

INTRODUCTION

Travelling with Judges: Brief Reflections on the Roadmap on Comparative Law Developed by the Network of Presidents of the Supreme Judicial Courts of the European Union

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This article accompanies a Roadmap on the judicial use of comparative law, which was developed by judges from different European supreme courts. This document is published in this issue of Utrecht Law Review. Brief reflections on relevant scholarly aspects help the reader to appreciate the meaning and value of this Roadmap for contemporary judicial functioning in Member States of the European Union. Addressed aspects concern the legitimacy of judicial comparativism and the methodological quality of the Roadmap. This analysis leads to a conclusion about the Roadmap's potential to enhance the quality of judicial decision-making and support dialogues of courts with their foreign counterparts as well as with other legal and societal audiences.

1. Introduction

In this issue of *Utrecht Law Review*, Maarten Feteris, former President of the Supreme Court of the Netherlands (Hoge Raad), presents a Roadmap on the judicial use of comparative law.¹ The Roadmap was developed within the framework of the Network of Presidents of the Supreme Judicial Courts of the European Union (hereafter: the Network). This association, which exists since 2004, aims to bring European supreme courts closer through discussions and exchanges of ideas as well as to offer a forum through which European institutions can ask these courts for their opinions on specific topics.² Regarding the Roadmap, Feteris explains that 'the aim was to develop a document which can be helpful for the courts in the Network in a practical way when considering and implementing the use of comparative law.'³ As a reason for engaging with this matter, he mentions: 'The use of comparative law by judges implies that judges, when making a decision on a controversial legal issue, look (amongst others) at the solutions which have been chosen for similar problems in other legal systems.'⁴

The request to publish this Roadmap is an interesting development. After all, its primary audience are judges and the stated aim regarding the document is to provide guidance to them. Yet, several possible reasons which justify a broader distribution come to mind. Firstly, the publication enables other legal communities, such as lawyers and legal scholars, to gain insight into the working methods of the supreme courts and to use this information in their own activities, for example, the preparation of arguments by lawyers or the critical analysis of judicial decision-making by scholars. Secondly, the publication of the Roadmap allows the wider society to obtain an understanding of judicial functioning in a contemporary globalised context. In this regard, the publication fits in a more general trend concerning demands of transparency and accountability of institutions as a basis for their legitimacy.⁵

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¹ M. Feteris, 'Roadmap on Comparative Law in the Case Law and Practice of the Supreme Courts of the EU'(2021) Utrecht Law Review, this issue.

² <<https://www.network-presidents.eu/page/network-0>> accessed 28 February 2021.

³ Feteris, 'Roadmap', section A.

⁴ Ibid.

⁵ On the notion of legitimacy of institutions, see M. Bovens et al., 'Institutional Legitimacy in Open Societies', IOS Think Paper Series nr. 2, <<https://www.uu.nl/en/research/institutions-for-open-societies/ios-think-paper-series>> accessed 28 February 2021.

The publication of the Roadmap thus invites us to travel along with the judges in their comparative-legal journeys. In order to optimise the travel experience of readers of the Roadmap, the next sections contain a brief reflection on the visited landscape of transnational judicial communication (Section 2), the possible ways of reading the Roadmap (Section 3), and brief concluding thoughts regarding the road ahead (Section 4).

2. The Landscape of Transnational Judicial Communication

In his introduction to the Roadmap, Maarten Feteris demonstrates awareness of debates regarding the legitimacy of judicial recourse to comparative law.⁶ Indeed, the use of comparative law by courts has prompted a stream of academic analyses since the 2010s, in which the normative and societal justifications of this practice are discussed. This practice falls under the wider conceptual umbrella of ‘transnational judicial communication,’ which concerns the exchange of legal ideas between judges from different legal orders through the study of laws and case law (judicial comparativism) as well as through interactions in inter alia bilateral meetings and judicial networks (judicial networking).⁷ The judicial use of comparative law has been a central object of scholarly analyses because of the intricacies regarding its role and meaning in judicial decision-making. It has also provoked sometimes heated societal discussions. As an extreme example, the politicisation of comparative outlooks to other legal systems resulted in death threats to the US Supreme Court Justice Breyer and the late Justice Bader Ginsburg for going against the idea of exceptionalism of the US legal system.⁸

A main reason for the controversy surrounding the judicial recourse to comparative law concerns disagreement about the sources which can inform judicial decision-making and the weight of these sources in the reasoning of judgments. Opponents take positivist or originalist views on judicial interpretation. From a positivist perspective, judges can consider only legal norms with a formal status in the hierarchy of norms of the domestic legal order in their deciding of individual cases. This excludes references to laws and case law from other legal systems when interpreting domestic legal norms. In an originalist view, as supported by the late US Supreme Court Justice Scalia, comparative law should not be taken into account in constitutional interpretation, furthermore, because – with the exception of still applicable old English precedents – it was not available as a source of reference at the time of drafting of the Constitution. Those with a favourable outlook on the use of comparative-legal references focus on the substantive quality of judicial argumentation, which involves its soundness, clarity and persuasiveness. In this perspective, judges can learn from the legal interpretation developed by their peers in other countries in cases where a similar legal question was at stake. Comparative-legal insights then have a relative weight in the substantive reasoning of a judgment, without being decisive for the judicial decision.⁹ This view acknowledges that foreign insights in principle cannot determine a domestic judgment because of differences relating to the historical and societal contexts of legal systems and the principles and policies which underpin those legal systems.¹⁰ The Roadmap fits in with this justification by describing the impact of comparative-legal analyses as mostly inspirational and additional to the judicial reasoning of a supreme court. Comparative law is possibly decisive only in a situation of interpretation of a legal norm which is shared between legal systems based on historical connections.¹¹

For all the attention paid to judicial uses of comparative law, it is important to realise that the practice itself actually occurs in a relatively small amount of cases.¹² Generally, these are ‘difficult cases’ in which there is a need for judicial interpretation of laws in order to reach a decision in the case at hand.¹³ The practice is popular in cases in which courts are confronted with a novel legal question and/or a sensitive societal

⁶ Feteris, ‘Roadmap’, section A.

⁷ A.M. Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *University of Richmond Law Review* 99. See also E. Mak and D.S. Law, ‘Transnational Judicial Communication: The European Union’ in D.S. Law (eds), *Constitutionalism in Context* (Cambridge University Press, forthcoming).

⁸ The notion of American exceptionalism refers to the belief that the US as ‘the first new nation’ is inherently different from other nations. This would preclude the idea of finding useful inspiration for judicial decision-making through comparative-legal analyses.

⁹ J. Bell, ‘The Argumentative Status of Foreign Legal Arguments’ (2012) 8(2) *Utrecht Law Review* 8, pp. 10–11.

¹⁰ E. Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013) 202.

¹¹ Feteris, ‘Roadmap’, section C4.

¹² M. Gelter and M. Siems, ‘Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts’ (2012) 8(2) *Utrecht Law Review* 88.

¹³ For a perspective based on judicial experience, see M. Feteris, ‘Development of the Law by Supreme Courts in Europe’ (2017) 13 *Utrecht Law Review* 155.

issue and when similar cases have occurred already in other legal systems. As an example, comparative-legal references can be found around the world in cases on civil responsibility for ‘wrongful life.’¹⁴ Also, judges sometimes use comparative-legal references as a means to align their interpretations with foreign peers in the framework of implementation of international treaties or participation in a supranational legal order such as the European Union.¹⁵ The use of comparative-legal references is most common in supreme courts for a number of practical reasons, including the amount of cases which require judicial interpretation of laws and the availability of research support to conduct comparative-legal analyses (although references can be presented also by parties and their lawyers or by amici curiae).¹⁶ Still, since there is no denying that practices of comparative analysis of case law exist and raise questions about dos and don’ts in many supreme courts, there is value in providing courts with ‘a systematic roadmap for a more or less conscious decision-making process.’¹⁷

3. Reading the Roadmap

Maarten Feteris indicates that the Network did not strive for ‘completeness or scientific reliability’ when developing its Roadmap on comparative case law.¹⁸ The document was compiled on the basis of input from a questionnaire which was filled out by the Supreme Courts who participate in the Network, a General Report written by Feteris based on the analysis of the submitted answers, the discussion of this Report in the Network, and a review of academic literature.¹⁹

Scholars reading the Roadmap might be tempted to criticise aspects of the methodology employed for the drafting of the Roadmap. For example, the questionnaire does not specify what is meant with ‘the comparative law method.’²⁰ With regard to the qualitative empirical analysis, the published document does not clarify how many answers to the questionnaire were obtained and to what extent the answers varied between courts based on particularities of their legal system or societal context.²¹ Finally, the literature review addresses trends regarding the use of comparative law by courts, but includes less information about actual judicial strategies and methodological concerns with regard to comparative-legal analysis.^{22, 23} Because of these methodological issues, some doubts could come up regarding the actual practical guidance which the Roadmap is able to provide to supreme court judges across Europe.

Yet, these scholarly concerns are likely to hold more relevance for academic debates than for the practical reality of supreme courts. In this regard, Jaakko Husa’s typology of different weight-classes of comparison provides a helpful clarification on possible degrees of systematic and interdisciplinary analysis in comparative-legal research.²⁴ A heavyweight comparison is the go-to method for comparative-law scholars and allows them to explain similarities and differences between legal systems. A middleweight comparison is suitable for knowledge building in a specific field of law, while a lightweight comparison enables finding the ‘most fitting’ model for an endeavour of legal harmonisation. A featherweight comparison is functionalist and non-systematic in nature. It concerns a collection of comparative-legal information which can serve as an inspirational source or a persuasive element in activities in legal practice, for example, proposals for law reforms or judicial decision-making.²⁵ Judicial references to comparative law fit with this last category in the typology. In a featherweight comparison of foreign laws and case law, it is acceptable if the presentation of outcomes concerns only a selection which is deemed to best serve the goals of inspiration and persuasion. Also, it is not problematic if in this comparison there is an emphasis on similarities rather than on differences between legal norms and contextual aspects of the compared systems.

¹⁴ I. Giesen, ‘The Use and Influence of Comparative Law in “Wrongful Life” Cases’ (2012) 8(2) *Utrecht Law Review* 35.

¹⁵ Feteris, ‘Roadmap’, sections C1 and D.

¹⁶ Mak, ‘Judicial Decision-Making’, chapter 4. See also Feteris, ‘Roadmap’, section C3.

¹⁷ Feteris, ‘Roadmap’, section A.

¹⁸ *Ibid.*

¹⁹ Questions 1a and 1b.

²⁰ Question 1d.

²¹ See e.g., K. van den Bos, *Empirical Legal Research: A Primer* (Edward Elgar Publishing 2020).

²² See e.g. G. Sitaraman, ‘The Use and Abuse of Foreign Law in Constitutional Interpretation’ (2009) 32 *Harvard Journal of Law and Public Policy* 653; A. Lollini, ‘The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law’ (2012) 8(2) *Utrecht Law Review* 55.

²³ See e.g., E. Mak, ‘Watch Out for the Under Toad: Role and Method of Interdisciplinary Contextualisation in Comparative Legal Research’ (2015) 8(2) *Erasmus Law Review* 65.

²⁴ J. Husa, ‘About the Methodology of Comparative Law: Some Comments concerning the Wonderland...’, Maastricht Faculty of Law Working Paper 2007/5, pp. 17–18.

²⁵ *Ibid.*

When focusing our attention on the content of the published Roadmap, it is interesting to notice that the presented tips, insights and recommendations correspond well with conclusions of scholarly research on the methodology of judicial references to comparative law. Tips focus on the selection of countries for a comparison and principled and practical concerns when conducting a comparative-legal analysis to inform judicial decision-making.²⁶ Core insights concern the importance of avoiding (the appearance of) ‘cherry picking’ in the use of comparative-legal references, explicit reflection on the reasons for giving priority over one foreign system above another (e.g. ‘closeness,’ most persuasive reasoning, uniqueness of a foreign solution), and the acknowledgement of comparative-legal references in relation to the style of judicial reasoning of a specific supreme court.²⁷ As a recommendation, the Roadmap highlights the importance of clear and transparent judicial decision-making. It advises the Supreme Courts in the Network to explain their choices when engaging in comparative-legal analysis, both regarding the included legal systems in a comparison and the selection of systems which appear in the judicial reasoning based on this comparison.²⁸

4. The Road Ahead

In sum, the Roadmap on comparative law brings judicial recourse to comparative law a step further into the mainstream of approaches to judicial decision-making. The publication of this document underlines that transnational judicial communication has become part and parcel of the activities of supreme courts, especially in a context of regional legal integration such as the European Union.

Yet, developments which have occurred in recent years give rise to concerns regarding the future of both judicial comparativism and judicial networking in this European context. Indeed, the rule-of-law backsliding in Hungary and Poland has put pressure on the ambition at the basis of the European cooperation, that is, to realise ‘an ever closer union’ among the Member States. Concerns of systemic threats to judicial independence have already led to refusals of judicial cooperation with Poland in European Arrest Warrant cases²⁹ and to the suspension of the Polish National Judicial Council’s membership of the European Network of Councils for the Judiciary.³⁰ These developments could affect meaningful transnational communication between courts in Europe, which requires consensus on fundamental values (comparativism) and a willingness to learn about and share legal ideas and practices (networking).

In this context, the Roadmap as well as other activities of the Network of Presidents could help to enhance the quality of judicial decision-making and support dialogues between courts from different countries and between courts and other audiences (lawyers, academia, wider society). The publication of the Roadmap makes it possible to travel onwards with a clear and transparent frame of reference for all.

Competing Interests

The author has no competing interests to declare.

²⁶ Feteris, ‘Roadmap’, sections C2 and C3.

²⁷ *Ibid.*, sections C4 and C5.

²⁸ *Ibid.*, section C5.

²⁹ Allowed on the basis of the judgment of the Court of Justice of the European Union in case C-216/18 PPU, Grand Chamber judgment of 25 July 2018, *LM*.

³⁰ ‘ENCJ suspends Polish National Judicial Council – KRS’ <<https://www.encj.eu/node/495>> accessed 28 February 2021.

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