Trends in the use of foreign law: A review of *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems*

John Stanton*

Abstract: This review article offers a discussion of *Judicial Cosmopolitanism: The Foreign Law in Contemporary Constitutional Systems* and explores the contribution the book makes to an ever growing corner of comparative constitutional law. It starts by placing scholarship focusing on judicial use of foreign law within the broader field, marking out Ferrari's contribution as comprehensive. It then explains, in detail, some of the trends that can be identified from Ferrari's text, embarking on a discussion of the varying ways in which jurisdictions across the world make use of foreign law.

Keywords: comparative constitutional law; foreign law; judicial use of foreign law (explicit; non-explicit; and limited)

I. Introduction - comparative constitutional law

Comparative constitutional law has emerged relatively recently as a prominent area of legal scholarship.

> "From its beginnings as a relatively obscure and exotic subject studied by a devoted few, comparative constitutionalism has developed into one of the more vibrant and exciting subjects in contemporary legal scholarship, and has become a cornerstone of constitutional jurisprudence and constitution-making in an increasing number of countries worldwide".[1]

Explaining the relative youth of the area, Rosenfield and Sajó also discuss the manner in which "constitutional law was often neglected in the comparative study of great legal systems

* Senior Lecturer in Law, The City Law School, City, University of London, Northampton Square, London EC1V 0HB. Email: john.stanton.1@city.ac.uk

[1] Ran Hirschl, "Comparative Methodologies" in Roger Masterman and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2019), 11, 11.

... [possibly] due to the difficulties in finding universal elements in constitutional law".[2] It is in part for this reason that they go on to explain how "[c]omparative constitutional law scholarship did not emerge as an academic discipline until after the Second World War".[3] Since then, though, there has been a burst of academic contributions to the field, offering a fast growing library of scholarship that focuses on a wealth of different issues and discussions.[4] These include comparative exploration of fundamental constitutional principles; discussion of the varying ways in which human rights are protected across the world; differing constitutional structures and arrangements; and consideration of the ways in which constitutions come into effect and are amended. In these – and many other – ways, the field of comparative constitutional law has, like many other areas of legal scholarship, become subdivided into more specifically focused, or niche, areas.

One such subdivision concerns the way in which supreme and constitutional courts across the world draw from and use foreign law in reaching their decisions and in informing their judgments. Foreign law, in this context, is a broad term. It can refer to legal instruments, case law or academic writings that have been introduced in *another* jurisdiction. To a large extent, it includes laws passed and cases decided in other countries, often of similar or relatable constitutional foundation, but it can also refer to laws and cases on a supranational plane (e.g. the European Convention on Human Rights[5] or the European Union[6]) and provisions and decisions of international law. As discussions below will indicate, the use of "foreign law" differs greatly across the world and is dependent upon a number of factors. Generally speaking, though, and with some notable exceptions, the practice is a relatively recent one. Murray explains why this is:

---

[2] Michel Rosenfield and András Sajó, "Introduction" in Michel Rosenfield and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1, 5.

[3] *Ibid.,* 5, citing Günther Doeker-Mach, "Comparative Constitutional Law: Reflections on the Past and Concerns about the Future" in Günther Doeker-Mach and Klaus A. Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (2004), 337.

[4] See, for example, Michel Rosenfield and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012); and Roger Masterman and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2019).

[5] Hereinafter ECHR.

[6] Hereinafter EU.

> "That national courts increasingly refer to the case law of foreign and international courts is a phenomenon indicative of the era in which we live. That is to say, the era of globalisation … Courts, particularly supreme or constitutional courts, are more than ever looking at how complex jurisprudential problems are resolved in judicial decisions of foreign countries".[7]

The global emergence of this trend and the value with which it is regarded is also explained by Halmai, who notes that:

> "Judicial use of foreign law … has been made possible by a dialogue among high court judges with constitutional jurisdiction around the world, conducted through mutual citation and increasingly direct interactions. This growing 'constitutional cross-fertilization' can prove to be not only a tool for better judicial judgments, but eventually also for the construction of a 'global legal system'".[8]

The value of foreign law is self-evident. As the world becomes smaller, better connected and with increased emphasis on the "global", use of foreign law, as a manifestation of globalization, encourages states to look beyond their own borders and to contribute to and engage with "an international community of courts that share similar views on similar legal questions".[9] Indeed, in Duranti's chapter in *Judicial Cosmopolitanism: The Foreign Law in Contemporary Constitutional Systems*, the former Chief Justice of the Norwegian Supreme Court is cited as explaining that "[i]t is a natural obligation that, in so far as we have the capacity, we should take part in European and international debate and mutual interaction. It is the duty of national

---

[7] The Hon. Mr. Justice John L. Murray, "Judicial Cosmopolitanism" (2008) 2 *Judicial Studies Institute Journal* 1, 1 and 2.

[8] Gábor Halmai, "The use of foreign law in constitutional interpretation" in Michel Rosenfield and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1328, 1328, citing Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 65 - 103.

[9] Francesca Polacchini, "Foreign Law and Foreign Case Law before Latin American Constitutional and Supreme Courts" in Giuseppe Franco Ferrari (ed.), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Leiden: Brill / Nijhoff 2019), 827, 850. (Hereinafter, simply *Judicial Cosmopolitanism*).

courts … to introduce new legal ideas from the outside world into national judicial decisions".[10] In this context, the use of foreign law has quickly emerged as an interesting and valuable area of comparative constitutional law and it is in this field that *Judicial Cosmopolitanism: The Foreign Law in Contemporary Constitutional Systems* places its contribution. This article offers a review of the book, outlining its approach and its contribution to the field, before going to identify the way in which its various discussions and chapters reflect an interesting trend as regards judicial use of foreign law.

II. Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems

Judicial Cosmopolitanism: The Foreign Law in Contemporary Constitutional Systems, edited by Giusseppe Franco Ferrari of Bocconi University in Milan, is a comprehensive anthology of the way in which constitutional courts the world over draw from and use foreign law in deciding their own cases and developing their own judgments and case law. It is vast in its scope, with 31 chapters arranged geographically and discussing approaches taken across Europe, Asia, Latin America, Israel and various Common Law countries. Each chapter has been written by a specialist in that particular jurisdiction, bringing together a wealth of expertise that serves to make this *the* book on the subject. In the opening chapter, Ferrari attributes the growing prominence of judicial use of foreign law to "the recourse to comparative law (and indeed international law) by the US Supreme Court at the turn of the millennium and in the first few years of the new century".[11] Indeed, the cases of *Lawrence v. Texas*[12] and *Roper v. Simmons*[13] are singled out as indicating the developing "worldwide interest" afforded to the study of comparative constitutional interpretation.[14] It is here that our exploration of the judicial practice starts.

---

[10] Statement by Carsten Smith - Chief Justice of the Norwegian Supreme Court (1991 - 2002) - quoted in Anne-Marie Slaughter, *A Global Community of Courts*, (2003) 44 Harv. Int'l L J 194 - 195, cited at Francesco Duranti, "The Use of Foreign Precedents in Constitutional Interpretation by the Nordic Courts" in *Judicial Cosmopolitanism*, 461, 469.

[11] Giuseppe Franco Ferrari, "Introduction: Judicial Constitutional Comparison and its Varieties" in *Judicial Cosmopolitanism*, 1, 2 – 3.

[12] 39 U. S. 558 (2003).

[13] 543 U.S. 551 (2005).

[14] Ferrari, (n 11), 3.

In *Lawrence v. Texas*, the US Supreme Court was asked to consider whether a "Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" contravened the Due Process Clause of the Constitution's Fourteenth Amendment.[15] In finding that it did, Supreme Court Justice Kennedy drew from the European Court of Human Rights[16]decision in *Dudgeon v. United Kingdom*[17], a case that Kennedy acknowledged had "parallels" with that before the court in *Lawrence*.[18] In *Dudgeon*, the ECtHR held that Mr. Dudgeon had suffered "an unjustified interference with his right to respect for his private life. … [protected by] Article 8 [ECHR]",[19] as a result of the criminalization in Northern Ireland of sexual activity between consenting adults of the same sex. In a similar token, and referring to the Strasbourg Court's decision, the Supreme Court in *Lawrence* held that any American laws that prohibited sexual activity between adults of the same sex were unconstitutional. The Supreme Court Justices, therefore, not only made explicit reference to foreign law but also drew from that law in reaching its own decision. Similarly, in the case of *Roper v. Simmons*, the US Supreme Court was asked to consider whether imposing capital punishment against a juvenile offender was consistent with the eighth and fourteenth amendments of the Constitution. In finding that the Constitution was infringed by such a sentence, Justice Kennedy again drew from legal systems across the world and noted that

> "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty".[20]

These two cases, therefore, demonstrate how foreign law informed the US Supreme Court's decision and its own practices of constitutional interpretation. Despite the significance Ferrari attributes to these cases, though, they are by no means the first or the most significant instances

[15] 39 U. S. 558 (2003), 562.

[16] Hereinafter ECtHR.

[17] 45 Eur. Ct. H. R. (1981).

[18] 39 U. S. 558 (2003), 573.

[19] 45 Eur. Ct. H. R. (1981), para. 63.

[20] 543 U.S. 551 (2005), 577.

of judicial recourse to foreign law. Indeed, and notwithstanding these cases, the US Supreme Court nowadays makes virtually no reference to foreign law, as this article will go on later to explain. Elsewhere in the world, though, the trend has persisted and grown in recent years. The breadth of this trend is acknowledged by Ferrari who, in the Introduction to this book, explains how the differing constitutional systems considered throughout *Judicial Cosmopolitanism* can be categorized and sub-divided within the field. On this foundation, the book does very well to unite a very broad range of legal systems and constitutional practices together within focused themes and discussions, also picking out existing literature within relevant areas and giving an insight into the way in which judicial activities concerning foreign law fit within the broader constitutional structures and practices of each country at issue. In this way, the *Judicial Cosmopolitanism* makes an extremely valuable contribution to the field and to the area of comparative constitutional law generally. As a means of demonstrating this contribution, the article now goes on to identify and examine the differing emphases that countries across the world place on the use of foreign law and how the actual practice of referring to foreign law varies from jurisdiction to jurisdiction.

II. Comparing the use of foreign law in courts across the world

Looking across the various countries discussed in *Judicial Cosmopolitanism* that make use of foreign law, it is possible to identify certain categories that reflect differing practices and approaches. Though Halmai notes that "constitutional jurisdictions tend to fall into one of three categories: those which do not use foreign law … those which do use foreign law but do not do so explicitly, and those which do so explicitly",[21] there are possibly two further categories that might also be identified. These are, namely, where foreign law is used in limited circumstances or to a limited degree; and where the practice of using foreign law has fluctuated over time. Drawing from both Halmai's contributions to the field, as well as these additional categories, it is the purpose of this section of the article to discuss and examine how some of the countries discussed in *Judicial Cosmopolitanism* fall under one of the following four headings: (a) countries making explicit use of foreign law; (b) countries making limited use of foreign law; (c) countries making non-explicit use of foreign law; and (d) countries where the use of foreign law has varied over time. In so doing, this section focuses extensively on *Judicial Cosmopolitanism*, thereby demonstrating the extent of its contribution to the field.

[21] Halmai, (n 8), 1329.

A. Explicit use of foreign law

There are a number of states across the world and discussed in *Judicial Cosmopolitanism* that make clear and blatant use of foreign law in their constitutional courts. In India, "the Supreme Court … make[s] detailed analysis of relevant judicial decisions, commentaries and scholarly writings from other jurisdictions, especially where the court is propounding a new legal principle". [22] In Latin America, "[t]he use of comparative law by both Supreme and Constitutional courts is a fundamental part of the legal tradition";[23] and in the Middle East, "the Israeli Supreme Court has always made abundant use of foreign law in its adjudication".[24] Use of foreign law in these jurisdictions enables the judiciary to engage in a global conversation, through which judges are able to contribute to their own experiences and findings to "an international community of courts that share similar views on similar legal questions".[25] Indeed, and echoing this, Pierdominici, in the chapter on Israel, talks about the way in which use of foreign law permits states to become "a prominent participant in those *transnational judicial conversations* described by scholars as a global phenomenon based on comparative law".[26] The value of judicial use of foreign law, then, is – again – self-evident. As Granat notes in commenting on Poland's broad use of "comparative analysis" in the Constitutional Tribunal, "[i]t seems a natural way of judging by a constitutional court".[27]

Across the range of countries in which courts make full and explicit use of foreign law, though, an interesting trend can be identified. Broadly speaking, there appears to be a correlation between those states where foreign law is readily cited by the courts and the relative age and origin of that state's constitution. To put this another way, where a country's constitutional system draws from or is influenced by other systems across the world, then there appears to be greater willingness to refer to foreign law. This is readily apparent from many of

---

[22] Anton Cooray, "Developing an Indian constitutional jurisprudence drawing on judicial thinking in the rest of the common law world" in *Judicial Cosmopolitanism*, 177, 187.

[23] Polacchini, (n 9), 849.

[24] Leonardo Pierdominici, "The Supreme Court of Israel and the use of Comparative Law" in *Judicial Cosmopolitanism*, 853, 858.

[25] Polacchini, (n 9), 850.

[26] Pierdominici, (n 24), 869.

[27] Miroslaw Granat, "Comparative analysis in the case law of the Constitutional Tribunal of Poland" in *Judicial Cosmopolitanism*, 567, 587.

the discussions in *Judicial Cosmopolitanism*. India, for example, along with other notable countries across the common law world, is governed by a post-colonial constitution; that is, one established following India's independence from the British Empire in 1947. Given that British rule had dominated for so long and so prominently in India, though, it is not surprising that "[t]he British constitutional system … influenced the Indian drafters".[28] Their system, in other words, was not purely homegrown but was instead built up on a foundation of what might be regarded as foreign law. The willingness of countries such as India nowadays to draw from and refer to foreign law, then, is arguably embedded within the fabric of their respective systems. Where a state's constitution is itself rooted in foreign law, that state's courts appear more willing and inclined to continue the practice of referring to foreign law in deciding cases and in interpreting that constitution. Indeed, substantiating this reality, it is interesting that the UK and US constitutional systems, which *were* generally home-grown and created internally, do not have such a wide and established system of referring to foreign law, as this article goes on to discuss.

The use of foreign law in establishing a fresh system of government in a newly independent country is particularly evident across Eastern Europe, as various chapters through Parts III and IV of *Judicial Cosmopolitanism* discuss in detail. Estonia, for example, was "[h]istorically bound to the German legal culture".[29] Consequently, when it gained independence in 1991, "[t]he most influential model for reconstruction of vast parts of the Estonian legal order was modern German law".[30] Similarly, in the Czech Republic, "[i]n its formative years, the Czech Constitutional Court used foreign law in order to transplant into the Czech legal system important constitutional doctrines from the West European states and the United States".[31] And, finally, in Croatia, "during the initial phase of democratic transition, the Croatian constitutional document … [was] modelled by imitating Constitutions belonging to

---

[28] Anashri Pillay, "The Constitution of the Republic of India" in Roger Masterman and Robert Schütze (eds.), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2019), 141, 145.

[29] Madis Ernits, "The use of foreign law by Estonian Supreme Court" in *Judicial Cosmopolitanism*, 501, 506.

[30] *Ibid.*, 506.

[31] Jana Ondřejková, Kristina Blažková and Jan Chmel, "The use of foreign legal materials by the Constitutional Court of the Czech Republic" in *Judicial Cosmopolitanism*, 589, 617.

the Western legal tradition".[32] In all of these systems (Estonia, Czechia and Croatia), reference to Western European law has become a common judicial practice, as *Judicial Cosmopolitanism* makes abundantly clear. Indeed, backing up this trend, Erdós and Tanács-Manadák, explain, in noting how the Hungarian Constitutional Court has also made wide use of foreign and international law:

> "In most of the Western European countries, constitutional courts were established after the Second World War, while in Central and Eastern Europe, these organs were founded only after the fall of communism. The distinctive and esteemed Austrian, German, Italian, French and Spanish Constitutional Courts were examples of good practice for the Central and Eastern European courts".[33]

The constitutional development in the States of Former Yugoslavia, discussed in the chapter by Gian Antonio Benacchio, though, are perhaps the most prominent example of foreign law informing the emergence of a new constitutional order. Benacchio states that "I do not think there are other countries in the world where the comparative study of laws by national courts and jurists has been so important and evident as in the states of former Yugoslavia".[34] Judges in those states, and perhaps more so than any other Eastern European system, "stud[ied] and compare[d] foreign models".[35] In so doing, though, they "were not limited to Austrian, German or Swiss laws, but also included EU, English, US, Italian and other similar laws".[36]

It is interesting to see, therefore, the factors underpinning judicial use of foreign law in jurisdictions where the practice readily and commonly takes place. Though, as Polacchini and Pierdominici explain, in their respective chapters, there are some systems where judges embrace the use of foreign law as a means of engaging with a broader, transnational conversation, the more prominent instances appear to be where constitutional systems have

---

[32] Carna Pistan, "Constitutional adjudication and comparative law in the Republic of Croatia" in *Judicial Cosmopolitanism*, 650, 654, citing Wiktor Osiatynsky, "Paradoxes of constitutional borrowing" (2003) 1(2) *International Journal of Constitutional Law* 244.

[33] Csaba Erdős and Fanni Tanàcs-Mandàk, "Use of foreign law in the practice of the Hungarian Constitutional Court – with special regard to the period between 2012 and 2016" in *Judicial Cosmopolitanism,* 618, 618.

[34] Gian Antonio Benacchio, "National courts and comparative law – the States of Former Yugoslavia (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Macedonia and Montenegro)" in *Judicial Cosmopolitanism,* 745.

[35] *Ibid.,* 760 - 761.

[36] *Ibid.*, 760 - 761.

emerged as a result of a country achieving independence. In those systems, foreign law seems to provide something of a blueprint for constitutional design, often with a particular emphasis on the system from which the country in question sought independence. This practice is prominent in those Eastern European countries whose democratic systems of government emerged in the early 1990s, following the fall of communism, but it can also be seen in countries that sought independence from the British Empire, such as India, Australia and Canada. Ultimately, in those systems that make explicit use of foreign law, Botelho notes (in discussing the practice in Portugal) that "[o]ne should not fear constitutional comparative law … Nowadays, courts are asked to decide about unstable or new legal concepts that *challenge* constitutional law in a way like never before … jurisdictional dialogue and legal comparison that can offer new insights are more than welcome".[37]

B. Limited use of foreign law

The second category of countries to consider concerns those states who make *limited* use of foreign law. As this section will explain, some states - whether through explicit or covert reference - draw from foreign law to a very limited degree. In Spain, for instance, the "Constitutional Court is among the courts that resort explicitly to comparative law, including foreign precedents, in the legal grounds and in particular opinions, but only … [on] very rare occasions".[38] Similarly, in Italy, "[t]he number of decisions by the Italian Constitutional Court in which there is an explicit reference to foreign law, foreign case-law and comparative law is extremely limited".[39] These - and other - states are discussed at length in *Judicial Cosmopolitanism*, with authors in those chapters providing detailed consideration of the reasons underpinning the limited use of foreign law. These reasons are numerous and are explained briefly here.

The first is where a court is seemingly unwilling or reluctant to refer to foreign law. In the Russian Constitutional Court, for example, between 1991 and 2015 "on a total of more than

[37] Catarina Santos Botelho, "Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law" in *Judicial Cosmopolitanism*, 424, 445.

[38] Ángel Aday Jiménez Alemán, "The Spanish Constitutional Court and foreign and comparative law: Theory and Practice of a Marriage of Convenience" in *Judicial Cosmopolitanism*, 375, 381.

[39] Vincenzo Zeno-Zencovich, "The Italian Constitutional Court" in *Judicial Cosmopolitanism*, 449, 453.

eleven thousand decisions … only six references to decisions by foreign courts are found".[40] This is not to say that Russian judges are unaware or ignorant of relevant parts of foreign law, it is just reflective of an unwillingness to make explicit reference.[41] Russia, though, is not simply an example of a state making non-explicit reference to foreign law, but rather one in which the aforementioned unwillingness appears to motivate a reluctance to consider foreign law at all. As Mazza explains in *Judicial Cosmopolitanism*, "[t]he fact … that … [reference to foreign law] is made by the dissenting judges, sometimes later fallen into political disgrace, is … indicative of the reluctance of the constitutional judges who form the majority in the decisions of the Court to pay [any] great attention to foreign laws".[42]

The second reason explaining some states' limited use of foreign law is where the practice is not commonplace, meaning that the courts might lack the habit or experience of readily making references to such law. In the UK, for example, whilst the Supreme Court has, over the years, drawn from various foreign sources of law, it is notable that virtually all the cases discussed in Frosini's chapter in *Judicial Cosmopolitanism* were decided within the last decade. Therefore, whilst it might be that the Supreme Court "is likely to cite a decision of a foreign court in around one in three cases",[43] the still recent emergence of the practice in the UK means that the court is perhaps limited in its experience compared to some other jurisdictions around the world. Indeed, Frosini cites Lord Mance – former Deputy President of the UK Supreme Court - in concluding that "one would be gravely mistaken to believe that the UKSC is in the forefront in terms of judicial internationalisation, cosmopolitanism or dialogue … 'the Supreme Court should itself aim to acquire a *comparative legal and linguistic expertise*'".[44]

---

[40] Mauro Mazza, "The Russian Constitutional Court and the judicial use of comparative law: A problematic relationship" in *Judicial Cosmopolitanism*, 531, 545.

[41] See: *ibid.*, 549.

[42] *Ibid.*, 552.

[43] Justin O. Forsini, "Splendid isolation or open to the world? The use of foreign law by the UK Supreme Court" in *Judicial Cosmopolitanism*, 29, 66, citing Hélène Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Oxford: Hart Publishing, 2018), 194.

[44] *Ibid.*, 67, citing Lord Mance, *Foreign Laws and Languages*, in A. Burrows, D. Johnston and R. Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: OUP, 2013), 96 - 97.

There also appears to be, in some countries, substantive limits to the practice of referring to foreign law. What this means is that, rather than judges being reluctant or inexperienced to make reference to such laws, a court might limit itself to citing foreign law in respect of only certain matters or, indeed, only making reference to the laws of certain countries. In Germany, for example, Haberl explains that "the German Federal Constitutional Court seems to engage in a rather introverted prospective because it is 'more or less ignoring foreign law and precedent': on average the Court refers to foreign materials only a few times a year".[45] One of the main factors in this limited use of foreign law in Germany, though, appears to relate to the substantive areas relevant to the discussion. In other words, the German Federal Constitutional Court appears to be more willing in some areas rather than others to engage with and refer to foreign law. "Due to their high degree of universalism, [for instance,] fundamental rights particularly lend themselves to the adoption of foreign solutions. [Whilst a] second important group within which the Constitutional Court frequently refers to foreign materials are decisions regarding the concretisation and interpretation of general principles of law".[46] In a similar vein, though in a markedly different system, in the Netherlands, use of foreign law in constitutional review is only permitted in the context of international law and in the application of rights derived from international law.[47] This limitation is based on the reality that "[t]he Netherlands … does not have a Constitutional Court, nor much in the way of constitutional review proper. The Dutch Constitution even contains a ban on constitutional review".[48] As a consequence of this, the Dutch have had to establish a system of constitutional review rather different from more conventional systems, as Voermans explains in the chapter. Ultimately, it lies with Parliament.[49] Limits on the countries to which courts might make reference is evident in Switzerland. Though use of foreign law is a key part of the Swiss Federal Tribunal's work,

---

[45] Sonja Haberl, "Comparative reasoning in constitutional litigation: Functions, methods and selected case law of the German Federal Constitutional Court" in *Judicial Cosmopolitanism*, 295, 296, citing Stefan Martini, "Lifting the constitutional curtain? The Use of foreign precedent by the German Federal Constitutional Court" in Tania Groppi and Marie-Claire Ponthoreau (eds.), *The use of foreign precedents by constitutional judges* (Oxford: Hart Publishing, 2013), 230.

[46] *Ibid.*, 305, citing Peter Haberle, *Grundrechtsgeltung und Grundrechsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als "funfte" Auslegungsmethode* (1989) 44 JZ 913.

[47] See: Wim Voermans, "Conspicuous absentees in the Dutch legal order: Constitutional review and a Constitutional Court" in *Judicial Cosmopolitanism*, 337, 343.

[48] *Ibid.*, 337.

[49] See: *ibid.*, 339 – 340.

emphasis is very much placed on legal systems geographically proximate. "[I]n many of the rulings the tendency of the Federal Tribunal to consider for the purposes of comparison a limited number of legal systems is easily understood, and specifically those, also geographically, close to Switzerland (Germany, France, Italy and Austria)".[50] Whilst, as Gerotto notes, such an approach is understandable, "in some rulings the comparative exam made by the Federal Tribunal might have – actually it should have – been extended to a broader range of legal systems than the considered one, so to dismiss the suspicion of a convenient comparison".[51]

As this section has explored, there are a number of jurisdictions across the world where there is a limited practice of referring to foreign law, as various chapters in *Judicial Cosmopolitanism* explain. Such limits are imposed either through some procedural reticence or inexperience; or through some substantive restriction, such as a limit to systems geographically proximate or a limit to areas of law that most warrant consideration of foreign law.

C. Use of foreign law without explicit reference

Separate from those jurisdictions in which limited use of foreign law is made, there are those who make wide use of foreign law but who do so without explicit reference. This can be seen in countries like France, where "comparative law has had (and continues to have) a highly significant role in the activity of the Constitutional Council … the Council's judgments [though] contain[ing] no express reference to foreign or comparative law".[52] Similarly, in Norway, whilst the "former Chief Justice of the Norwegian Supreme Court [explains that]: 'the Supreme Court has to an increasing degree taken part in international collaboration among the

[50] Sergio Gerotto, "The use of comparison in the Swiss Federal Tribunal case law" in *Judicial Cosmopolitanism*, 402, 422.

[51] *Ibid.*, 422.

[52] Paulo Passaglia, "Comparative Law and the French Constitutional Council" in *Judicial Cosmopolitanism*, 263, 263.

highest courts' … [as Duranti notes that] explicit references to foreign precedents in constitutional litigations are almost non-existent".[53]

It is interesting to consider why some countries – such as those discussed in this section – make frequent yet non-explicit use of foreign law. Distinct from some countries, such as Russia, where use of foreign law is both limited and covert, wide yet non-explicit use of foreign law would not necessarily appear to reflect an unwillingness to engage with foreign sources. In the chapter on France, Passaglia considers, for instance, that it is perhaps down to attitude, there being "a certain resistance [that] has developed against the use of foreign law" and a desire "to avoid the role of comparative law from being formally challenged by its opponents".[54] It is evidently easier in such instances to make more subtle use of foreign law to protect from such challenges.

D. Changing patterns in the use of foreign law

The final area for consideration in this article relates to those countries discussed in *Judicial Cosmopolitanism* in which the practice of referring to foreign law has changed over time. It has already been discussed how the use of foreign law in the UK Supreme Court is a relatively recent practice, and that is one such example of a changing pattern in this regard. There are other examples, too, though. In Austria, for instance, though the Constitutional Court "does not show a lot of explicit references to foreign law or to comparative arguments … [b]efore … [the early 1980s] there exist hardly any references to foreign precedents or foreign jurisdiction in the case law of the … Court".[55] In Latvia, the opposite trend is apparent, since "[t]he Constitutional Court [in Latvia] has referred to foreign legal sources most frequently in the initial stage of its activities (1996 - 2000) for the simple reason that the case law was not

[53] Duranti, (n 10), 469, citing Statement by Carsten Smith - Chief Justice of the Norwegian Supreme Court (1991 - 2002) - quoted in Anne-Marie Slaughter, *A Global Community of Courts*, (2003) 44 Harv. Int'l L J 194 – 195.

[54] Passaglia, (n 52), 289.

[55] Christoph Grabenwarter, "Comparative Law in the case law of the Austrian Constitutional Court" in *Judicial Cosmopolitanism*, 325, 326, citing Anna Gamper, "Foreign Precedents in Austrian Constitutional Litigation" (2015) 9(1) *ICL Journal*, 27, 32.

developed. A study found that the year 2007 marked a decrease in references".[56] References to foreign law are still made in Latvia, though just not as frequently as they once were.

Decreasing references to foreign law are also evident in the USA. Ferrari explains that, throughout the 19th and 20th centuries, federal and state courts made limited use of foreign law, the famous case of *Roe v Wade*[57] being a prominent example. Upon this foundation, "[t]he opening up of a new front of judicial activism in terms of the use of foreign materials from a comparative or international law perspective" emerged.[58] Indeed, and as a consequence, Ferrari devotes a section of the chapter in *Judicial Cosmopolitanism* to developments that occur between 1990 and 2005 and the flood of judgments that see the use of foreign law in the US become far more common. More recently, though, there has been a growing reluctance to accept the relevance of foreign law. Supreme Court Justice Scalia, for instance, is cited as noting that "[t]o invoke alien law when it agrees with one's own thinking, and [to] ignore it otherwise, is not reasoned decision making, but sophistry".[59] Ferrari goes on to observe that the Supreme Court's use of foreign law has also "triggered a backlash … in Congress[, with] a not insignificant grouping within Congress … react[ing] with nationalist overtones to a supposed trend within case law, using various instruments … draft legislation has been tabled seeking to codify and in some sense to prohibit the recourse to non-national sources".[60] Ferrari rightly devotes ample space to this discussion of what he calls "American isolationism".[61] Its significance is evident by the reality that "for some years the Supreme Court has refrained from resorting to the foreign or international law argument … [whilst] a majority of the States … as of 2013, had underway statutes aiming at prohibiting judges from resorting to foreign law materials".[62]

---

[56] Anita Rodina, "Foreign materials in the judgments of the Constitutional Court of the Republic of Latvia" in *Judicial Cosmopolitanism*, 500, citing J. Pleps, "Ärvalstu precendenti konstitutcionālajā tiesvedībā: Latvijas prakse" [Foreign Precedents in the Constitutional Adjudication: Practice in Latvia]. *Jurista vārds*, Nr 32 (834), 19/08/2014.

[57] 410 U.S. 497 (1972).

[58] Giuseppe Franco Ferrari, "Legal comparison within the case law of the Supreme Court of the United States of America" in *Judicial Cosmopolitanism*, 103.

[59] 543 U.S. 573 (2005), cited at *ibid.*, 107.

[60] Ferrari, (n 58) 108.

[61] *Ibid.*, 111.

[62] *Ibid.*, 114 and 117.

Finally, a particularly prominent example of the use of foreign law varying over time is in Japan. Whilst, in the early years (i.e. after World War II), the Supreme Court of Japan (SCJ) made reference to foreign law as it sought to establish some of its key legal principles, "[a]fter … [this] early period … the majority opinion of the SCJ stopped citing or referring to foreign or comparative law in constitutional cases".[63] Indeed, "between the period of 1 January 1990 and 31 July 2008 … there is no case in which the majority opinion cites or refers to foreign or comparative law".[64] Since 2008, though, the trend appears to have reversed, with the SCJ once again making reference to foreign law. On this basis, Ejima opines that "[r]ecent judgments and decisions show that the SCJ is ready to refer to foreign and/or international law when it is useful for the SCJ to strengthen their conclusion. On the contrary, when it is not, the SCJ does not refer to foreign or international law".[65]

III. Conclusion

It has been the intention of this article to provide a brief insight into the growing area of scholarship that focuses on judicial use of foreign law and to provide an explanation of *Judicial Cosmopolitanism*'s contribution to the field. The book offers a superb anthology of the way in which foreign law has come to be used in contemporary constitutional systems; Ferrari brings together some of the leading names in the field to compile a text that must be seen as the definitive authority in the area. What is particularly interesting from an examination of the book, though, is the varying ways and extents to which courts across the world use foreign law. Whilst some states make full and blatant use of foreign sources in their courts, there are a large number of examples of countries where the practice is covert, limited and has varied over time, as this article has sought to explain through its review of *Judicial Cosmopolitanism.*

[63] Akiko Ejima, "Use of foreign and comparative law by the Supreme Court of Japan" in *Judicial Cosmopolitanism*, 803.

[64] *Ibid.,* 803.

[65] *Ibid.*, 82 3.