

References to jurisprudence of foreign constitutional courts in judgments and decisions of the Constitutional Tribunal of the Republic of Poland

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Abstract: In its jurisprudence, the Constitutional Tribunal of the Republic of Poland often uses the comparative law method. For it, comparative material is not only the normative acts in force in other countries, but also foreign jurisprudence. This article presents the results of a quantitative and qualitative study of the judgments of the Polish Constitutional Tribunal in terms of the presence of references to the judgments of other constitutional courts. Reference by the Tribunal to foreign constitutional jurisprudence is a relatively rare practice, but not an occasional one. It was intensified after Poland's accession to the European Union. Although the main point of reference for the Tribunal in its comparative analysis is still the jurisprudence of the German Federal Constitutional Court and constitutional courts of other Western countries, it also increasingly frequently reaches to the judgments of the constitutional courts of Central European and Baltic countries. The subject issue is part of the progressive process of the so-called transnational judicial discourse or judicial globalization. The reluctance of the Tribunal to reach in its rulings to judgments of foreign constitutional courts, which has been observed since 2017, may be the beginning of its assumption of an exceptionalistic attitude similar to the U.S. Supreme Court.

1. Introduction

For about two decades, in legal scholarship, including Polish, increased attention has been paid to the complex phenomenon of interactions between judges and courts, both international and national, from different countries¹. Several terms are used to describe it, especially such as “judicial globalization” or transnational or supranational “judicial discourse (dialogue, conversation)”². Judicial interactions take a diversified form, which is reflected in their various typologies. One of the types of interaction are face-to-face meetings of judges, e.g. during scientific conferences, workshops, and study visits. The exchange of views and experiences between judges also takes place indirectly through e-platforms and internet blogs. Another type of interaction, which raises many more questions of a legal nature, is the impact of the court judgments of one legal order on the judicial decision-making process in another legal order. Interactions of this kind are intrinsically heterogeneous, in scale, form, or causes. This broad category of interactions includes the reference in judgments of domestic and international courts to decisions of “foreign” courts³. The increase of citing foreign law – both

¹ Przemysław Florjanowicz-Błachut and Marta Kulikowska and Piotr Wróbel, *Metody interakcji sądowych w sprawach dotyczących europejskich praw podstawowych* (Warszawa: Naczelny Sąd Administracyjny, 2014), 41–43.

² See: Anne Marie Slaughter, “Judicial Globalization,” *Virginia Journal of International Law* 40 (2000): 1103–1124; Francis G. Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice,” *Texas International Law Journal* 38, no. 3 (2003): 547–556; Yuval Shany, *Regulating Jurisdictional relations between National and International Courts* (Oxford: Oxford University Press, 2009); Lech Gardocki and Janusz Godyń and Michał Hudzik and Lech Paprzycki, *Dialog między sądami i trybunałami* (Warszawa: Sąd Najwyższy, 2010); Monica Claes et al., *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Mortsel: Intersentia, 2012); Olga Frishman, “Transnational Judicial Dialogue as an Organisation Field,” *European Law Journal* 19, no. 6 (2013): 739–758; Lech Garlicki, “Ochrona praw jednostki w XXI w. (globalizacja – standardy lokalne – dialog między sądami),” in *25 lat transformacji ustrojowej w Polsce i Europie Środkowo-Wschodniej*, ed. Ewa Gdulewicz and Wojciech Orłowski and Sławomir Patyra (Lublin: Wydawnictwo UMCS, 2015): 160–180. Evangelia Psychogiopoulou, “Judicial Dialogue in Social Media Cases in Europe: Exploring the Role of Peers in Judicial Adjudication,” *German Law Journal* 22, no. 7 (2021): 915–935; Klodian Rado, *The Transnational Judicial Dialogue of the Supreme Court of Canada and its Impact* (Toronto: York University, 2018, dissertation thesis).

³ See: Basil Markesinis and Jorg Fedtke, *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (London: Routledge Taylor & Francis Group, 2006); Tania Groppi and Marie-Claire Ponthoreau, ed. *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart, 2013);

normative legal acts and judicial decisions – in the reasons of judgments explains the lively interest of legal scholarship and academic circles in the issue of the comparative method in the operative interpretation of law⁴.

Legal scholars indicate a number of purposes that the comparative method serves in the judicial process, such as:

- „– to demonstrate that the domestic law is fully in line with modern international trends;
- to complement the historical method of interpretation of domestic law;
- to discover and demonstrate the diversity of solutions from which the courts may choose;
- to benefit from experiences made abroad and to avoid reinventing the wheel again and again;
- to sharpen one's own understanding of certain legal problems and to compare the national solution with differing foreign solutions in order to highlight the particularities of the domestic law;
- to counter arguments that a given solution will lead to harmful or disastrous results;
- to find legal support for a value judgment by the court; and finally,
- to justify changes to domestic case law or to confront new problems, introduce new institutions or remedies”⁵.

In Polish jurisprudence, the issue of the impact of the judgements of foreign courts on the decision-making process of domestic courts has been subject to a broader scientific exploration, especially in the context of the multicentrism phenomenon of the legal system or legal order, considered mainly against the background of the processes of European

Martin Gelter and Mathias Siess, “Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe,” *Supreme Court Economic Review* 21, no. (2013): 215–269; Gábor Halmái, *Perspectives on Global Constitutionalism. The Use of Foreign and International Law* (Hague: Eleven International Publishing, 2014).

⁴ See: Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013); Mads Andenas and Duncan Fairgrieve, *Courts and Comparative Law* (Oxford: Oxford University Press, 2019).

⁵ Thomas Kadner Graziano, “Is it legitimate and beneficial for judges to compare?,” in *Courts and Comparative Law*, ed. Duncan Fairgrieve and Mads Andenas (Oxford: Oxford University Press, 2015): 52.

integration within the European Union and the Council of Europe⁶. The relations between the judgments of domestic courts and the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights have raised some questions concerning the issues of fundamental, both legal and political, importance, e.g. the understanding of law and the limits of its autonomy, the system of sources of law, and the understanding of the political sovereignty of the Nation. In light of the multicentric nature of the legal system, it becomes debatable to define the Luxembourg and Strasbourg jurisprudence as “foreign” or heteronomous for the Polish judicative. On the other hand, cases of Polish courts citing judgments of foreign courts other than the CJEU and the ECtHR have attracted to a lesser extent the attention of the Polish legal doctrine.

The article presents and assesses the practice of the Constitutional Tribunal of the Republic of Poland (PCT) to refer to the decisions of constitutional courts and tribunals of other countries⁷. The study of the PCT’s jurisprudence combines the quantitative and qualitative character, although with the predominance of a quantitative analysis. The intention behind this paper is to answer the following questions:

⁶ See: Mirosław Granat, “Comparative Analysis in the Case Law of the Constitutional Tribunal of Poland,” in *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*, ed. Giuseppe Franco Ferrari (Leiden: Brill, 2019): 567–588. Ewa Łętowska, “Między Scyllą a Charybdą – sędzia polski między Strasburgiem i Luksemburgiem,” *Europejski Przegląd Sądowy* 1 (2005): 3–10. Ewa Łętowska, “Multicentryczność współczesnego systemu prawa i jej konsekwencje,” *Państwo i Prawo* 4 (2005): 3–10. Anna Kalisz, “Multicentryczność systemu prawa polskiego a działalność orzecznicza Europejskiego Trybunału Sprawiedliwości i Europejskiego Trybunału Praw Człowieka,” *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4 (2007): 35–49. Anna Pudło, “Dialog między Trybunałem Konstytucyjnym a sądami europejskimi (Europejskim Trybunałem Praw Człowieka i Trybunałem Sprawiedliwości Unii Europejskiej),” *Sprawy Międzynarodowe* 1 (2014): 83–104. Adam Wiśniewski, “Nowe podstawy formalnoprawne dla dialogu pomiędzy sądami krajowymi a Europejskim Trybunałem Praw Człowieka,” *Gdańskie Studia Prawnicze* 33 (2015): 415–424. Grzegorz Maroń, “References to Common Law in the Reasons for Judgments by Polish Courts,” *Review of European and Comparative Law* 1 (2020): 131–161.

⁷ This does not mean that the importance of foreign jurisprudence for the PCT comes down solely to its direct quotation. In many cases, decisions of foreign constitutional courts are consulted in the judicial deliberation preceding the issuance of the Tribunal’s own judgment.

- what is the actual scale of the phenomenon of referring in the decisions of the PCT to foreign constitutional jurisprudence?
- how does the practice of invoking foreign constitutional jurisprudence look like in a chronological aspect?
- is the reference to foreign constitutional jurisprudence to a greater extent the practice of the Tribunal itself or of individual judges as authors of dissenting opinions?
- what is the geopolitical diversity of the cited foreign constitutional jurisprudence and the case law of which countries can be considered as preferred by the Tribunal?
- does the Tribunal respond to foreign constitutional jurisprudence cited by a participant in the proceedings in its argumentation?
- what is the operationalization of the use of foreign constitutional jurisprudence by the Tribunal in terms of the precision of marking the cited judgments and reasons for the selection of comparative material?
- what factors influence the dynamics of the title issue?

Anticipating the above research questions has been dictated by my willingness to respond to those issues that have not been addressed in detail in the reference literature yet. For this reason, the issue of the functional characteristics of references to foreign jurisprudence in judgments and decisions of the PCT, already discussed in the Polish legal literature, is beyond the scope of the study⁸.

A quantitative study of the entirety of the Constitutional Tribunal's jurisprudence will make it possible to present the title issues in a more authoritative manner. Its analysis based on judgments only selected or recognized as examples condemns the researcher to formulating very approximate estimates and partially intuitive conclusions, and thus not necessarily representative. For example, while the Author of one of the studies described the cases of the PCT's reference to the decisions of other constitutional

⁸ Ada Paprocka, "Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego," *Państwo i Prawo* 7 (2017): 37–53. Magdalena Bainczyk, "Odwołania do prawa obcego w orzecznictwie Trybunału Konstytucyjnego w sprawach związanych z integracją europejską," in *Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa*, ed. Arkadiusz Wudarski (Warszawa-Frankfurt nad Odrą: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2016): 505–532. Piotr Chybalski, "Wykładnia komparatystyczna w orzecznictwie konstytucyjnym – zarys problemu," *Temidium* 2 (2019): 33–36.

courts as “sporadic”⁹, another Author takes the position that “the Constitutional Tribunal relatively eagerly uses references to materials concerning foreign law”, where she also includes “judgments of foreign courts and tribunals” into foreign law¹⁰.

The scope of the research covers judgments and decisions of the PCT issued from 1986 to the end of 2021. They have been analysed in terms of explicit referring to the decisions of constitutional courts of other countries¹¹, but not the decisions of international courts, even if legal scholars see significant analogies in the judicial practice of the latter courts to the activities of national constitutional courts¹². For this reason, the study has not considered the cases of reference by the PCT to the judgments of the ECtHR and the CJEU. For the research, I have used the search engine on the Internet Portal of the Constitutional Tribunal Rulings¹³.

2. Quantitative characteristics of references to foreign constitutional jurisprudence

References to foreign constitutional jurisprudence appear in at least 78 rulings of the Polish Constitutional Tribunal, while in 71 cases the ruling took

⁹ Jakub Królikowski, “Uzasadnienia orzeczeń Trybunału Konstytucyjnego,” in *Uzasadnienia decyzji stosowania prawa*, ed. Mateusz Grochowski and Iwona Rzucidło-Grochowska (Warszawa: Wolters Kluwer, 2015), 436. Similarly, Tomasz Stawecki and Wiesław Staśkiewicz and Jan Winczorek, *Między policentrycznością a fragmentaryzacją. Wpływ Trybunału Konstytucyjnego na polski porządek prawny* (Warszawa: Ernst & Young 2008), 25.

¹⁰ Paprocka, “Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego,” 46 and 48.

¹¹ The Tribunal sometimes invokes judgments of courts of other states which are not constitutional courts. Cf. e.g. PCT, Judgment of 21 June 2005, P 25/02, OTK-A 2005, no. 6, item 65 (pt. III.4.6) (the French Court of Appeal); PCT, Judgment of 3 June 2008, K 42/07, OTK-A 2008, no. 5, item 77 (pt. III.4) (the French Court of Cassation).

¹² For example, Robert Harmsen, “The European Court of Human Rights as a ‘Constitutional Court’: Definitional Debates and the Dynamics of Reform,” in *Judges, transition, and human rights*, eds. John Morison, Kieran McEvoy, Gordon Anthony (New York: Oxford University Press, 2007), 33–53.

¹³ Online Portal of the Rulings of the Constitutional Tribunal of the Republic of Poland (Internetowy Portal Orzeczeń Trybunału Konstytucyjnego), accessed January 31, 2022, <https://ipo.trybunal.gov.pl/ipo/Szukaj?cid=1>.

the form of a judgment, and in 7 cases – of a decision¹⁴. In 11 of these rulings, the reference was of a general nature without giving a specific ruling by a constitutional court of another country¹⁵. In total, the Tribunal referred to nearly 200 judgments of foreign constitutional courts.

In proportional terms, the Tribunal refers to the constitutional jurisprudence of other countries relatively rarely, but not sporadically. Said 78 rulings constitute about 2.4% of all the rulings made by the PCT between 1986 and 2021 (excluding decisions made in the context of preliminary control). However, if the estimates are limited only to judgments (and before 16 October 1997 also nominally to “resolutions” and “rulings”), it turns out that references to foreign constitutional jurisprudence appear in almost 4.6% of the Tribunal’s judgments.

Foreign constitutional jurisprudence was mentioned in 15 dissenting opinions submitted to 14 rulings of the PCT. In two cases, references to the decisions of constitutional courts of other countries were included both in the ruling of the Constitutional Tribunal and in a dissenting opinion to it.

Chronologically, the first case of reference to foreign constitutional jurisprudence was recognized in the ruling of 30 January 1991¹⁶. Until the end of the 1990s, such references appeared in 13 rulings. In the years 2000–2009 references were identified in 29 rulings, and in the years 2010–2021 in 36 rulings.

¹⁴ The given number does not take into account those judgments in which the Tribunal only reported that the participant in the proceedings referred to foreign constitutional jurisprudence in his argumentation. See PCT, Decision of 8 March 2011, K 29/08, OTK-A 2009, no. 2, item 14 (pt I.1); PCT, Judgment of 12 May 2008, SK 43/05, OTK-A 2008, no. 4, item 57 (pt. I.1.5); PCT, Judgment of 16 October 2007, K 28/06, OTK-A 2007, no. 9, item 104 (pt. I.3); PCT, Judgment of 3 November 2006, K 31/06, OTK-A 2006, no. 10, item 147 (pt. III.4.3); PCT, Judgment of 16 January 2006, SK 30/05, OTK-A 2006, no. 1, item 2 (pt. I.8.2).

¹⁵ The statistics do not consider two decisions, pursuant to which the PCT corrected an obvious error consisting in the erroneous marking of rulings by the Hungarian and German Constitutional Courts in its previous judgments. PCT, Decision of 5 June 2012, K 11/10, OTK-A 2012, no. 6, item 68; PCT, Decision of 10 January 2012, SK 45/09, OTK-A 2012, no. 1, item 8.

¹⁶ PCT, Judgment of 30 January 1991, K 11/90, OTK 1991, no. 1, item 2 (pt. II.2).

The main factor intensifying the reference by the Constitutional Tribunal to foreign constitutional jurisprudence seems to be Poland's accession to the European Union. Such references have been included in 56 rulings of the PCT issued after 1 May 2004. Until then, the Tribunal, for over 18 years of its activity, had mentioned foreign constitutional jurisprudence in 23 judgments. This statistic confirms the correctness of the statement that “The membership of a State in the European Union causes not only the Europeanization of national law ... but also the opening of this law to the legal systems of other Member States”¹⁷.

However, it would be an oversimplification to see only the accession to the EU as a factor responsible for the intensification of the practice of using foreign jurisprudence by the Tribunal. Other possible relevant factors in this regard are, for example, the judicial globalization process, the current easy access to foreign law (including case law) or familiarity of judge-rapporteur as a legal scholar with foreign law.

The adoption of the new Constitution did not have a major impact on the discussed practice. Before the entry into force of the Basic Law (17 October 1997), references to judgments of constitutional courts of other countries were identified in 11 rulings, and from that moment until the accession to the European Union in 12 rulings.

The Tribunal most frequently by far reaches to the decisions of the German Federal Constitutional Court (FCC). It did so in 61 rulings, in which it mentioned a total of 84 judgments and decisions of the FCC. In 10 of these 61 rulings, the Tribunal referred to German constitutional jurisprudence in general, without quoting specific judgments. Considering the fact that there have been 38 in total of the Tribunal's rulings containing references to the judgments of constitutional courts of other countries, it can be said that the FCC's decisions have dominated the comparative analysis of the Polish Constitutional Tribunal. This state of affairs gives rise to ambivalent assessments. On the one hand, the inclination of the Tribunal to look at the FCC's decisions is explained by the historical ties between Polish law and German law¹⁸, taking advantage of the German constitutional system

¹⁷ Bainczyk, “Odwołania do prawa,” 505.

¹⁸ See: Agnieszka Liszewska and Krzysztof Skotnicki, *Związki prawa polskiego z prawem niemieckim* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2006).

experience in creating the Polish constitution and shaping the competences of the Polish Constitutional Tribunal¹⁹ as well as the rich achievements of the FCC and the authority that it commonly enjoys in the legal community in Europe and in the world²⁰. On the other hand, treating almost *a priori* the FCC's jurisprudence as a natural and often the only point of reference calls into question the reliability or representativeness of the results of the comparative considerations and findings of the Tribunal. In 36 rulings of the PCT, the only cited foreign constitutional jurisprudence was the position of the FCC. Meanwhile, the point of view of the *Bundesverfassungsgericht* on a number of issues is only "one of" and not "the unique" or even not necessarily "dominant" in the constitutional jurisprudence of European states. Not uncommon confining only to citing the German constitutional jurisprudence, combined with the practice of not explaining the reasons for the choice of such and not another comparative material, makes the comparative analysis highly selective, and thus weakens its argumentative value and persuasive power. It must be admitted, however, that the German Federal Constitutional Court is the most frequently cited foreign constitutional court in the constitutional jurisprudence of many other European countries²¹.

The judgments and decisions of the PCT refer to the constitutional jurisprudence of 27 countries. Most of these states are European countries included in the culture of continental statutory law, and at the same time – with the exception of Moldova and Switzerland – belonging to the European Union. Among the European countries, to whose constitutional

¹⁹ Allan Tatham, *Central European Constitutional Courts in the Face of EU Membership. The Influence of German Model in Hungary and Poland* (Leiden: Nijhoff, 2013), 41–63.

²⁰ The Federal Constitutional Court has sometimes been described as the "most influential" constitutional court in the world. Christine Landfried, "The Impact of the German Federal Constitutional Court on Politics and Policy Output," *Government and Opposition* 20, no. 4 (1985): 522. Peter Quint, "The Most Extraordinarily Powerful Court of Law the World has Ever Known? - Judicial Review in the United States and Germany," *Maryland Law Review* 65, no. 1 (2006): 153. Cf. also, Stephen Gardbaum, "What Makes for More or Less Powerful Constitutional Courts?," *Duke Journal of Comparative & International Law* 29, no. 1 (2018): 1–40.

²¹ Christoph Grabenwarter, "The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives," *Bulletin on Constitutional Case-Law* (2014): XXI–XXIV; Luis Lopez Guerra, "Constitutional court judges' roundtable," *International Journal of Constitutional Law* 3, no. 4 (2005): 567–569.

jurisprudence the PCT referred to are both Western countries with rich achievements in the field of constitutional review of law (especially Austria, Germany, France, Spain, and Italy), and countries which share with Poland the common historical experience of the People's "democracy" and the socialist command and distribution economy (Bulgaria, Croatia, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovakia, and Slovenia).

It draws attention, and at the same time deserves approval, that the Tribunal in its decisions has not referred yet to the judgments of the constitutional courts of those European countries whose democratic condition and independence of the judiciary raise serious reservations, such as Belarus, Russia, Ukraine or Turkey.

In case of non-European countries, the Tribunal most often referred to the rulings of the Supreme Court of the United States. In 11 of its own rulings 8 judgments of the U.S. Supreme Court have been noted²². The inclusion of the U.S. *case law* by the Tribunal proves that the constitutional jurisprudence from common-law countries also shows the usefulness for a comparative legal analysis. In two other rulings, the Tribunal has also referred to two judgments rendered by the UK House of Lords²³, and a judgment of the Supreme Court of Canada.

Occasionally, the Tribunal reaches in its comparative legal considerations to the constitutional jurisprudence of countries outside Western

²² The lack of exclusivity of the federal Supreme Court in the control of the constitutionality of the law in the United States explains the fact that the Tribunal also relies on judgments of state courts and federal courts of appeals. However, these cases were not included in the quantitative analysis for the purposes of this article. See PCT, Judgment of 10 December 2013, U 5/13, OTK-A 2013, no. 5, item 136 (pt. III.2.5); PCT, Judgment of 9 June 2009, SK 48/05 OTK-A 2009, no. 7, item 108 (pt. III.1.4).

²³ On the "weak" form of the constitutional review of law in the UK, cf. Marta Przygoda, "Ewolucja modelu kontroli konstytucyjności prawa w Wielkiej Brytanii," *Politeja* 21 (2012): 377–386. Mark Tushnet, "The Rise of Weak-Form Judicial Review", in *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon (Cheltenham: Edward Elgar, 2011): 321–333. Piotr Mikuli, *Zdekoncentrowana sądowa kontrola konstytucyjności prawa. Stany Zjednoczone i państwa europejskie* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2007).

civilization²⁴. The only identified cases have been references to the jurisprudence of Israel and the Republic of South Africa. The lack of references to the judgments of the constitutional courts of Latin American and Asian countries is noteworthy²⁵.

In 10 rulings, the Tribunal noted that a participant in the proceedings (the applicant, the Speaker of the Sejm, the Public Prosecutor General, the Ombudsman, the Helsinki Foundation for Human Rights) referred to foreign constitutional jurisprudence, including that only in 4 cases the Tribunal indicated specific judgments. The lack of a precise indication of foreign judicial decisions – invoked by a participant in the proceedings – in Part I (the so-called “historical”) of the reasons for the judgment, should be considered justified whenever the Tribunal itself does not refer or respond to them in Part III of the reasoning. The argumentative economy speaks for this, the more so that the pleadings have been available on the Tribunal’s website²⁶.

3. Qualitative assessment of references to foreign constitutional courts’ rulings

The generally positive assessment of the practice of referring to foreign constitutional jurisprudence in the reasons for judgments and decisions by the Constitutional Tribunal of the Republic of Poland does not mean that

²⁴ The assignment of states to individual civilizations is given by me after Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster Paperbacks, 2011): 51–55.

²⁵ Germany (61/84), France (14/22), The USA (11/8), Austria (10/7), Spain (8/9), The Czech Republic (6/8), Italy (5/11), Estonia (4/5), Slovakia (3/3), Belgium (3/2), Hungary (3/2), Bulgaria (2/2), Denmark (2/2), Romania (2/2), Slovenia (2/2), Latvia (2/1), Switzerland (2/1), Israel (1/3), Lithuania (1/3), Ireland (1/2), The UK (1/2), Cyprus (1/1), Canada (1/1), Croatia (1/1) Moldova (1/1), Portugal (1/1), The RSA (1/0). Firstly, the number of rulings of the Constitutional Tribunal, and then the number of rulings of foreign constitutional courts cited in these rulings are given in parentheses. The digit “O” in the second position indicates that the PCT referred generally to the constitutional jurisprudence of a given state, without indicating any specific judgments. The French constitutional jurisprudence includes not only the rulings of the Constitutional Council, but also of the Council of State. Cf. Radosław Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji* (Warszawa: Uniwersytet Warszawski, 2017, the doctoral dissertation).

²⁶ Królikowski, “Uzasadnienia orzeczeń Trybunału Konstytucyjnego,” 430.

the form of this practice does not raise any objections. Critical attention should be paid to, fortunately few, cases of referring generally to the constitutional jurisprudence of a given state, and, even more so, to foreign constitutional jurisprudence as such²⁷. Failure to mark specific judgments does not allow for verification whether the Tribunal correctly established the law appropriate for a given state. In a way, the reader is “doomed” to believe the Tribunal “on its word”. The laconic reference to foreign jurisprudence only gives the appearance of argumentation, *de facto* being only a stylistic device²⁸. The specific blank references to foreign jurisprudence has been shared by both the Tribunal itself²⁹, and individual judges as authors of dissenting opinions³⁰.

The source of reservations is also the general reference by the PCT to foreign court decisions by means of quoting monographs or scientific articles. Identifying specific judgments that the Tribunal had in mind then requires referring to the cited reference literature. While such cases could

²⁷ PCT, Judgment of 7 May 2014, K 43/12, OTK-A 2014, no. 5, item 50 (pt. III.3.3.1).

²⁸ Similarly, in the context of the enigmatic reference by courts to the “doctrine of law” or the “position of doctrine”, cf. Tomasz Stawecki, “Dorobek nauki prawa w uzasadnieniach decyzji sądowych,” in *Uzasadnienia decyzji stosowania prawa*, ed. Mateusz Grochowski and Iwona Rzucidło-Grochowska (Warszawa: Wolters Kluwer, 2015), 136.

²⁹ PCT, Decision of 16 January 2013, Ts 22/11, OTK-B 2013, no. 4, item 311; PCT, Judgment of 4 December 2001, SK 18/00, OTK 2001, no. 8, item 256 (pt. IV.3); PCT, Judgment of 26 April 1995, K 11/94, OTK 1995, no. 1, item 12 (pt. III.2). We deal with another situation in the reasons for PCT, Judgment of 23 November 2016, K 6/14, OTK-A 2016, item 98 (pt. III.4.3.13), where the Tribunal refers to “the constitutional review in Belgium, the Czech Republic, Estonia, France, Germany and the USA”, and then it quotes no Belgian, French or US ruling.

³⁰ Cf. PCT, Judgment of 20 April 1993, U 12/92 (Czesław Bakalarski, dissent), OTK 1993, no. 1, item 9; PCT, Judgment of 28 May 1997, K 26/96 (Wojciech Sokolewicz, dissent), OTK 1997, no. 2, item 19; PCT, Judgment of 10 July 2000, SK 21/99 (Lech Garlicki, dissent), OTK 2000, no. 5, item 144; PCT, Judgment of 30 September 2015 r., K 3/13 (Wojciech Hermeliński, dissent), OTK-A 2015, no. 8, item 125; PCT, Judgment of 10 July 2019, K 3/16 (Piotr Tuleja, dissent), OTK-A 2019, item 40 (“jurisprudence of the European constitutional courts”). Sometimes, on the basis of a contextual analysis, it is possible to arrive at a conclusion which foreign judgment the judge had in mind, e.g. Judge L. Garlicki, writing in a dissenting opinion to judgment K 26/96 that the case law of the US Supreme Court “since 1973, had recognized the existence of a constitutional right of the mother to terminate an unwanted pregnancy”, thus implicitly referring in this way to the ruling in the case of *Roe v. Wade*, 410 US 113 (1973).

to some extent be justified in the first two decades of the Tribunal's operation, in times of the difficult access to databases of foreign jurisprudence³¹, in the era of online availability of jurisprudence resources, one can expect the Tribunal to refer directly to individual judgments of constitutional courts of other countries and their individualized designation in the reasoning³². The indication of scholar studies in which these judgments were discussed in the reasoning may, however, be complementary³³. Occasionally, the PCT provides a link to the cited foreign ruling as well as its Polish or English translation³⁴.

Another drawback is the inaccuracy of marking foreign rulings cited by the Tribunal. It would be optimal to provide the name of the court, the date of the ruling, the case number and the official publisher. While the omission of the publisher is acceptable, failure to provide the date or reference number of the judgment should be treated in terms of unreliability, and it has been the case in both the older³⁵ and the more recent decisions of the PCT³⁶.

The extension of foreign constitutional jurisprudence, considered for comparative aims by the PCT, to the judgments of the constitutional courts of Central European countries should be assessed positively. Common historical experiences, with regard to the political, economic and social system, have meant that the constitutional courts there have often subjected their assessment to the same issues that have had to be examined also

³¹ PCT, Judgment of 19 June 1992, U 6/92, OTK 1992, no. 1, item 13 (pt. III.3).

³² Cf. PCT, Judgment of 7 October 2015, K 12/14, OTK-A 2015, no. 9, item 143 (pt. III.3.3.1); PCT, Judgment of 25 May 2004, SK 44/03, OTK-A 2004, no. 5, item 46 (pt. VI.5); PCT, Judgment of 12 April 2000, K 8/98, OTK 2000, no. 3, item 87 (pt. V.4).

³³ Presenting the relevant Polish-language reference literature next to a foreign ruling may facilitate the reader's perception of the Tribunal's argumentation, in a situation where in the reasoning the ruling was more mentioned than analysed. Such a practice may also be helpful for people who do not speak the language in which the ruling cited by the Tribunal was originally formulated.

³⁴ PCT, Judgment of 2 April 2015, P 31/12, OTK-A 2015, no. 4, item 44 (pt. III.8.2); PCT, Judgment of 10 December 2013 r., U 5/13, OTK-A 2013/9/136 (pt. III.2.5).

³⁵ For example, U 6/92 (pt. III.3); PCT, Judgment of 22 November 1995, K 19/95, OTK 1995, no. 3, item 16 (pt. III.4).

³⁶ For example, PCT, Judgment of 3 December 2015, K 34/15, OTK-A 2015, no. 11, item 185 (pt. III.1.1).

by the Polish Constitutional Tribunal. In such cases, the jurisprudence of the constitutional courts of, e.g. the Czech Republic, Slovakia, Hungary, Lithuania or Estonia seems to be a more adequate comparative material for the Polish Tribunal than, for example, the jurisprudence of the French Constitutional Council or the Austrian Constitutional Tribunal. Even if the constitutional courts of Western countries dealt with a particular constitutional and legal issue, which the Polish Constitutional Tribunal was faced with in time, the different historical, political or social background creating the context for this constitutional and legal problem in these countries means that the argumentation and conclusions of the constitutional courts from that part of Europe may have a limited potential for the Polish Constitutional Tribunal. With the passing of years, it is less and less convincing to argue that some preference to refer to the constitutional jurisprudence of Western countries is supported by the “maturity” of the democracies of these countries. While in the 1990s, in the period of deep political and economic transformation, it was somewhat natural for the Tribunal to focus its comparative considerations on the jurisprudence of Germany or France, 30 years after the 1989 milestone, the achievements of the constitutional courts in the states of Central Europe and the Baltic countries are equally valuable – from the viewpoint of the comparative law method – for the Polish Constitutional Tribunal³⁷.

This statement should not be interpreted as a postulate of abandoning or even limiting further reference to the constitutional jurisprudence of Western countries. It only expresses an approval and justification for a greater diversification of the comparative materials taken into account and the “non-hierarchization” of it based on the criterion of the origin of

³⁷ It seems that the Tribunal sometimes classifies some countries too apriorily as “countries with mature democracy, well-established understanding of the separation of powers, and a high legal and political culture” in opposition to the so-called young democracies with “the unfixed democratic custom and lower professional efficiency of the state apparatus, and especially the mechanism of separation of powers, which is only just being polished”, thus explaining the preferences in the comparative reflection for law and jurisprudence of Western countries. PCT, Judgment of 28 November 2007, K 39/07, OTK-A 2007, no. 10, item 129 (pt. III.10.1). This does not mean, however, that this preference is categorical. Cf. e.g. PCT, Judgment of 24 November 2010, K 32/09, OTK-A 2010/9/108 (pt. III.2.6).

the constitutional court from Western or Central Europe, which has been visible in the rulings of the PCT for several years³⁸.

Rarely, the PCT formulates methodological comments as to its reference to foreign law, including foreign jurisprudence. In one of the judgments, it stated that “The analysis by the Constitutional Tribunal of foreign domestic law, as well as jurisprudence in the field of public international law – which results from the fact that modern legal systems have become closer to each other – must be preceded by a reservation that it requires meeting various conditions and maintaining awareness of a different context. ... It should be additionally noted that in the event that the Tribunal refers to foreign domestic law, it is necessary to determine the adequacy of using foreign models for the interpretation of Polish law. In particular, it is necessary to take particular care to ‘choose’ the legal system to which the reference is made”. It is significant that the following sentence of the reasoning after the quoted excerpt reads: “In the case under consideration, it is appropriate to refer to the legal solutions functioning in Germany and to the jurisprudence of the European Court of Human Rights”³⁹. However, the Tribunal did not explain in any way why the German solutions were the “appropriate” comparative material.

The Tribunal can be expected to justify the adoption of a specific law or foreign jurisprudence for a comparative analysis. «The court should explain on the basis of which comparative method it makes its findings and according to which criteria it selects the reference legal system with which it compares its own decision»⁴⁰. The explanation of the selection criteria for

³⁸ The Tribunal referred for the first time to constitutional jurisprudence of a post-communist country, *in concreto* of Hungary, in 2004 (PCT, Judgment of 25 May 2004, SK 44/03, OTK-A 2004, no. 5, item 46 (pt. VI.5)). However, only since 2008, in the framework of its comparative legal analysis, the Tribunal has begun to recognize the constitutional jurisprudence of Central European countries more widely.

³⁹ PCT, Judgment of 3 July 2008, K 38/07, OTK-A 2008, no. 6, item 102 (pt. III.4).

⁴⁰ Fryderyk Zoll, “Argumentacja komparatystyczna w polskich sądach,” in *Prawo obce w doktrynie prawa polskiego. Polska komparatystyka prawa*, ed. Arkadiusz Wudarski (Warszawa-Frankfurt nad Odrą: Stowarzyszenie Notariuszy Rzeczypospolitej Polskiej, 2016), 127. Likewise, Paprocka, “Argument komparatystyczny w orzecznictwie Trybunału Konstytucyjnego,” 52–53.

the comparative material is important, since the selection of this material is translated into some conclusions obtained in the comparative analysis⁴¹.

The justification by the PCT of the choice of a particular foreign law as a comparative source is – if it exists at all – brief and quite general. The Tribunal refers, for example, to the criterion of “similarity” or “closeness” of the foreign legal system to “the Polish legal culture”⁴². It emphasizes the fact that specific foreign legal systems “have had a significant impact on the shaping of contemporary Polish law, as well as the legal systems of other democracies”⁴³. Sometimes the selection of foreign law and constitutional jurisprudence is dictated by the similarity of the “historical experiences” of Poland and other countries⁴⁴. Another time, the Tribunal emphasizes the “maturity” or “consolidation” of democracy or “stability of the market economy” of these countries, to whose law or jurisprudence it refers comparatively⁴⁵.

The use of the comparative method by the Tribunal has very rarely been the subject of objections by the PCT judges as the authors of dissents. For example, in the context of the constitutionality of ritual slaughter, Judge Mirosław Granat, in a dissent, argued that the Tribunal’s statement that “the protection of animals does not have priority over the provisions of the Constitution guaranteeing freedom of religion”, at best “is based on quoting the administrative or constitutional jurisprudence of other countries”⁴⁶.

It happens that the Tribunal, by reporting the fact of a reference of a participant of the proceedings to foreign jurisprudence, at the same time evaluates indirectly the quality of these judicial decisions, and thus their

⁴¹ Cf. PCT, Judgment of 30 October 2006, P 10/06, OTK-A 2006, no. 9, item 128 (pt. III.2.2), where both the Tribunal and Judge Ewa Łętowska, as the author of a dissent, found support in the comparative arguments for the thesis about the constitutionality and unconstitutionality of Art. 212 of the Penal Code penalizing slander.

⁴² PCT, Judgment of 15 January 2009, K 45/07, OTK-A 2009, no. 1, item 3 (pt. III.2.4).

⁴³ *Ibidem*.

⁴⁴ PCT, Judgment of 19 July 2011, K 11/10, OTK-A 2011, no. 6, item 60 (pt. III.3.2).

⁴⁵ PCT, Judgment of 30 October 2006, P 10/06, OTK-A 2006, no. 9, item 128 (pt. III.2.2); PCT, Judgment of 28 November 2007, K 39/07, OTK-A 2007, no. 10, item 129 (pt. III.10.1); PCT, Judgment of 14 March 1995, K 13/94, OTK 1995, no. 1, item 6 (pt. III).

⁴⁶ PCT, Judgment of 10 December 2014, K 52/13 (Mirosław Granat, dissent), OTK-A 2014, no. 11, item 118.

adequacy for the case under examination, e.g. by including them among the judgments of “states of the so-called immature democracies (Hungary, Slovakia)”⁴⁷. The use of the term “immature democracy” was not merely descriptive.

The comparative analysis is not an integral or inseparable element of the reasons for the rulings of the Polish Constitutional Tribunal. Sometimes, however, the Tribunal presents the consideration of the comparative legal context in terms of a procedure necessary for the proper examination and adjudication of a case⁴⁸. This does not mean, of course, that the Tribunal then treats the legal solution adopted in another state as prejudging its own conclusions and decisions⁴⁹.

Some authors combine the practice of the PCT to refer to the law and jurisprudence of other EU countries with the existence of a European «constitutional community in a horizontal dimension, within which there is an increasingly intense exchange of constitutional ideas»⁵⁰. Other representatives of the legal doctrine argue that “The assumptions of existence of a common European legal tradition as a binding, even subsidiarily, normative order is a wonderful idea and may constitute a kind of philosophical postulate for Western countries. However, it is rather an expression of a certain romantic mythodology that would be difficult to apply in legal practice. For now, we are experiencing a deep crisis in the integration process”⁵¹.

The phenomenon of transnational judicial discourse or dialogue mentioned in the introduction to the article – one of the manifestations of which is the reference to foreign law and jurisprudence in the ruling reasonings – finds an explanation not only in the processes of Europeanization

⁴⁷ PCT, Judgment of 12 May 2008, SK 43/05, OTK-A 2008, no. 4, item 57 (pt. I.1.5).

⁴⁸ PCT, Judgment of 16 March 2010, K 17/09, OTK-A 2010, no. 3, item 21 (pt. III.1.4); PCT, Judgment of 3 June 2008, K 42/07, OTK-A 2008, no. 5, item 77 (pt. III.4); PCT, Judgment of 23 November 2016, K 6/14, OTK-A 2016, item 98 (pt. III.4.3.12).

⁴⁹ Cf. PCT, Judgment of 12 December 2005, K 32/04, OTK-A 2005, no. 11, item 132 (pt. III.3.1) [“The comparative argument that similar measures happen to be used at all in other countries is also irrelevant”]; PCT, Judgment of 14 May 2009, K 21/08, OTK-A 2009, no. 5, item 67 (pt. IV.6.4.1) [“The experiences of other Member States of the European Union, although not without significance, cannot determine the accuracy of the adopted solutions”].

⁵⁰ Bainczyk, “Odwołania do prawa obcego,” 506.

⁵¹ Zoll, “Argumentacja komparatystyczna w polskich sądach,” 130.

or, more broadly, globalization and multicentricity of law⁵². Reference or non-reference to foreign jurisprudence by courts is also related to the style of justifying judicial decisions, appropriate for a given legal order. Citing foreign jurisprudence in the texts of court judgments is characteristic for the German style, but not for the French one⁵³. The French style is featured by the categorical utterance of the court presenting the ruling as the only possible result of a syllogistic subsumption of the actual facts to a meaningfully unquestionable legal norm decoded from the text of a normative legal act. The German style, on the other hand, is of a discursive rather than magisterial character. Its discursiveness is manifested in the fact that “the judge, by showing various points of view, interpretation options and possibilities of decision,” thus communicates that he or she “has a space for manoeuvres and that he or she has a choice among several options, all of which ‘can be defended’ against the background of the text that served him or her as the basis for the decision”⁵⁴.

However, the style of reasoning does not always determine the willingness of courts to invoke judgments of other countries’ courts, as evidenced by the decision-making practice of courts in common law countries for which the Anglo-American style is appropriate. While American courts, and especially the federal Supreme Court, relatively rarely refer to both foreign law and jurisprudence, the courts of other common law countries show a much greater readiness to quote foreign law and jurisprudence in the reasons for their own judgments⁵⁵. Moreover, the cases of using the comparative argumentation are a subject of deep controversy in American

⁵² Jan Wawrzyniak, “O potrzebie uprawiania prawa konstytucyjnego porównawczego,” *Państwo i Prawo* 9 (2020): 119.

⁵³ For more on the styles of reasoning, cf. Iwona Rzucidło-Grochowska, “Wcześniejsza decyzja sądowa jako argument uzasadnienia orzeczenia sądowego,” in *Precedens sądowy w polskim porządku prawnym*, ed. Bartosz Liżewski, Adam Szot, Leszek Leszczyński (Warszawa: C.H. Beck, 2018), 244–252.

⁵⁴ Ewa Łętowska, “Pozaprocesowe znaczenie uzasadnienia sądowego,” *Państwo i Prawo* 5 (1997): 4.

⁵⁵ Cf. Elaine Mak, “Reference to Foreign Law in the Supreme Courts of Britain and the Netherlands: Explaining the Development of Judicial Practices,” *Utrecht Law Review* 8, no. 2 (2012): 20–34. Bijon Roy, “An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation,” *University of Toronto Faculty of Law Review* 62, no. 2 (2004): 99–148.

jurisprudence itself and in American legal scholarship. Exceptionism, inherent for the U.S. judiciary, or even isolationism, prevents the courts from applying more widely the comparative method whenever the comparative material is to be non-U.S. law and jurisprudence, both international and national⁵⁶.

It is an assessment matter to assign the form of reasons for Polish courts' rulings to one of the styles. Legal scholars indicate that "the Polish practice of providing reasons is somewhere in the middle" between the German and French styles⁵⁷. It seems, however, that over the three decades after 1989, it has been possible to observe a certain transformation in the style of providing reasons for judgments of Polish courts, which "shifts on the scale from French rulings to German rulings", i.e. from "authoritarian" to "more discursive" argumentation⁵⁸.

From the very beginning of its operation, the reasons for rulings of the PCT have had elements of the German style. Although comparative legal considerations did not occur – as already mentioned – in the judgments from the second half of the 1980s, even then the Tribunal also referred to the views of legal scholars, including those expressed in the form of expert opinions.

The PCT's reference to foreign constitutional jurisprudence has also been influenced by the increasing ease of access to this jurisprudence. The emergence of online digital databases of jurisprudence, sometimes even including English translations of some of the rulings of the constitutional courts of individual countries, has facilitated significantly comparative analysis.

Moreover, the fact that most of its judges belong to the academic legal community is a favourable circumstance conducive to making use of legal-comparative analysis by the PCT. Experiences in using the comparative

⁵⁶ Cf. Gráinne de Búrca, "International law before the Courts: the EU and the US compared", *Virginia Journal of International Law* 3 (55) (2015): 685–728; Steven G. Calabresi, "«A Shining City on a Hill»: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law", *Boston University Law Review* 86, no. 5 (2006): 1335–1416.

⁵⁷ Artur Kotowski, "Operatywna wykładnia prawa w warunkach multicentryzmu," *Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji* 104 (2016): 212.

⁵⁸ Zoll, "Argumentacja komparatystyczna w polskich sądach," 120.

method in research and academic teaching activities increase the readiness to include this method in judicial activity.

Determining the specific functions or objectives of references to jurisprudence of foreign constitutional courts would require a separate analysis of each of the Tribunal's judgments in which such references appear. However, making a simplified generalization, it can be legitimately stated that in most cases foreign jurisprudence plays the role of persuasive authority. Therefore, foreign judgments neither determine the Tribunal's decision, nor does their mentioning boil down to eristic ornamentation, but are part of the rationalization of the Tribunal's conclusions. In other words, they constitute an additional argument for the accuracy of the Tribunal's own autonomous findings.

4. Conclusion

During over 30 years of the Polish Constitutional Tribunal's activity, the operationalization of the comparative legal method in its jurisprudence has undergone a significant evolution. Until the end of the 1980s, the Tribunal did not refer to foreign law and jurisprudence in its rulings. It started to use comparative argumentation in the early 1990s in the new geopolitical, constitutional and socio-economic conditions. From then on, the frequency of referring to foreign constitutional jurisprudence by the PCT remained at a similar level until Poland's accession to the European Union. Poland's participation in the process of European integration has intensified the practice of comparative reference by the PCT to the rulings of constitutional courts of other countries, usually European ones. However, the assessment of the contemporary condition of the European integration and its translation into the title issues remains a controversial question.

Recent years show that, the practice of citing foreign constitutional jurisprudence may be strongly influenced by political factors, reflected in the selection by the parliamentary majority of persons appointed as judges of the Polish Constitutional Tribunal. In 2017–2020, there was no case of a reference by the PCT to a judgment of a foreign constitutional court. In 2019 and 2020, such references appeared only in dissenting opinions to 4 rulings. This situation is a certain phenomenon, considering the fact that almost continuously since 1991 every year (with the exception of 1996) in at least one of its rulings, and usually even in several, the Tribunal referred

to judgments of other constitutional courts. The explanation for this state of affairs may be the profound changes in the composition of the Tribunal that took place in 2015–2017. However, in the judgment of 14 July 2021 – regarding EU Court of Justice issuing interim measures relating to the system and jurisdiction of Polish courts and the procedure before Polish courts – the Tribunal referred to a total of 31 decisions of constitutional courts of 12 countries. With this in mind, it is still difficult to predict whether a certain regression in taking into account foreign constitutional jurisprudence in the comparative legal analysis carried out by the PCT is temporary, or is a harbinger of a more permanent reorientation in its jurisprudence to the resemblance to the exceptionalism inherent for the U.S. Supreme Court⁵⁹. Time will tell.

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⁵⁹ Another observed trend is the decrease in the number of the issued judgments starting from 2016. In 2018, the Court issued 72 rulings, which was the lowest number since 1999. In 2019 and 2020, the Court issued 70 rulings each year and from 2021 there are 75 judgments.

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