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The European Court of Human Rights and Transnational Judicial Dialogue

References to Foreign Law and the Quest for Justification

Carla M Zoethout*

Abstract: Over the past decade, the European Court of Human Rights (ECtHR) seems more and more inclined to use foreign sources of law, that is to say, law that does not originate in the Convention itself or in one of the Member States of the Council of Europe. Unlike in the US, there is little discussion in Europe about this form of judicial dialogue in the case-law of the ECtHR. This paper seeks both to clarify transnational dialogue by the ECtHR and find ways to justify this practice, against the backdrop of the American debate on this topic. First, the concept of transnational judicial dialogue is analysed (Part II). Then judicial dialogue as it presents itself in the judgments of the ECtHR is assessed, especially when non-Convention or foreign law is being used in a substantive way (Part III). Subsequently, an attempt is made to define when and why the use of foreign law by the ECtHR can be considered a justifiable approach in judicial decision-making (Part IV). The paper rounds off with some concluding remarks (Part V).

Keywords: Transnational, Judicial Dialogue, European Court of Human Rights, Justification

I. Introduction

The twenty-first century is the era of overwhelming opportunities to gather information in a way that was unthinkable before. A few mouse-clicks open the way to libraries, databases and court decisions from all over the world. Not only the study of comparative (constitutional) law is being thoroughly influenced by these potentials,1 but practically all fields of law that go beyond that of the nation-state - international law in the first place. In that perspective, it seems therefore no more than logical that judges and courts also use these options to get informed and consequently, to refer increasingly to other jurisdictions. After all, we are living in a globalizing world and judges and courts, in particular the highest human rights and constitutional courts are not supposed to lock themselves up in their ivory towers but to consider their cases in the light of global standards. This, in a nutshell, is the way many commentators regard the role of judges in the present-day world.2

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The courts' practice of referring to foreign law in order to explain their decisions, to substantiate their cases or to confer legitimacy upon their judgments, has been a hotly debated topic in the United States for some time. Two of the most controversial issues concerning the case-law of the Supreme Court over the past ten years were both partly based on non-US law. In Lawrence v Texas (2003) the question was whether a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct, violated the 'due process' clause of the Fourteenth Amendment to the US Constitution. In striking down the statute, the majority decision by the Supreme Court cited similar cases in which the ECtHR had invalidated laws prohibiting consensual homosexual conduct. In Roper v Simmons (2005) the problem was whether the death penalty for juveniles must be considered 'cruel and unusual punishment' in terms of the Eighth Amendment. The way the Supreme Court refers to international opinion to substantiate its decision that the penalty is disproportionate punishment for offenders under 18, is remarkable indeed:

'It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. [...] The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our conclusions.'

Despite the fact that this practice is much disputed, there are a number of other cases where the Supreme Court refers to non-US law in order to justify its decisions.

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As far as the case-law of the European Court of Human Rights is concerned, the same trend can be observed— the Court seems more and more inclined towards using foreign sources of law, that is to say, law that does not originate in the Convention itself or in one of the Member States of the Council of Europe. To name a remarkable example: in the case of Jalloh v Germany (2006) on incriminating evidence obtained as a result of acts of violence, the European Court assessed cases by American courts and the United States Supreme Court which dealt with the same subject matter. According to the ECtHR, the incriminating evidence should never be relied on as proof of the victim’s guilt. Quoting the Supreme Court literally, the ECtHR concluded that any other solution would be to ‘afford brutality the cloak of law’.9

The practice of using foreign law by international and constitutional courts has been discussed under a number of different terms, all suggesting a ‘transnational judicial dialogue’ taking place among these institutions.10 The idea underlying this trend seems to be that transnational judicial dialogue may result in (what Jeremy Waldron calls) a ‘ius gentium’, ‘a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems.’11 Waldron’s approach of transnational judicial dialogue is important and fertile, and even more pertinent as far as human rights are concerned. ‘It is now commonplace in many other jurisdictions as well for courts to refer extensively to the decisions of the courts of foreign jurisdictions when interpreting human rights guarantees’, Christopher McCrudden has observed.12 With a view to these developments, the following parallel can be drawn: just like the quest for universal or common values for the world or regional community has resulted in the Universal Declaration of Human Rights and the European Convention of Human Rights, so transnational dialogue by judicial institutions may lead to a ‘common law of human rights’, as a further refinement of the international written texts.13 It needs no argument that this approach is a rather idealistic one which may not be immediately convincing as a justification for references to foreign law. Transnational judicial dialogue does indeed raise some pertinent questions which need to be addressed.

When we focus our attention at the ECHR, judicial dialogue seems—at face value—an attractive if not self-evident development. It may be argued that the Convention should indeed be interpreted in the light of the jurisdictions of the Member States of the European Convention. But when the Court engages in a comparative search into the jurisdictions of countries outside the Council of Europe it is a different matter. In what way may the outcomes of this search be used in its case-law? What could be said in order to justify the use of non-Convention or foreign law, before appealing to the grander ideal of ‘a common law of human rights’?

9 Jalloh v Germany App no 54810/00 (ECtHR, 11 July 2006).
10 See (n 2) and Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 University of Richmond LR 99. So far, different terms are being used all indicating some form of reference to foreign law. Hereafter, I hope to elucidate the different ways of referring to foreign law by the ECtHR.
13 Ibid.
14 See Part IV of this paper.

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Unlike in the US, there is little discussion in Europe about this development in the case-law of the European Court of Human Rights. This paper seeks both to clarify transnational dialogue by the European Court of Human Rights and find ways to justify this practice, against the backdrop of the American debate on this topic. I will proceed as follows. First, the concept of transnational judicial dialogue will be analysed (Part II). Subsequently, judicial dialogue as it presents itself in the judgments of the European Court of Human Rights is assessed, especially when non-Convention or foreign law is being used in a substantive way (Part III). Then, an attempt is made to define when and why the use of foreign law by the ECtHR can be considered a justifiable approach in judicial decision-making (Part IV). The paper rounds off with some concluding remarks (Part V).

II. Transnational Judicial Dialogue: a Multilevel Concept

‘Transnational judicial dialogue’ is one of those terms in comparative constitutional and international law that are appealing and elusive, yet diffuse at the same time. Everyone seems to have different associations with the term and cynical commentators would perhaps say that ‘transnational judicial dialogue’ means anything its user wants it to mean. Undoubtedly this has much to do with the term ‘dialogue’. Sympathetic by definition, like ‘diversity’ or ‘tolerance’ or ‘respect’, but what does it actually signify?

In the Oxford Dictionary ‘dialogue’ is defined as ‘a conversation between two or more persons as a feature of a book, play or film; or a discussion between two or more people or groups, especially one directed towards exploration of a particular subject or resolution of a problem’. The term ‘dialogue’ in combination with ‘judicial’ is of course more


16 Just like in the story of Humpty Dumpty, a character in Lewis Carroll’s Through the Looking Glass (1871). Humpty Dumpty uses the word ‘glory’ in a highly idiosyncratic manner:

‘I don’t know what you mean by “glory”,’ Alice said.
Humpty Dumpty smiled contemptuously, ‘Of course you don’t know—till I tell you. I meant “there’s a nice knock-down argument for you!”’

‘But “glory” doesn’t mean “a nice knock-down argument,”’ Alice objected.
‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’
‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’
‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’
Alice was too much puzzled to say anything.

17 In the Online Etymology Dictionary ‘dialogue’ is described as: ‘early 13c., “literary work consisting of a conversation between two or more persons”, from Old French dialogue, from Latin dialogus, from Greek dialogos “conversation, dialogue”, related to dialogesthai “converse”, from dia “across” + legein “speak”. Sense broadened to “a conversation”’. © Verlag Österreich
specific. In this combination it refers to a discussion by judges or courts, while the term 'transnational' indicates a discourse about law which is not limited to national boundaries. The term however, needs a further exploration.18

Under the title 'Dialogue between judges', the ECtHR itself publishes the proceedings of seminars held annually to mark the opening of the judicial year at the European Court of Human Rights. These meetings provide a forum for discussion between judges from the European Court and various other courts on different themes.19 'Transnational judicial dialogue' seems an appropriate term to label these discussions, because the judges derive from different jurisdictions of the Member States. The term is also being used for informal networks of domestic courts existing worldwide, 'interacting with and engaging each other in a rich and complex dialogue on a wide range of issues.' In this conception transnational judicial dialogue is supposed to lead not only to court decisions that enforce international law, but also contribute to creating international norms.20

There is yet another variant of 'transnational judicial dialogue'. In the Oxford Handbook of Comparative Constitutional Law21, a huge22 and important volume on the current status of comparative constitutional law, one chapter deals with 'The Use of Foreign Law in Constitutional Interpretation'.23 The focus of that chapter is on transnational judicial dialogue by constitutional courts, that is to say, the actual use of judicial decisions of foreign jurisdictions in constitutional interpretation. As a matter of fact there are many examples of constitutional courts referring in their case-law to foreign and international law and in that sense contribute to 'a transnational judicial dialogue'.24 As we have seen, the United States Supreme Court refers to jurisdictions other than its own in a number of cases – a phenomenon which has prompted a heated discussion in the US. Further-

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18 See also: Maya Hertig Randall, 'Der grundrechtliche Dialog der Gerichte in Europa' (The Dialogue on Human Rights by Courts in Europe) (2014) Europäische Grundrechte Zeitschrift 5. Hertig Randall distinguishes between the following functions of dialogue; a. strengthening of persuasive authority; b. striving for external coherence; c. countering the fragmenting of human rights systems; d. mutually limiting authority (in the case of 'vertical dialogue').


21 Michel Rosenfeld and András Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP 2012).

22 Comprising of sixty-four different contributions on comparative constitutional law, divided over 9 parts and all in containing 1396 pages.

23 Gábor Halmai, 'The Use of Foreign Law in Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP 2012) 1328-1349. Closely related to this is the article by Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Michel Rosenfeld and András Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP 2012) 1304-1328 dealing with constitutional borrowing (also by courts) and the migration of constitutional ideas.

24 Tania Groppi and Marie-Claire Ponthoreau (eds), The Use of Foreign Precedents by Constitutional Judges (Hart Publishing 2013).
more, the Canadian Supreme Court tends to be very open towards other jurisdictions. But while the latter two courts refer to other jurisdictions of their own accord, there is also the rather unique situation in which courts are obliged to (or may) refer to international and foreign law. South Africa’s Constitution for instance, contains a provision compelling courts to refer to other legal systems. Section 39 of the 1996 Constitution says that – when interpreting the Bill of Rights – a court, tribunal or forum ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. Furthermore, these institutions must consider international law and it is expressly stated that they may consider foreign law. The provisions are intimately intertwined with South Africa’s national history. The transition of South Africa from an apartheid regime to a constitutional democracy was very much influenced by constitutional borrowings, for the simple reason that South African lawyers had had no real experience of constitutional law or bills of rights prior to the Interim Constitution. From the very first decisions delivered after its establishment in 1995, the South African Constitutional Court has made extensive use of international and foreign law.

For a number of reasons, it is the references by the European Court of Human Rights that are particularly interesting. The ECtHR is one of the most authoritative of international courts and in that respect an example for other international courts. According to Alec Stone Sweet and Helen Keller in their elaborate study on the European Court of Human Rights, this institution is ‘the most effective human rights regime in the world.’ Moreover, the Court’s decisions reach further than that of other constitutional courts in that it is considered by many as a ‘constitutional court’ of the European Convention system. In interpreting the Convention norms the European Court mentions international legal norms; the case-law of the European Court of Justice reaches international legal norms; the case-law of the European Court of Justice of the European Union or

25 Section 39 of the 1996 Constitution of the Republic of South Africa, the last provision of Chapter 2 on the Bill of Rights, says:

(1) When interpreting the Bill of Rights,

a. a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b. must consider international law; and

c. may consider foreign law

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. Emphasis added.


28 I will elaborate this statement hereafter, in Part IV.

29 Mamatkulov and Askarov v Turkey ECHR 2005-I 293 paras 328-31 and Demir and Baykara v Turkey App no 34503/97 (ECtHR, 12 November 2008) para 85, in which it stated: ‘[t]he Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of the European States reflecting their common values. The consensus emerging from specialized international instruments and from the practice of contracting States may consti-

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European Union law; other treaties of the Council of Europe; the case-law of other international human rights courts; and the law of the Member States of the Council of Europe as well as the law of countries that are not members of the Council of Europe. However, when it comes to the latter two forms of transnational judicial dialogue, the problematic character of the phenomenon becomes apparent. To put it rather bluntly: it is by no means self-evident that the US Supreme Court or the Inter American Court of Human Rights exert any influence on the European Convention system. The question is whether this (potential) influence can be justified at all.

Hereafter it is in particular the references by the ECtHR to foreign law which will be further explored, albeit one caveat should be made. All of the abovementioned examples do indeed concern references to different judicial institutions, but whether or not there is really a dialogue in the sense of a discussion between the courts, is a question I will not address here. The very fact that the Strasbourg Court refers in its case-law to law that does not originate in the Convention or in one of the Member States, is in itself a phenomenon worth further examination.

III. Judicial Dialogue in the Case-Law of the ECtHR

Finding out how often and under what conditions the ECtHR engages in judicial dialogue and actually refers to foreign law is a difficult if not impossible task. The point is: what to regard as references? Is the mere mentioning of foreign law already relevant, or is the weight that is attached to it by the Chamber or maybe rather the Grand Chamber decisive? Is it only relevant when used in a substantive way? Whatever the number of decisions in which references to foreign law are actually made, the importance is that – given the possibilities to gather information about foreign law – the trend is likely to rise. This makes it even more important to address the questions it raises in a fundamental way.

Some authors criticize the Court for being rather superficial, lacking in method when referring to foreign law. ‘In previous years the ECtHR appears to have had hardly any resources for systematic comparative research at its disposal’, one researcher writes. Comparative research took place in an informal way, depending on the knowledge of the judges themselves. In recent years, a research division has been installed, but it is un-

32 Ambrus (n 31) 364.
clear whether it is sufficiently equipped to conduct a thoroughgoing comparative research. Moreover, systematic studies are only conducted in cases to be decided by the Grand Chamber.34

References to case-law from other jurisdictions present themselves in different ways in the case-law of the ECtHR. At times the parties take the initiative to refer to foreign jurisdictions, sometimes third parties like NGO's or the Chamber or Grand Chamber themselves. One example of a reference to foreign law that was initiated by (one of) the parties, is the case of Refah Partisi and Others v Turkey35 on the question whether the dissolution of the 'Refah-party' because of anti-constitutional activities was compatible with Article 11 ECHR (the freedom of association). According to the members of the Refah-party, the dissolution of Refah was not prompted by a pressing social need and was not necessary in a democratic society. Nor was their party's dissolution justified by application of the 'clear and present danger test' as interpreted by the Supreme Court of the United States of America.36 The reference does not seem to play any role in the Grand Chamber's considerations and final judgement.

In the case of Christine Goodwin v United Kingdom37 on the legal recognition of post-operative transsexuals in the United Kingdom, it was through third party interventions that relevant case-law was introduced in the case. The intervener – the NGO called ‘Liberty’ – carried out a comparison at the level of the contracting states as well as countries outside Europe, in order to show that there was a common approach that would narrow the margin of appreciation of the respondent state.

In most other cases the source of the reference is not clarified. The more recent ones, especially the Grand Chamber judgments, usually include a section on comparative and international material which mostly returns in the reasoning of the Court. The question that needs concern here is, however: what is the relevance of foreign law for the decisions of the Court? In what ways do references to foreign law in the Court's case-law present themselves and exert their influence?

A. A Typology of Judicial Dialogue

As has been observed, the topic of judicial dialogue has been more thoroughly discussed in the United States than in Europe. Advocates of references to foreign law and those who oppose this phenomenon have both sought to substantiate their arguments in a considerable number of articles on the subject and even Supreme Court Justices have expressed their views on the issue.38 One of these analyses, by Joan L Larsen, has resulted in a typology of the US Supreme Court's use of foreign law.39 The author distin-

34 Senden (n 33) 136.
36 ibid para 14.
37 Christine Goodwin v United Kingdom App No 28957/95 (ECtHR, 11 July 2002). This case will be discussed more at length, hereafter.
39 Joan L Larsen, 'Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation' (2004) 65 Ohio State L J 1283.
guishes between three distinct purposes of the ways foreign law has been used in its case-law: (1) expository, (2) empirical and (3) substantive. The expository use of comparative or international law is relatively straightforward: a court uses comparative or international law ‘to contrast and thereby explain a domestic constitutional rule.’ The empirical use of comparative constitutional law is more complex – the Court looks abroad to see what the effect of the proposed rule has been in the context of a specific legal system. That effect is taken into consideration when reviewing the domestic rule in the light of the Constitution.\(^4\)

Whereas the expository and empirical use can fairly be justified, the use of foreign law to supply substantive meaning to domestic sources is more problematic. The substantive use means – in Larsen’s definition – that the Court ‘seeks foreign and international guidance in defining the content of the domestic constitutional rule.’ Again two different modes can be distinguished: that of (a) reason-borrowing and (b) moral fact-finding. The ‘reason-borrowing’ use seeks foreign and international guidance in defining the content of the domestic constitutional rule. The use of foreign and international law labelled as ‘moral fact-finding’ takes place when a court is looking for the fact that ‘foreign or international jurisdictions have adopted a particular rule, as a reason to conform the U.S. constitutional rule to the foreign or international norm’.\(^4\)

More in general, this means that judges in one jurisdiction, actually use judicial interpretations of human rights norms in another jurisdiction as persuasive authority.

In my view, the typology of references to foreign law is a very fruitful analysis, all the more since the typology may be applied in the same way to the case-law of the ECtHR. However, when applied to the case-law of the European Court the same difficulties appear. Just like in the American model, references to the law of other legal systems which are merely explanatory do not really raise a problem.\(^4\) After all, by mentioning foreign

\(^4\) Following Larsen in this respect, the Supreme Court’s decision in Washington v Glucksberg 521 US 702, 734 (1997), may serve as an example of empirical use of foreign law. In this case, the Court had to decide whether the State of Washington’s ban on physician-assisted suicide violated the Due Process clause of the Fourteenth Amendment. After examining the American history, legal traditions and practices, the Court concluded that the right to physician-assisted suicide was not a fundamental liberty protected by the Constitution. The Court then turns to comparative sources, in order to determine whether the ban could survive the rational basis review. According to Larsen, it’s reliance on Dutch experience is a good example of the empirical use of foreign law. The point is that the Court looked to a study by the government of the Netherlands, which suggested that: ‘despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons.’ On the basis of this report, the Supreme Court subsequently concludes that the State of Washington was reasonable in ‘ensur[ing] against this risk by banning, rather than regulating assisted suicide.’ The effect of the Dutch rule in other words, was to provide the Supreme Court decision with an empirical basis for answering the question posed by the domestic constitutional standard.


\(^4\) An example of the expository use of foreign law is to be found in Appleby v United Kingdom App no 44306/98 (ECtHR, 6 May 2003) where the applicants had been denied permission to demonstrate in a privately owned shopping centre. They claimed a violation of Article 10 of the ECHR and relied on US case-law (including a number of Supreme Court decisions) dealing with the freedom of speech in commercial areas to support their claim. The ECHR takes cognizance of the reference to the American case-law, but it explains that it will not be ‘guided’ by it. The Court seems willing to accept US law here, but concludes that there is no uniform approach in this matter and therefore cannot guide Convention law. Appleby v the United Kingdom, para 46. A more recent example is the concurring opinion in the
case-law the Court is trying to elucidate its own decision. The same holds true for those cases where the ECtHR would use foreign law to get informed about the empirical effects of a certain measure. But – just like in the case-law of the American Supreme Court – there are also manifestations of a substantive use of foreign law in the judgments of the ECtHR, which raise more fundamental questions.

B. Substantive Use of Foreign Law: Reason-Borrowing and Moral Fact-Finding

1. Reason-Borrowing

The substantive use of foreign and international law can be distinguished into two different modes: that of ‘reason-borrowing’ and ‘moral fact-finding’. The case of *Jalloh v Germany* as mentioned in the introduction, may serve as an example of the first. Mr *Jalloh* is a national of Sierra Leone, who was born in 1965 and lives in Cologne (Germany). On 29 October 1993, plain-clothes policemen spotted the applicant taking two tiny plastic bags out of his mouth and handing them over for money. Considering that the bags contained drugs, the police officers went over to arrest the applicant. While they were doing so he swallowed another tiny bag he still had in his mouth. As no drugs were found on him, the competent public prosecutor ordered that he be given an emetic to force him to regurgitate the bag. The applicant was taken to a hospital. As he refused to take medication to induce vomiting, four police officers held him down while a doctor inserted a tube through his nose and administered a salt solution and *Ipecacuanha* syrup by force. The doctor also injected him with apomorphine, a morphine derivative. As a result the applicant regurgitated a small bag containing 0.2182g of cocaine. A short while later he was examined by a doctor who declared him fit for detention.

On 30 October 1993 the applicant was charged with drug-trafficking and placed in detention on remand. Before the Court, the applicant complained that he had been administered an emetic by force and that the evidence thereby obtained – in his view, illegally – had been used against him at his trial. He further complained that his right not to incriminate himself had been violated. He relied on Articles 3 (prohibition of inhuman and degrading treatment), 6 (fair trial) and 8 (family life) of the Convention.

In its judgment the Court refers to the case-law of the United States Supreme Court in which comparable cases were discussed. The Strasbourg court quotes literally from several Supreme Court cases, in particular the case of *Rochin v California* and Justice Frankfurter’s majority opinion in this case. The European Court observes:

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*case of Hirsi Jaama and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012) concerning Somalian and Eritrean migrants travelling from Libya, who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning these migrants to Libya without examining their case exposed them to a risk of ill-treatment and amounted to collective expulsion, according to the Court. In particular the concurring opinion by Judge Pinto de Albuquerque refers to decisions by the US Supreme Court, the Supreme Court of Canada and the High Court of Australia, and states: ‘The fact that some supreme courts, such as the United States Supreme Court and the High Court of Australia, have reached different conclusions is not decisive. [...] With all due respect, the United States Supreme Court’s interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the UN Refugee Convention and departs from the common rules of treaty interpretation.’ Concurring opinion by Judge Pinto de Albuquerque, para 67 and 68.

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In its view [the Supreme Court’s view], incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court’s judgment in the Rochin case (see paragraph 50 above), to “afford brutality the cloak of law.”

It must be admitted here that Article 3 of the Convention is a special case in kind. The prohibition of torture and inhuman and degrading treatment is a unqualified provision which does not allow for any limitations. Moreover, the importance of the provision (a core right) may explain the urge of the Court to seek international support. But what concerns us here is the fact that the Court uses foreign law in order to borrow reasons for its decision.

In sum, in the case of Jalloh v Germany, the ECtHR uses the reasons given by the United States Supreme Court, to support its interpretation of Article 3 of the Convention not to accept incriminating evidence obtained as a result of violence.

2. Moral Fact-Finding

That brings me to the case of Christine Goodwin v the United Kingdom (2002), which may serve as an example of ‘moral fact-finding’. The applicant was a post-operative male to female transsexual who – after her operation – went through great difficulties at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. The applicant was subsequently dismissed from her employment for reasons connected with her health, but she alleged that the real reason was that she was a transsexual. In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate. More in general, her case demonstrates that the social and legal acceptance of transsexuals in the United Kingdom was highly problematic.

Despite the fact that in a number of cases on the legal recognition of post-operative transsexuals in the United Kingdom, the Court decided there was no infringement of the right to ‘family life’, it now decides in a different manner. After some thoughts on the treatment of the applicant as a transsexual and some medical and scientific considerations, the Court states in Goodwin that there is no evidence of a European consensus regarding transsexuals (a reflection which usually leads to granting a broad ‘margin of...
appreciation' to the Member State in question). Then the Court continues with an important consideration on the emergence of an 'international trend':

'The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.'

The 'international trend', that is to say, the law and practice of non-European states, like Singapore, South-Africa, Canada, the majority of the US states and others, is used here to narrow down the margin of appreciation in this case. Consequently, since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the fair balance now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

Now whatever one thinks of the final outcome of the decision, the fact remains that the identification of an 'international trend' was relied on by the Court to justify an evolutive interpretation based on developments that did not take place within the contracting states. Should not the Court at least have tried to explain why it thought foreign law was that persuasive in this case?

IV. The Role of the ECtHR and Justification of Judicial Dialogue

A. A Constitutional Court rather than a Court of Final Instance for Individual Justice

So far, some examples of the use of foreign jurisdictions by the ECtHR in a substantive way have been presented. Before dealing with the question of how to justify these invocations, it is important to consider the Court's role within the Convention system and its position vis-à-vis the Member States. It is indeed its position as a constitutional court of the Convention system which renders arguments in favour of references to other jurisdictions more plausible.

Despite the subsidiary role the Court is supposed to play regarding human rights protection under the Convention (which the Court itself has repeatedly stressed by developing the doctrine of the 'margin of appreciation'), over the years the position of the

47 The Court relies for this information on facts which have been put forward by 'Liberty' in its 'third party intervention' (para 55, 56).
48 Christine Goodwin v United Kingdom App No 28957/95 (ECtHR, 11 July 2002) para 85.
49 Ibid para 93.
50 Dzehtsiarou, O'Mahony (n 31) 45. Both authors criticize the reliance of the ECtHR on 'an international trend' to justify an evolutive interpretation of the Convention. 'If the task of the courts, when engaged in evolutive interpretation, is to identify the extent of the evolution of consensus within that community, then the existence and direction of trends in other states outside of the United States or the Council of Europe is essentially irrelevant to this task.' Dzehtsiarou, O'Mahony 48-49.
51 Handyside v United Kingdom App No 54933/72 (ECtHR, 7 December 1976) para 48, in which the Court had to decide whether the prohibition of a book aimed at school children of twelve years and
Court has changed into that of a ‘constitutional court’ under the Convention system. That is by no means an uncommon stance, but rather a generally accepted point of view. The Court itself regards the Convention as a constitutional instrument of the European public order. Within that perspective, it positioned itself as guardian of the Convention, as a constitutional court. Apart from this, a number of leading experts on ECtHR-law tend to denote the Court in these terms. Steven Greer for instance, has been using the ‘constitutional’ framework to discuss the Convention system for some time. In his view, the Court is ‘the Constitutional Court for Europe, in the sense that it is the final authoritative judicial tribunal in the only pan-European constitutional system there is’. The former President of the ECtHR, Luzius Wildhaber, has been writing about the Court as an institution seeking ‘constitutional justice’. Several times he has expressed that the delivery of ‘constitutional justice’ should take precedence over ensuring ‘systematic individual justice’. Alec Stone Sweet and Helen Keller are most explicit in indicating the Court’s role when they write that: ‘the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe. But the most convincing reason for labeling the Court as a true constitutional court has been delivered by Wojciech Sadurski in his book entitled Constitutionalism and the Enlargement of Europe. According to this author, the accession of Central and Eastern European countries to the Council of Europe after the fall of the Berlin Wall, has inevitably changed the position of the Court. Where the Court’s role initially was that of ‘fine-tuning’ the national systems regarding human rights protection, it now had to adopt a role of policing national systems which suffered important systemic deficiencies [...] and in which serious rights violations occurred. The effect was a reinforcement of the constitutional role of the Court, that is to say – the most appropriate way to qualify the Court’s position, is to speak in terms of a trend towards constitutionality.

older because of the allegedly obscene and pornographic character of its sections on sex education, was ‘necessary in a democratic society’ for the ‘protection of morals’. The Court decided that since State authorities are in principle in a better position to judge the requirements of domestic law and the necessity of a restriction than the Court, the Contracting States must be left a margin of appreciation (in this case concerning Art 10 para 2 of the Convention).

52 See Loizidou v Turkey (1997) 23 EHRR 513 para 75; Loizidou v Turkey App No 15318/89 (ECtHR, 23 March 1995) para 75.


54 ibid 173.


57 Wojciech Sadurski, Constitutionalism and the Enlargement of Europe (OUP 2012).

58 Sadurski (n 57) 4-5.

59 Sadurski (n 57) 47.

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As has been said, the reason why I highlight the Court's constitutional position is that this perspective has consequences for transnational judicial dialogue by the ECtHR. More than a court of final instance for individual justice within Convention system, a constitutional court is supposed to seek a common denominator, or 'a common law of human rights'. As a constitutional court whose judgments transcend the particularities of the case at hand, whose interpretations and case-law are binding upon the states, and as a Court which refers to the Convention as a constitutional instrument of the European public order ('ordre public'), the search for a common frame of reference seems a defensible way to proceed. There is however, more to be said about the justification of references to foreign law.

B. Justification of References to Foreign Law

When dealing with the problem of justification, the arguments against the use of foreign law must be considered in the first place. In general, the most important objections can be divided into two categories: those dealing with the heuristic process and those concerning the legitimacy of judicial decisions. As to the heuristic process - in the American debate the Supreme Court has been accused of 'cherry-picking', only choosing the cases and other foreign material that proved supportive of the case at hand. More in general, the references to foreign law in the constitutional context have been found lacking in method.60 Several commentators have uttered the same objections regarding the ECtHR's references to foreign law.61 Within the context of this paper however, the focus is on the justification of judicial decisions with foreign jurisdictions rather than the method of references.

Questioning the legitimacy of judicial decisions concerns the problem that interpretation of the constitution or Convention by judicial institutions via borrowing is - in a way - undemocratic. This is again an argument which has been put forward quite forcefully in the debate on 'constitutional comparativism' in the United States. Should not the national law and legal system be the foundation of judicial decision-making? What is the democratic basis of foreign law? Or, as one scholar put it:

‘If we are concerned about the legitimacy of national judges making these decisions, is not the idea of judges making these decisions transnationally, in a cosy dialogue with each other, even more worrying?’62

Supreme Court Justice Scalia, one of the most outspoken adversaries of references to foreign law in the American debate, expressed his dissent in Thompson v Oklahoma, the following way:

60 Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' Michel Rosenfeld and András Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP 2012) 1322.
61 As Ambrus remarks on the ECtHR: 'In practice, the thoroughness with which a comparison is carried out varies widely, from a deep state-by-state analysis to merely acknowledging the existence or lack of a common approach without any further elaboration.' Mónika Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law' (2009) 2 Erasmus LR 353, 368.
‘We must never forget it is a Constitution for the US of America that we are ex-
pounding. The practices of other nations, particularly other democracies, can be rel-
evant to determining whether a practice uniform among our people is not merely a
historical accident, but rather “so implicit in the concept of ordered liberty”, that it
occupies a place not merely in our mores but, text permitting, in our Constitution as
well [...] But where there is not first a settled consensus among our people, the views
of other nations, however enlightened the Justices of this Court may think them to be,
cannot be imposed upon Americans through the Constitution.’

So far, the supposed undemocratic character of judicial references to foreign law.
Closely related to this is the problem of the anti-democratic character of judicial review
itself – the so-called ‘countermajoritarian dilemma’. If judicial review of legislation in the
light of the American Constitution and legislation is problematic from a democratic point
of view, this is all the more so with decisions based on an even broader set of lawgivers.
References to foreign law only seem to enhance this dilemma. Then how to justify ‘judi-
cial dialogue’ at all?

In response to the problem of the lack of legitimacy, it must be underlined that deal-
ing with an international treaty instead of a Constitution makes the discussion on refer-
ences to foreign law under the system of the European Convention quite a different
matter than under the American Constitution. First of all, the European Convention is
largely inspired by the Universal Declaration of Human Rights (UDHR), which came into
existence only two years before its regional counterpart. Unlike the UDHR, however, the
Convention is a binding treaty for the member states. Interpretation of the Convention
provisions by the Strasbourg Court therefore starts from the premise that this document
incorporates the shared values of a broad community of states. The idea underlying the
Convention and even more the European Court of Human Rights was that human rights
protection should not only take place at a local level, but needed a supranational moni-
toring system, in order to be really effective. The very fact that the Convention is a
treaty, not a Constitution which the Court is expounding has consequences for the pre-
sent subject. International treaties (in this case, a treaty for 47 Member States, ranging
from the Russian Federation to Malta) are by definition less particular, less directed at
local values than constitutions (if that holds true for constitutions at all). That might even
lead to the conclusion that judicial dialogue is in a way inherent in the case-law of the
ECtHR, albeit judicial dialogue within the community of Member States of the Conven-
tion.

A second feature of the Convention (making it different from the US Constitution and
more open towards other jurisdictions) is that it is a treaty of human rights, that is to say

63 Thompson v Oklahoma 487 US at 869. In this case, the Supreme Court concluded that the Eighth
Amendment's prohibition of 'cruel and unusual punishment' forbade the execution of a criminal who
was less than 16 years of age at the time of the offence. In the plurality opinion, Justice Stevens ar-
gued that to allow the execution of a criminal who was less than 16 years old at the time of the of-
fence, would offend civilized standards of decency. He supported this argument by reference to both
the practice of 18 states in the USA, but also to international experience: 'The conclusion [that it would
offend international standards] is consistent with the views that have been expressed by [...] other
nations that share our Anglo-American heritage, and by the leading members of the Western Euro-
pean community.' Thompson v Oklahoma 487 US at 830.

Zealand LR 45.
of 'moral standards' which are considered to be applicable to a broad community of states. How to interpret terms such as the 'right to life' (Article 2); 'inhuman and degrading treatment' (Article 3) or 'the protection of morals' (Article 10, clause 2 of the ECHR)? When it comes to interpreting human rights as transnational norms, the search for a broader perspective can be well defended. One may think of the Convention norms not so much in essentialistic ways, but rather in terms of a continuum. At the one pole of the continuum there are more universalistic norms (such as 'the prohibition of inhuman and degrading treatment' or 'the right to a fair trial') and at the other pole are the more relativistic, particularistic norms, like the limitation clause referring to a country's 'morals', 'the right to family life' etc. For the interpretation of more universalistic norms, judicial dialogue may be more obvious than for instance when it comes to interpreting what is supposed to be 'morals' – a norm which is eo ipso particularistic. From this point of view, references to foreign law may indeed be a legitimate way of interpreting (at least) some cases.

A third and in a way inevitable argument in favour of references to foreign law within the Convention system may be that it is, in a way, a self-evident phenomenon in the twenty-first century. Given the fact that through modern technology, it is so easy to take cognizance of foreign jurisdictions that it seems no more than logical to do this, particularly when it comes to 'hard cases'. According to Ran Hirschl, the motto of many jurists worldwide is that 'we are all comparatists now'. Constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question. With this way of putting it, Hirschl at the same time seems to demonstrate the limited conditions under which judicial dialogue is acceptable – it is most easily to be justified when the references to foreign law are not decisive for the case in question. That brings us again to the typology of cases that has been presented in Part III.

As we have seen, the more problematic use of foreign law is when it is being applied in a substantive way, either reason-borrowing or moral fact-finding. That statement holds true for the Supreme Court as much as for the European Court of Human Rights. The use of foreign law in this way, requires a further motivation than simply stating that it is a source of inspiration. The legitimacy of the judgment will be strengthened when the Court gives reasons for its use of foreign law and demonstrates how the solution that has been found elsewhere, fits into the Convention system.

66 ibid.
67 As Christos Rozakis, former vice-president of the ECtHR was inclined to do. Rozakis, 'The European Judge as Comparatist' (2005) 80 Tulane LR 276 ff. Supreme Court Justice Breyer is also an advocate of 'constitutional comparativism'. He regards American law (in contrast to that of other countries) not as a phenomenon that is 'handed down from on high', but as a complex interactive democratic process, a kind of 'conversation'. From that point of view it seems hardly objectionable to get acquainted with the law of other countries. Breyer is inclined to downplay the relevance of foreign law in judicial decision-making. If lawyers bring up a foreign decision, he says, 'the judges will likely read it, using it as food for thought, not as binding precedent'; Norman Dorsen, Antonin Scalia and Stephen Bryeyer, 'A conversation between US Supreme Court justices, The relevance of foreign legal materials in US constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3 International Journal of Constitutional Law 519.
V. Concluding Remarks

Transnational judicial dialogue seems to be a logical upshot of the twenty-first century digital world. The relative ease to gather information about foreign legal systems is a radical change compared to the preceding era. But although a constructive development at face value, transnational judicial dialogue is more complex than is commonly thought. References to foreign jurisdictions by international and constitutional courts cannot be simply presented as 'a source of inspiration' or as proof of their 'cosmopolitanism', but demand further justification.

The idea underlying this article is that the trend of referring to foreign law is likely to increase and needs further justification. An analysis was made of the notion of judicial dialogue and subsequently, some examples of judicial dialogue by the ECtHR have been analyzed. A typology of the Court’s cases demonstrates that when the Court uses foreign law in a substantive way, the problematic character of this way of motivating a case is most apparent. Since the references are by no means self-evident and arguments against judicial dialogue cannot simply be dismissed as irrelevant, the Court is suggested to try to explain its decisions more thoroughly, in particular when foreign law is being used as persuasive authority. In those cases a comprehensive reasoning is needed why the solution that has been found elsewhere, is being used for the interpretation of the Convention. Judicial dialogue by the ECtHR may then be considered a justifiable and even desirable development, with a view to an emerging 'common law of human rights' as a further refinement of the Convention. In the end, what Gábor Halmai observed when analysing present-day developments in comparative constitutional law, can be applied the way for the present topic. There is definitely a growing transnational judicial dialogue taking place, by the ECtHR and by other international and constitutional courts. Neglecting this trend is harder to justify than using the potential of judicial dialogue.

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As Halmai puts it: 'We can conclude that despite the different postures towards use of foreign law, constitutionalism and judicial review have gone “global” and there is definitely a growing horizontal communication between constitutional systems; and given this dramatic development, the traditional neglect of the study of comparative law is harder to justify.' Gábor Halmai, 'The Use of Foreign Law in Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), Oxford Handbook of Comparative Constitutional Law (OUP 2012) 1346. Jeremy Waldron states it more bluntly; ' [...] to ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face.' Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 Harvard LR 129, 144.

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