

Interest Group on

Use of Foreign Precedents by Constitutional Judges

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by

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Object

The use of foreign case law (and not of foreign constitution or foreign legislation) by constitutional courts is the object of this research.

“Constitutional Courts” means specialised Constitutional Courts, in the countries that follow the “Kelsenian model” of judicial review. It includes Supreme Courts which decide on constitutional cases in the countries that follow the “American model” of judicial review.

A constitutional case, according to these guidelines, is a case that involves the “constitutional interpretation” and that deals both with “institutional” and “human rights” issues.

The use of international case law is not included in the research, except if the country is not a party of the treaty because in this case there is not a hierarchical relationship between national and international or supranational institutions (for example, the use of ECHR by the US Supreme Court or by the High Court of Australia).

Methodology

This research is based on single-countries studies.

For each country should be pointed out:

a) The context:

a.1 context relating to the constitution and the legal system: cultural and historical origins; foreign influences on the constitutional text underlying mainly the influence on the bill of rights; common law, civil law or mixed system.

a. 2 context relating to the courts: the career of the judges; the use of the precedent itself; techniques of judicial reasoning, such as dissenting or concurring opinions; propensity toward the citation of the foreign law or foreign case law by the ordinary courts; propensity toward the citation of international case law; extrajudicial speeches of the judges on the use of foreign case law.

a.3 context related to the scholarship: links between legal scholarship and the courts; attention paid by the scholars to the influence of the foreign case law; existence of a debate on the use of foreign case law by the courts.

b) The empirical research:

b.1 explicit citations of foreign case law;

b.1.1 quantitative approach:

numbers of foreign citations out of the total number of decisions; number of citations of the decisions of each foreign jurisdiction cited; number of citations in cases dealing with human rights and in cases dealing with institutional issues; countries that are cited.

The possibility to have some tables to summarise might help (see the Israeli report).

b.1.2. quality-based approach:

for each case that cite foreign case law, we should have a record, recording both formal and substantive indicators of the influence of the foreign case law.

Formal indicators:

if the citation is in the majority opinion or in the dissenting opinion; if there is a mere reference or a quotation of entire paragraphs; if the citation is in the text of the decision or in a footnote; who put foreign precedents before the court (the parties or the court itself); what is cited: e.g. a dissenting opinion of another court.

Substantive indicators: based on an analysis of the legal reasoning;

We are aware that we should accept a certain degree of approximation.

The analysis should be carried out (if possible) according to the following guidelines.

1) Citations used at the very first stage of the interpretative process, when reasoning must be oriented. Examples of similar cases decided in other jurisdictions may be useful to illustrate the range of potential choices, or rather, of their possible consequences.

2) Citations used with the purpose of proving that “even there” a certain measure was adopted, which the court intends to adopt “even here.” It should be pointed out if “even there” refers to a group of democracies or when “even there” refers to a single jurisdiction.

3) Citations cited as an example not to be followed (*a contrario*), in order to set aside some of the potential interpretative readings.

b.2. implicit influences: we are aware that to assess the implicit influences of foreign case law is very difficult, almost impossible; notwithstanding, we believe this is a very important point and that all the reports should deal with it.

In particular, the role of individual judges has to be taken into consideration because different judges appear to adopt significantly different citation practices when delivering a dissenting or concurring opinion.

At this regard, we should think of informal interviews rather than questionnaires. The role of law clerks is also crucial and should be carefully analyzed.

Other elements to be analyzed: in order to better understand the reasons for the quotation of the foreign case, it might help the confrontation with the Court’s precedents (does it happen in a case that confirm or that overrule a precedent); it might be useful also to remark if the citation happens in a divided court, or in an unanimous court.

Time Period

It is not possible to fix exactly a time period to be analyzed for all the countries.

The time period should be established by the researcher, according to the specificities of each country. Each report has to justify the time period chosen.

It should be included “formative period” (it can help to discover a tendency); of course it is good if all the experience of the analyzed jurisdiction could be analyzed, in order to compare the different use along the time.

Goals

The research has two main goals:

1) From a scientific point of view:

1. We would like to clarify the very controversial issue of the use of foreign case law (that very often is an easy argument in favor of the anticomparativism) by improving the empirical research;
2. We would like to check the reality of the thesis of the transjudicial dialogue between courts;
3. We would like to check the reality of the thesis of the convergence of the common law and civil law traditions.

2) In practice:

The goal is to held a workshop on the topic in the next World Congress of the IACL in Mexico City, December 2010 and to publish the papers after the Congress in a book.

Language of work

The guidelines of the research are written in English, but the presentation and the report of the research could be either in English or in French, as you prefer.

Dedicated webpage

<http://www.unisi.it/dipec/en/interestgroup.php>

The page provides a general description of the Interest Group's origin, current composition and goals. It also provides an overview of the research that the Interest Group is currently carrying on.

A link within the text ("dedicated webpage") will take you to a reserved area where all the relevant materials drafted so far will be available for download: country reports; a complete list of the members with their respective e-mail addresses; the report of the first meeting held in London on November 15, 2008; a bibliography including law review articles and books addressing the subject of the research (updated on a monthly basis).

Agenda

The next steps will be:

- To go on with the reports, by carrying on the empirical research (mainly the part on substantive indicators, still missing, and the part on implicit influences)
- To organize a meeting in 2010 (proposed date: 24 April 2010, Tuscany)
- To post all the new material on the dedicated webpage of the University of Siena