Faculty of Administration and Social Sciences
WARSAW UNIVERSITY OF TECHNOLOGY

Transnational judicial dialogue in case law related to academic freedom

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Transnational judicial dialogue

A transnational judicial dialogue is a metaphor for the **comparative analysis found in judicial decisions**.

It may manifest itself in the court referring to the judgments of international tribunals and constitutional courts in

- interpreting national rights guarantees,
- in invoking international conventions,
- invoking the doctrine of another state or in pointing to the foreign law.

Academic freedom

Academic freedom is a **defensive right**.

It protects scientific and teaching activities **against the interference of the state and other authorities, including university and faculty authorities.**

Academic freedom is understood as the "**freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action**" (Declaration of Principles on Academic Freedom and Academic Tenure on Dec 31st, 1915)

Main Thesis

1.

- The countries where a **given right or freedom is not expressed explicitly in the constitution, or it does not have a legal definition or there is a dispute as to the essence of these rights and freedoms**, constitutional courts will be more likely to rely on international conventions and jurisprudence of international tribunals and constitutional courts of other states.

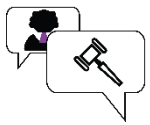
2.

The constitutional courts are also more likely to recall the legislative solutions of another state in **difficult or controversial cases**.

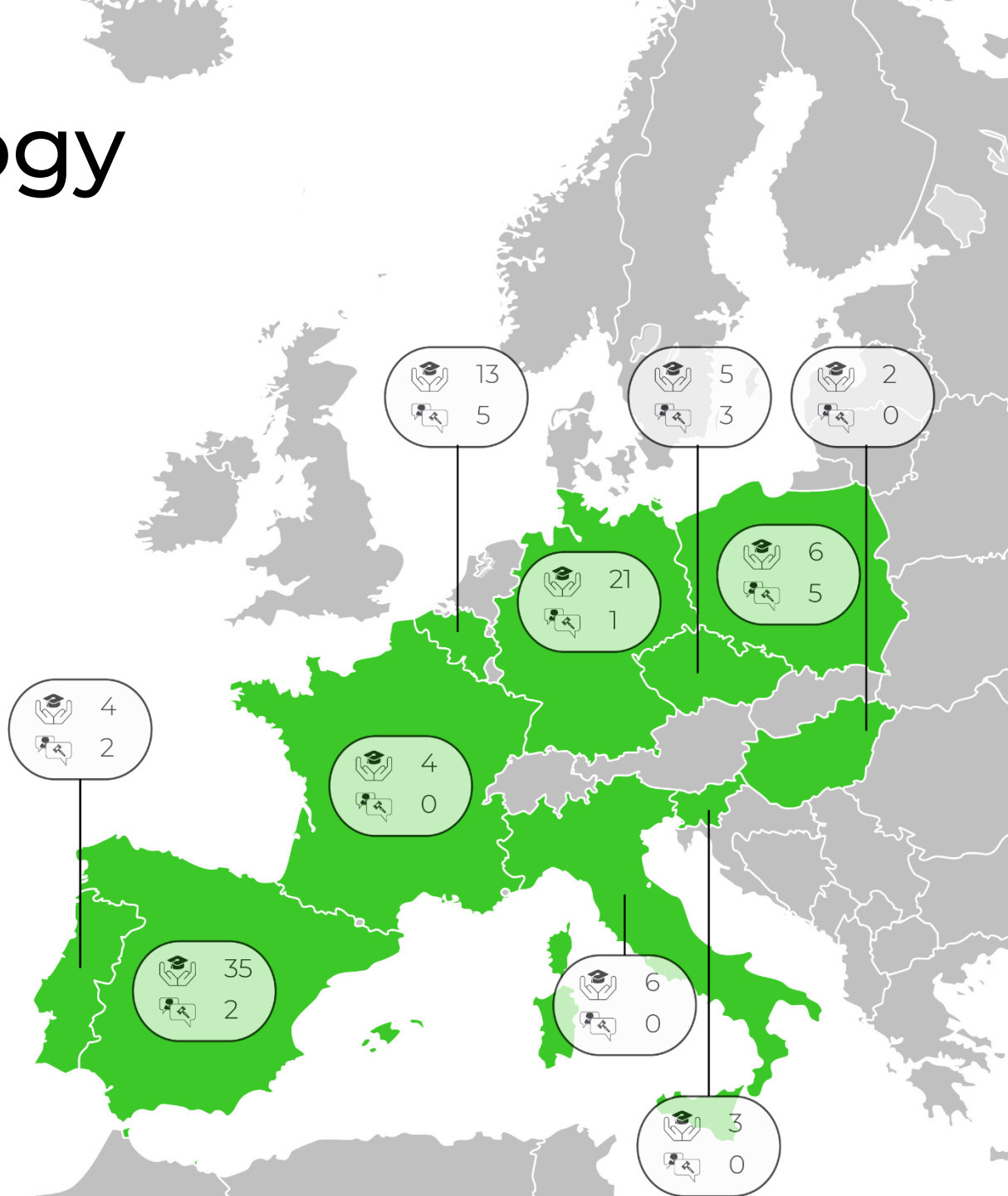
Methodology

The article analyzes 99 judgments from the constitutional courts of 10 European Union countries (that guarantee academic freedom in their constitution and that have constitutional courts) referring to academic freedom.

Cases concerning academic freedom



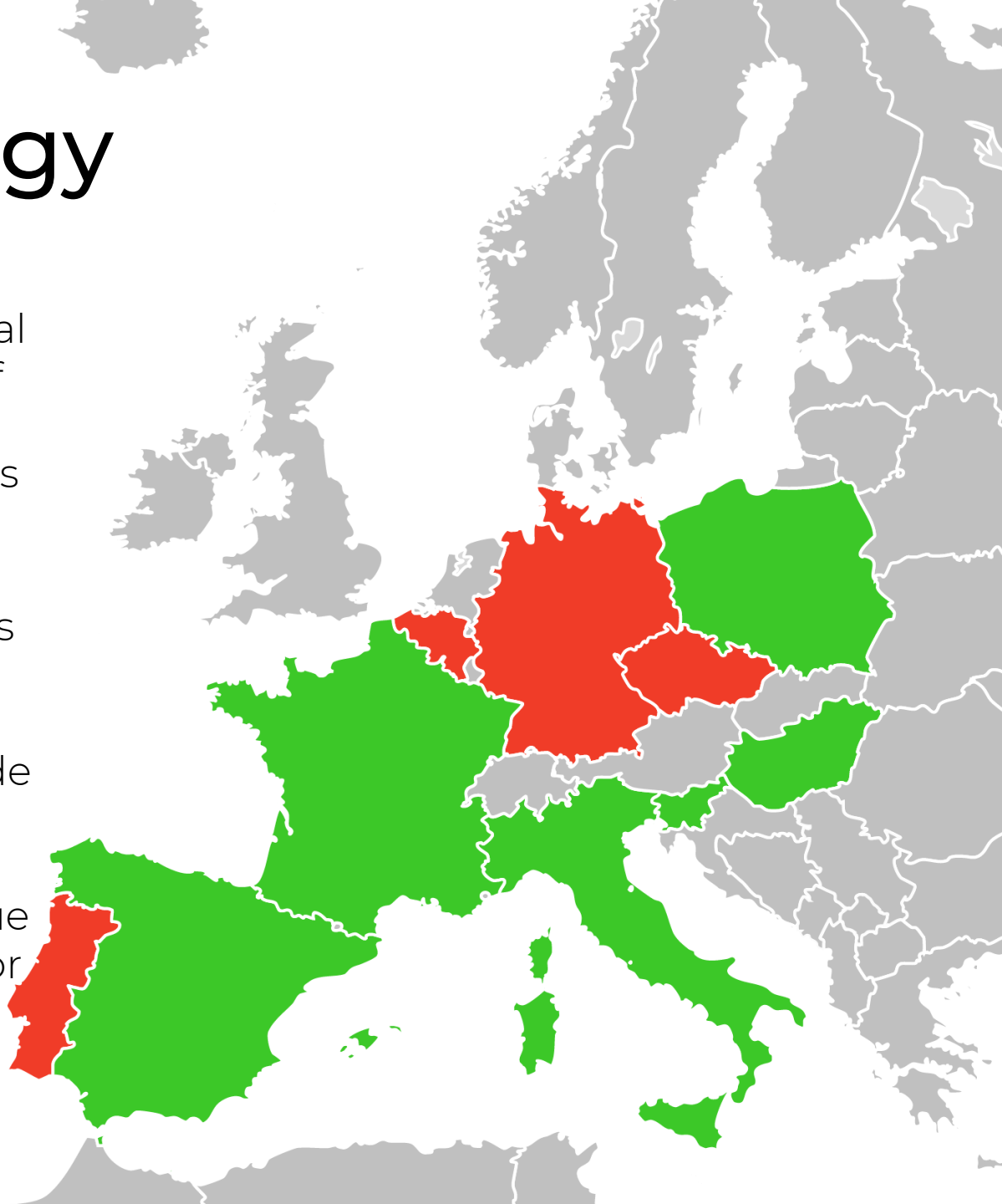
Number of cases with transnational judicial dialogue



Methodology

In some countries academic freedom does not have a legal definition and in the event of a dispute courts have to determine the essence of this right (France, Hungary, Italy, Poland, Spain and Slovenia).

The inclusion of the countries where the legal definition exists (Belgium, Czechia, Germany and Portugal), made it possible to examine whether the intensity of transnational judicial dialogue depends on the possession or absence of a legal definition of a given right.



Characteristic of the cases

- Disputes in which the constitutional court resolved the issue of **violation of academic freedom** are rare (**22 cases**).

- Most often, academic freedom is cited in the background of a dispute about another right. In **36 cases** the other right was **university autonomy**.

„Hard cases”

- A small number of academic freedom judgments indicate that this is **not a right which causes a lot of tension**. However, if such tensions do appear and are presented before a constitutional court, they are often “hard cases”.

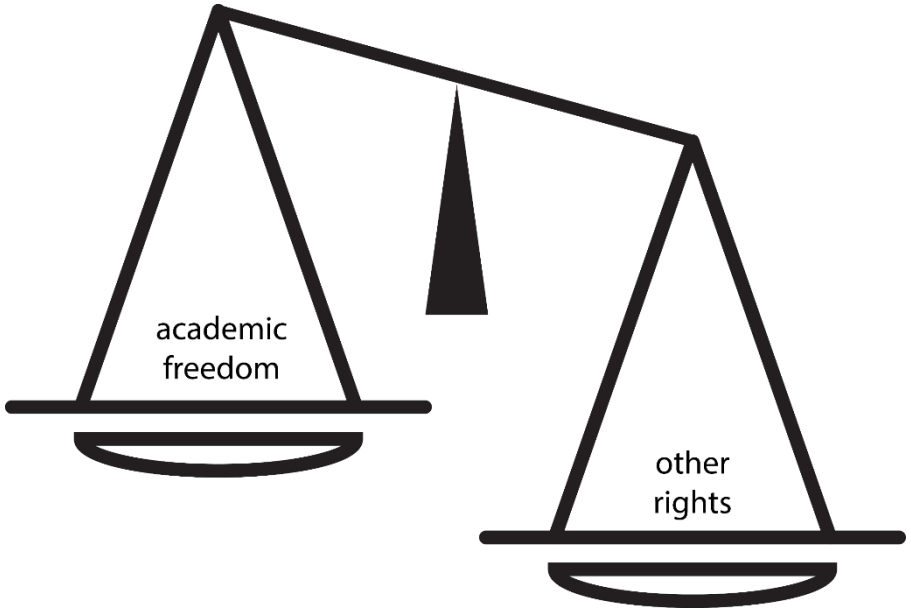
- According to David Fontana the **comparative constitutional law is justified only in „hard cases”,** when constitutional sources of law do not provide exact answers.

Two categories of „hard cases”

The **first category** includes cases referring to the **collision of principles**.

Academic freedom can conflict with both the individual rights, such as the right to respect for private life, or with institutional rights such as university autonomy or the right of the church to self-determination.

Academic freedom does not have such a strong position as other principles.



Two categories of „hard cases”

The **second category** of hard cases appear in countries in which the sources of law do not provide specific answers.

This happens when one of the parts of the **academic freedom is not guaranteed in the constitution, there is no legal definition of academic freedom or there is no agreement as to the essence of this right**.

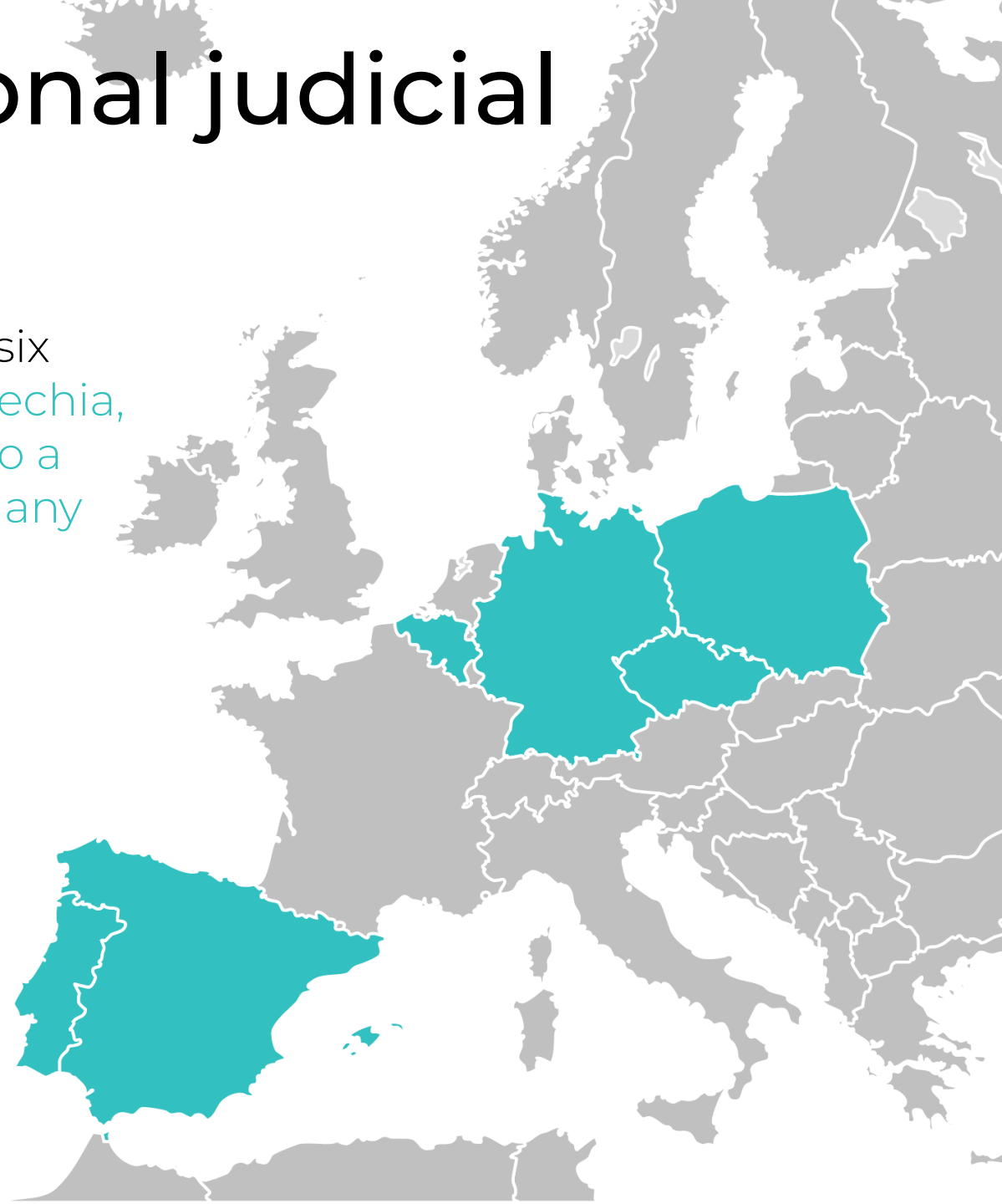
If a right is not explicitly guaranteed in the constitution, the constitutional court may try to derive it from other rights. Such is the case with freedom of scientific research in Belgium and Spain.

Transnational judicial dialogue
in case law related to academic freedom

Transnational judicial dialogue	in 18 cases
The court cited a judgment of a court of another state	in 5 cases
The court cited the European Court of Human Rights	in 7 cases
The court cited the Court of Justice of the European Union	in 2 cases
The court quoted a foreign law	in 5 cases
The court quoted the doctrine of another state	in 2 cases
The court referred to the Charter of Fundamental Rights of the European Union or the European Convention on Human Rights or International Covenant on Economic, Social and Cultural Rights	in 12 cases

Transnational judicial dialogue

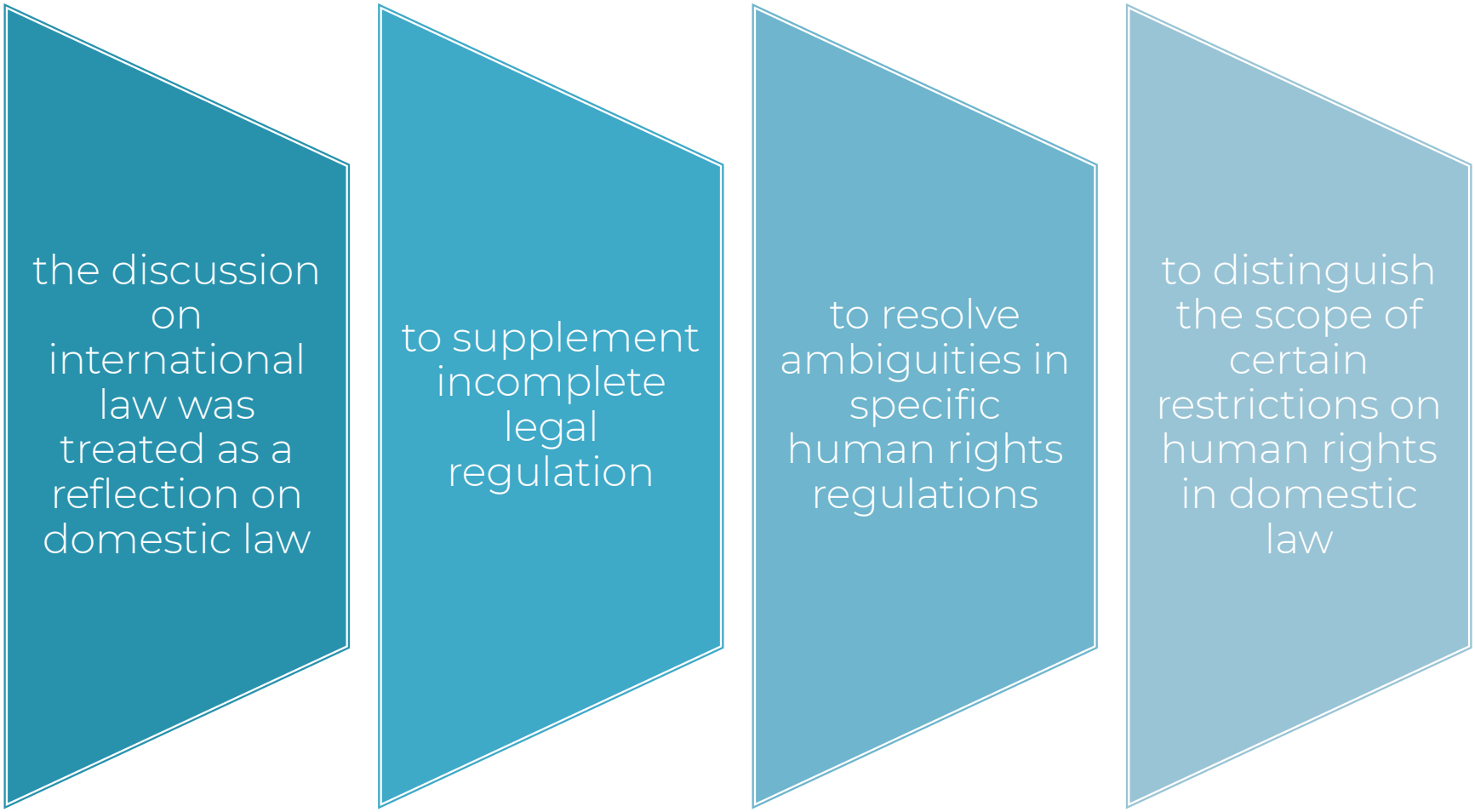
Has been observed in six countries: Belgium, Czechia, Poland, Portugal and to a limited extent in Germany and Spain.



Reasons for judicial dialogue

1. support for their own interpretation
2. it explains the procedure of conflict resolution
3. challenge the validity of the lower court's arguments
4. strengthen an otherwise uncertain argument

Different reasons for transnational judicial dialogue in international treaties



Transnational judicial dialogue in „hard cases”

Of the 18 cases in which we observe transnational judicial dialogue

- 5 belong to the first category of "hard cases", concerning collision of principles and principle of proportionality
- 6 should be classified as the second category, concerning the situations in which the sources of laws of constitutional and statutory significance do not provide specific answers

Concluding remarks

- An analysis of the case-law has shown that only some countries use the case-law of international tribunals and constitutional courts of other countries to interpret the national guarantee of academic freedom.

- The intensity of transnational judicial dialogue in case-law related to academic freedom should be assessed as not very widespread.

Concluding remarks

The case-law analysis in this paper allowed to find two additional reasons for starting a dialogue not previously indicated in literature.

- A judge may use foreign case-law to **challenge the validity of arguments put forward by another court**.

- Or the judge uses foreign jurisprudence **because it contains a description of the procedure for resolving a given type of case, which is missing** in his home court.

Concluding remarks

- Judicial comparativism is justified in "hard cases".
- If there are convergent decisions on similar cases, the court should present them.
- It should not limit itself to quoting those that are consistent with its vision of resolving the dispute.
- The court should explain why one of these models is chosen.

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Thank you for your attention!

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