal" rights, such as the right to life or the right to security of the person and physical liberty. It is a means to affirm Poland's

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[28] Conf. the judgment of 27 March 2013, K 27/12 (Law on Common Courts Organisation), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2013/K_27_12.doc, judgment of 19 December 2012, K 9/12 (valorisation of old-age and invalidity pension benefits in 2012), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2012/K_09_12.doc, both judgments issued *en banc*.

[29] Conf. judgment of 11 July 2012, K 8/10 (Family allotment gardens), http://otk.trybunal.gov.pl/orzeczenia/teksty/otk/2012/K_08_10.doc, CODICES POL-2013-1-002 (www.codices.coe.int), judgment of 24 February 2010, K 6/09 (Old-age pensions of former communist secret service agents), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2010/K_06_09.doc, CODICES POL-2010-2-004 (www.codices.coe.int), both judgments issued *en banc*.

[30] E. g. the legal systems of all Member States of an international organisation.

[31] www.codices.coe.int.

[32] www.servat.unibe.ch/dfr.

[33] S. Choudhry: *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*. Indiana Law Journal, 1999, Vol. 74, Issue 3, p. 826, 833-839. Maurer School of Law: Indiana University, Digital Repository @ Maurer Law, www.repository.law.indiana.edu/ilj/vol74/iss3/4.

[34] As in the case of certain institutions of the Polish Civil Code and of the German BGB.

membership in the mainstream of international society, and the internationalisation of domestic legal culture may lead to its reform, revitalisation and reinvigoration. Its linchpin is transcendence, and it proves moral truth with empirical convergence[35]. A good example would be the judgment of 30 September 2008, K 44/07[36], concerning the constitutionality of provisions on the shooting down of a "renegade" airplane, where the Court stated that human life and dignity are the foundations of European civilisation and determine the content of the notion of humanism, which is central in our culture, not only legal[37]. It is also worth mentioning that in a series of cases where universalist interpretation is not applied, the Court refers to CEE countries as to countries of "our region", which obviously is not an evidence of Polish territorial claims, but an expression of a strong belief that Poland shares the same legal, philosophical and political principles with its Central European neighbours[38].

Dialogical interpretation, with its relatively broad scope of application, is used more often by the Polish Court. It only requires corresponding foreign constitutional and/or statutory provisions and jurisprudence, and no normative consensus is needed. It fosters awareness of constitutional differences (or similarities)[39] and it insulates domestic constitutional culture from internationalisation. In a typical case the Polish Court will use comparative jurisprudence as a means to identify important assumption of the Polish legal order, compare the assumptions underlying domestic and comparative jurisprudence and engage in a process of justification[40]. It is particularly interesting that in cases where a dissenting Judge does not agree with the conclusions of the dialogical comparative interpretation of the Polish court, the validity of the comparative argument is not questioned *en bloc*. Instead, an alternative comparative interpretation is presented in the dissenting opinion[41].

7. Conclusions.

The Polish Constitutional Court does resort to comparative legal research in its decision drafting process. Its use of comparative law is rather instrumental, as it stimulates above all constitutional self-reflection, and it is usually devoted of any normative claims regarding foreign jurisprudence. Nevertheless one may find rulings of the Polish Court where it turns (at least indirectly) empirical observation into the premise of an argument for a normative conclusion that the presence of a legal principle in many legal systems is evidence of its truth or correctness[42].

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[35] S. Choudhry: *op. cit.*, pp. 886-890.

[36] Conf. otk.trybunal.gov.pl/orzeczenia/teksty/otk/2008/K_44_07.doc, CODICES POL-2009-2-001 (www.codices.coe.int), quoting case law of the German Federal Constitutional Court, but also of the US Supreme Court and of the Israeli Supreme Court.

[37] Final conclusions of the judgment K 44/07, item III.10 *in princ.* of the reasoning.

[38] Conf. the judgment of 18 January 2012, Kp 5/09 (Citizenship), http://otk.trybunal.gov.pl/orzeczenia/teksty/otk/2012/Kp_05_09.doc, CODICES POL-2013-2-004 (www.codices.coe.int), the judgment of 20 July 2011, K 9/11 (Electoral Code), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2011/K_09_11.doc, CODICES POL-2012-1-002 (www.codices.coe.int.), the judgment of 24 February 2010, K 6/09 (Old-age pensions of former communist secret service agents), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2010/K_06_09.doc, CODICES POL-2010-2-004 (www.codices.coe.int), or the judgment of 11 May 2007, K 2/07 (Lustration), http://otk.trybunal.gov.pl/orzeczenia/teksty/otk/2007/K_02_07.doc, CODICES POL-2007-3-005, all judgments issued *en banc*.

[39] S. Choudhry: *op. cit.*, pp. 886-892.

[40] *Ibidem*, pp. 857-858.

[41] Conf. the judgment of 12 March 2014, P 27/13 (Obligation of disclosure of the identity of the car driver), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2014/P_27_13.doc, judgment of 27 March 2013, K 27/12 (Law on Common Courts Organisation), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2013/K_27_12.doc, judgment of 20 July 2011, K 9/11 (Electoral Code), otk.trybunal.gov.pl/orzeczenia/teksty/otk/2011/K_09_11.doc, CODICES POL-2012-1-002 (www.codices.coe.int.), all judgments issued *en banc*.

[42] S. Choudhry: *op. cit.*, p. 890.

In the future it will be particularly interesting to follow the attitude of the Court in cases such as K 23/11, where the Court might want to take into account rulings of the Court of Justice of the European Union relating to the Charter of Fundamental Rights of the European Union (in this case, the judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others).

Thank you very much.