

The Dilemma of Constitutional Comparativism

*Carla M. Zoethout**

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Abstract

Over the past decade, a trend of referring to foreign law and foreign judicial decisions has emerged in the case-law of both the American Supreme Court and the European Court of Human Rights. Two of the most controversial cases of the Supreme Court in this era were partly based on non-US law. The European Court of Human Rights in turn, also frequently refers to case-law of non-Convention states.

This practice of what is called “constitutional comparativism” has been the cause of many debates in the United States, unlike comparable decisions by the European Court of Human Rights. All the same, it is far from self-evident that the Court, whose task it is to interpret and explain the Convention for 47 Member States, also refers to other jurisdictions. The apparent lack of justification of constitutional comparativism by the European Court demands further research.

This article discusses constitutional comparativism by the Supreme Court and the European Court of Human Rights (ECtHR) and the debate on this phenomenon, particularly in the United States. It further seeks to answer the question under what conditions constitutional comparativism by the

* Dr. iur., Associate Professor of Constitutional Law, University of Amsterdam, the Netherlands.

ECtHR – which appears to be part of a longer tradition of judicial activism – may be justified.

I. Introduction

Over the past decade, a trend of referring to foreign law and foreign judicial decisions has emerged in the case-law of both the American Supreme Court and the European Court of Human Rights. 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 one case (*Lawrence v. Texas*)¹ the question was whether a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause, while in *Roper v. Simmons*² the problem was whether the death penalty for juveniles must be considered “cruel and unusual punishment” in terms of the Eighth Amendment. Apart from these, there are many other cases where the Supreme Court refers to non-US law in order to justify its decisions.³ Nevertheless, this practice is much disputed. For some years now, there is a discussion going on in the United States about what is called “constitutional comparativism”.⁴

“Constitutional comparativism” is the practice of courts to refer to the law, judicial decisions or practice of legal systems other than their own. Many different terms are being used for more or less the same phenomenon:

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

² *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

³ To name some examples, the Court has referred to foreign precedents in: *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), *Printz v. United States*, 521 U.S. 898, 977 (1997); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 945 n.1 (1992); *Foster v. Florida*, 537 U.S. 990, 992 et seq. (2002); *Elledge v. Florida* 525 U.S. 944, 944 et seq. (1998); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997); *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002); *Raines v. Byrd*, 521 U.S. 811 (1997).

⁴ On this topic, see C. R. Sunstein, *A Constitution of Many Minds, Why the Founding Document Doesn't Mean What It Meant Before*, 2009, Chapter 8; M. Tushnet, *Weak Courts, Strong Courts*, 2008; R. A. Posner, *How Judges Think*, 2008, Chapter 12, “Judicial cosmopolitanism”; C. McCrudden, *Judicial Comparativism and Human Rights*, in: E. Özücü/David Nelken (eds.), *Comparative Law, A Handbook*, 2007, 371 et seq.; R. P. Alford, *In Search of a Theory for Constitutional Comparativism*, *University of California Law Review*, February 2005, 639 et seq.; J. Waldron, *Foreign Law and the Modern Ius Gentium*, *Harv. L. Rev.* 119 (2005), 129 et seq.; *A Conversation Between U.S. Supreme Court Justices, The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, *International Journal of Constitutional Law* 3 (2005), 519 et seq.; R. Bork, *Coercing Virtue, The Worldwide Rule of Judges*, 2003.

“comparative constitutional interpretation”,⁵ “migration of constitutional ideas” (or constitutional jurisprudence),⁶ “generic constitutional law”⁷. Hereafter, I will use the term “constitutional comparativism”, which should be distinguished from “comparative constitutionalism”, being the comparative study of constitutional systems based on the idea of limited government.

Despite the fact that reference to foreign law has become fairly common, the question is whether this is a prudent way of judicial decision-making. Should not US law or the European Convention be the sole source of law for the courts? Or, put differently, why should the meaning of the American Constitution depend on decisions of the Supreme Court of Canada or the European Court of Human Rights?⁸ Does the Supreme Court not violate the principle of national sovereignty, by doing so?

These questions are not only relevant for the American Supreme Court and Constitution, but also for the European Court of Human Rights. What is the basis of its authority to refer to American, South-African or Canadian law for the interpretation of the European Convention? Is this not a new form of judicial activism? A form of activism that requires substantial justification?

It is a striking phenomenon that whereas “constitutional comparativism” in the United States has been the cause of many debates, this can hardly be said about the European Court of Human Rights’ decisions in this respect.⁹ And that, while it is far from self-evident, the Court, whose task it is to interpret and explain the Convention for 47 Member States, also refers to case-law of the Canadian Supreme Court or the law of Australia or New Zealand. Just like the first reference to the notion of “the living constitution” in *Tyrer v. United Kingdom*¹⁰ in fact witnessed an “activist” approach of the Court regarding the interpretation of the Convention (which expanded its possibilities of interpretation), the same can be said about the

⁵ S. Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, *Ind. L. Rev.* 74 (1999), 820.

⁶ S. Choudhry (ed.), *The Migration of Constitutional Ideas*, 2006.

⁷ D. Law, *Generic Constitutional Law*, *Minn. L. Rev.* 89 (2005), 652.

⁸ In *Washington v. Glucksberg*, 521 U.S. 702 and n. 8, 718 n. 16 a reference is made to a decision by the Supreme Court of Canada and in *Printz v. U.S.*, 521 US 898, 977 (1997), Justice Breyer cited European practices.

⁹ More in general, decisions by European constitutional courts are not as much disputed as the US Supreme Court’s. See about this M. Rosenfeld, *Constitutional Adjudication in Europe and the US; Paradoxes and Contrasts*, *International Journal of Constitutional Law* 2 (2004), 633 et seq.

¹⁰ Judgment of 25.4.1978, Series A, No. 26.

Court's references to non-European law.¹¹ Again, we may regard it as a kind of activism, this time by the extension of the Court's legal sources.

Nevertheless, if it has been observed at all, the Court's behavior in this respect has hardly met any criticism. Rather, it has – without further ado – been regarded as a positive development in its case-law. Constitutional comparativism by the European Court is considered a sign of its “cosmopolitanism”¹² – the Court does not lock itself up in an ivory tower, but has an open attitude towards the globalization of jurisdiction.¹³ In my view, however, the apparent lack of justification of constitutional comparativism by the European Court of Human Rights, demands further research.

This article aims at contributing to such research. Hereafter, I will begin by discussing two Supreme Court cases and the American debate on constitutional comparativism (II.). Subsequently, I will focus on the European Court of Human Rights. As will appear, the references to non-Convention law seem to be part of a longer tradition of judicial activism by the Strasbourg Court (III.). The legitimacy of references to foreign law, however, can hardly exist in the fact that judges themselves regard the internationalization of judicial review as “inherently good” or a proof of the Court's cosmopolitanism.¹⁴ Part IV will therefore deal with the question how to justify constitutional comparativism. This article concludes with some final observations on this phenomenon (part V.).

¹¹ That means to say: not the law of the 47 Member States, but the law of other countries, for example the case-law of the Supreme Courts of the US or Canada.

¹² See *H. Nieuwenhuis*, How to Handle a Living Constitution?, in: A.-J. Kwak (ed.), *Holy Writ, Interpretation in Law and Religion*, 2009, 131 et seq.

¹³ Vice-President *Christos Rozakis* in particular refers in these terms to the Court's constitutional comparativism, *C. L. Rozakis*, *The European Judge as Comparatist*, *Tul. L. Rev.* 80 (2005), 257 et seq.; *Sir B. Markens/J. Fedtke*, *The Judge as Comparatist*, *Tul. L. Rev.* 80 (2005), 11 et seq.

¹⁴ Or, as *Jeremy Waldron* remarks about the principle of “stare decisis” in the United States: “But even if one disagrees with the judge's conception, it is surely better that he should articulate such a theory than that he simply give the impression that he thinks deferring to precedent is a good idea. We should require nothing less for the citation of foreign law.” *J. Waldron* (note 4), at 130.

II. “Constitutional Comparativism” by the Supreme Court of the United States

1. Two Supreme Court Decisions

That reference to foreign law is a much contested topic, appears from the flood of publications, but even more from a congressional resolution which was adopted in 2004, stating that “judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions”.¹⁵ Opposition to the Court’s decisions even induced some senators to introduce a bill – the Constitution Restoration Act of 2004¹⁶ – stating that in interpreting the Constitution, a court may not rely on “any constitution, law, administrative rule, Executive Order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law”. During the nomination hearings of *John Roberts* (2005) and *Samuel Alito* (2006), the senators were particularly focused on this matter, firing questions at the candidates hoping to make them somehow speak out publicly.

In order to get some idea of the way foreign law is being used in judicial decisions, it is important to go into further detail in two cases. In the case of *Lawrence v. Texas* (2003) the Supreme Court declared “sodomy laws” – which prohibited sexual contact between two persons of the same sex – unconstitutional. *Lawrence* was generally considered a “land-mark case”. The same question had been adjudicated before in *Bowers* (1986), but the majority of the Court now considers “intimate consensual sexual conduct” to be part of the freedom protected by the “Substantive Due Process” clause un-

¹⁵ H.R. Res. 568, 108th Cong. (2004); Press Release, Rep. *Tom Feeney*, Reaffirmation of American Independence Resolution Approved (13.5.2004). The Resolution states: “Resolved, That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws or pronouncements of foreign institutions unless such foreign judgments, laws or pronouncements are incorporated into the legislative history of laws passed by legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.” The preface of the resolution says that inappropriate judicial reliance on foreign laws threatens the separation of powers. A related congressional bill which seeks to prohibit any reference to foreign materials has also been introduced. H.R. Res. 3799, 108th Cong. (2004). *Y. Segal*, The Death Penalty and the Debate over the U.S. Supreme Court’s Citation of Foreign and International Law, *Fordham Urb. L. J.* 33 (2006), 1421 et seq.

¹⁶ S. 2323, 108th Cong. (2004) (note 15).

der the XIVth Amendment.¹⁷ In order to justify the fact that *Bowers* is overruled by this decision, the Supreme Court refers (among others) to the fact that the European Court of Human Rights rejects penalization of this conduct and that other countries have adopted measures which confirm the rights of homosexuals to enter into intimate relationships. In its conclusion the Court states: “*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled. (...) Petitioner’s right to liberty under the Due Process Clause gives them the full right to engage in private conduct without government intervention.” Thus the Supreme Court in its majority opinion.¹⁸

In *Roper v. Simmons*,¹⁹ Justice *Kennedy* writes the majority opinion. According to him, the execution of juveniles under eighteen at the time of the committed crime must be considered “cruel and unusual punishment as defined by the evolving standards of decency of a maturing society”. The way the Court refers to international opinion as an underpinning of its decision is remarkable:

“The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18.”²⁰

Even though international opinion is in no way decisive, but is only referred to as a confirmation of the Court’s judgment, it cannot be denied that it contributes to the final judgment of the majority of the Supreme Court justices and entails a revision of a former judgment in this delicate matter.

Both Supreme Court decisions raise several questions. What is the relative weight of foreign law in the considerations of the judges? Must they be regarded as *obiter dicta* or do they play a more important role in the final decision? These questions are related to the more general debate about the

¹⁷ The liberty protected by the Constitution allows homosexual persons the right to choose to enter into relationships in the confines of their homes and their own private lives and still retain their liberty as free persons. *Lawrence v. Texas* (note 1).

¹⁸ *Lawrence v. Texas* (note 1).

¹⁹ *Roper v. Simmons* (note 2), 578 et seq.

²⁰ According to *Y. Segal* (note 15), the use of the Court of comparative material in cases about the death penalty is only marginal. In an analysis of these cases *Segal* demonstrates that the Court uses a meticulously constructed hierarchy of sources, which serve as an objective indication of “society’s decency standards”, beginning with national laws and ending with international law. More in general, *Segal* believes that “constitutional comparativism” plays only a limited role in the Supreme Court’s case-law.

legitimacy of judicial review, which takes place ever since Chief Justice *Marshall* invalidated a federal law in *Marbury v. Madison* (1803).²¹

2. The Debate About “Constitutional Comparativism” in the United States

Like so many topics of public debate, “constitutional comparativism” in the United States leads to a strong polarization of views.²² The way adherents of constitutional comparativism define their position and that of their opponents is nothing less than suggestive. “Constitutional comparativism” is presented as a form of “cosmopolitanism”: *Harold Koh* refers to it as a “transnational legal process” and *Anne-Marie Slaughter* to “a process of constitutional cross-fertilization” which would result in a developing international legal order.²³ *Bruce Ackerman* criticizes the “parochialism” of American judges and their indifference towards the spreading of “world constitutionalism”.²⁴

Supreme Court Justice *Breyer* is one of those in favor 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”.²⁵ He underlines the similarities between an American and a foreign judge in interpreting constitutional terms. A similar person in a similar position in a similar society tries to interpret a similar document. Why should that be a problem?

In a way, references to foreign law only make sense when a constitution is being regarded as a living document which should not only be interpreted according to the ideas of the founding fathers and to the national legal system, but to a much broader set of legal sources. But then the question is,

²¹ 5 U.S. (137).

²² On the political debate in the US, see *R. Dworkin*, *Is Democracy Possible Here? Principles for a New Political Debate*, 2006. A difference in opinions which *Scalia* refers to as a “Kulturkampf”, in: *Romer v. Evans*, 517 U.S. 620, 636 (1996) (*Scalia*, J., dissenting).

²³ *H. Koh*, *International Law as Part of Our Law*, *AJIL* 98 (2004), 43 et seq. and *A.-M. Slaughter*, *A Global Community of Courts*, *Harv. Int'l L. J.* 44 (2003), 193.

²⁴ *B. Ackerman*, *The Rise of World Constitutionalism*, *Va. L. Rev.* 83 (1997), 771.

²⁵ *B. Ackerman* (note 24).

under what conditions would comparative constitutionalism make sense? Let us consider the following.

References to foreign law may be supported first of all by the idea of the “Zeitgeist”. As time passes, morality evolves. For constitutional interpretation, this entails that provisions should be interpreted in the light of present-day conditions and current society’s morals, rather than be bound to their meaning at the time of their coming into existence. One might even extend this principle and maintain that a judge should not only pay credit to the law of a particular country at a particular time, but he must necessarily be inspired by the leading principles of countries having a comparable political and legal system.

Secondly, it is the ideal of “universalism” that seems to underlie the constitutional comparativist tendencies. From this point of view, in a globalizing world, law is no longer only created by a nation’s own legal system. The world community as a whole determines the law. Those who interpret the law should therefore be guided by universally held convictions and legal provisions, in particular such fundamental principles as human rights.

Thirdly, “constitutional comparativism” may be influenced by the notion of “cosmopolitanism” as an ideal of citizenship. With the increasing possibilities of fast communication, technical progress and internationalization, we are no longer citizens of a particular country only. In the 21st century, it is the international community which determines our lives and our law. In this perspective, references to foreign law only seem a logical consequence of the way we live.

All these points of view, whether it is the idea of the “Zeitgeist”, the ideal of universalism or the notion of cosmopolitanism may contribute to a change in thinking about the interpretation of law and more specifically, constitutional provisions. Advocates of constitutional comparativism are likely to be influenced by one or more of the abovementioned ideals.

3. “Constitutional Comparativism”: Some Objections

Obviously, there is something to be said against comparative constitutionalism, too. One of the most outspoken adversaries of “constitutional comparativism” is Supreme Court Justice *Antonin Scalia*. He explicitly declines the references to foreign insights by the Supreme Court in *Lawrence*.²⁶ According to *Scalia*, these references are meaningless, but nonethe-

²⁶ *Lawrence v. Texas* (note 1).

less dangerous. In a notorious passage in his dissenting opinion to *Lawrence*, he remarks that: “this Court ... should not impose foreign moods, fads, or fashions on Americans”. In a debate with his colleague *Stephen Breyer*, he points at the arbitrary character of “constitutional comparativism”: when foreign decisions concur with what the judges think, they are being used, if not, not. Thus, the Supreme Court did refer to foreign law in *Lawrence*, “[b]ut we said not a whisper about foreign law in the series of abortion cases”.²⁷

Scalia does not seem to be entirely mistaken in this respect, as even *Breyer* admits. Since it is out of the question to have knowledge of all the law (and the contexts) of all countries, the judge cannot but be selective. But this selection can easily lead to references of law or judicial decisions that support the decision at hand (of the viewpoint of the majority of the judges). Decisions that do not support the majority opinion are, for the sake of convenience, left aside.

The practice of referring to foreign law or “constitutional comparativism” raises further questions. For one, there is the problem of legitimacy. Should the national law and legal system not be the basis of judicial decision-making? Put differently, why would foreign law be binding at all? Furthermore, there is the problem of the anti-democratic character of judicial review – the “counter-majoritarian dilemma”. References to foreign law only seem to enhance this 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. Then there is the problem of selection. How do judges make a selection at all? Are not those decisions selected that link with the viewpoints of the judges themselves (and thus other decisions being left aside)? One may argue that reference to foreign law can only be legitimate when the judge is confronted both with decisions that support the case and with decisions that do not. Finally, there is the question of the relative weight of the reference. Does it really contribute to the justification of the case?²⁸ Is the reference the basis of the judicial decision or is it only supportive, or for that matter, simply a source of inspiration for the judges?

²⁷ A Conversation Between U.S. Supreme Court Justices (note 4), 521.

²⁸ See *Y. Segal* (note 15), 1421 et seq.

III. Constitutional Comparativism by the ECtHR

1. A Dialogue with Foreign Law

As has been said before, these questions are just as relevant to the case-law of the European Court of Human Rights as they are to the Supreme Court. According to *Christos Rozakis*, Vice-President of this court, the ECtHR too uses international law and case-law from countries outside the Council of Europe. The Court regularly enters “a dialogue with”: (1) the legal system of the European Union, (2) the international legal order and (3) foreign jurisdictions.²⁹

Remarkably, *Rozakis* presents these references as nothing less than self-evident. Indeed, he considers the references to international and foreign law as a proof of the Courts “cosmopolitanism”.³⁰ He mentions judges who – by referring to foreign law – open a dialogue with the law outside their jurisdiction, in order to draw inspiration and enrich their own case-law. The enrichment of the law would consist in the fact that justice be done on the basis of other principles and values that are supposed to have gained “ecumenical dimensions” or express societal or other changes, for which the internal legal order is open.³¹ The Court, in other words, does not live in “splendid isolation”, but opens a dialogue with the law of other countries. Thus, *Christos Rozakis*.

Again, we are confronted with an advocate of “constitutional comparativism” who relies on vague and even slightly mystifying concepts and terms in order to sustain his case. After all, the question remains why the law of other nations (that is to say, countries from outside the Council of Europe) would be binding at all for the interpretation of the European Convention? *Rozakis*’ final remark is telling in this respect. Just like *Breyer*, he warns for a too idyllic idea of the Court’s “cosmopolitanism”. Moreover, says *Rozakis*, we must keep in mind that when the Court opens a “dialogue” with other countries, this does not automatically result in copying foreign preferences or choices by the Court. Let me quote him again:

²⁹ *C. L. Rozakis* (note 13), 270 et seq. See also *J.-F. Flauss*, La Présence de la Jurisprudence de la Cour Suprême des Etats-Unis d’Amérique dans les contentieux Européen des Droits de l’Homme, RTDH 16 (2005), 313.

³⁰ *C. L. Rozakis* (note 13), 279.

³¹ This is the way *Rozakis* sketches this phenomenon, with reference to the lengthy article by *Sir B. Markesinis/J. Fedtke* (note 13), 13 et seq. Literally he says that the enrichment of the law would consist in the fact that justice would be done “on the basis, inter alia, of principles and values that presumably have acquired ecumenical dimensions or reflect societal or other changes which their own legal system is also ripe to undergo”. *C. L. Rozakis* (note 13), 257.

“When we speak of a ‘dialogue’, we mean a ‘dialogue’. (...) *The ECHR may discuss ‘foreign’ law or experiences (...) but (...) [I]t still retains sovereign power to use all the evidentiary material before it freely and to assess it accordingly* (passage in italics, CMZ). Still, the fact remains that law extraneous to its own case law has gained ground, and is increasingly gaining ground, in the ECHR’s mode of operating before it reaches a decision. This is a good sign for the founders of a court of law protecting values which by their nature are inherently indivisible and global.”³²

Rozakis’ reflections appear sympathetic at first sight. Nevertheless, they can hardly be regarded as sufficient justification of the sweeping liberty of interpretation that the Court currently embraces. The “founding fathers” of the Convention in the 1950s at best envisioned a regional Court, as it appears from the *travaux préparatoires*. The history of the European Convention does not reveal some inherent form of “global” thinking.³³ In order to have an idea of the practice of the “dialogue” with foreign decisions, let us now analyze some cases of the Court in particular.

2. Two Cases of the European Court of Human Rights

Goodwin v. United Kingdom

Hereafter, I will consider two of the European Court’s decisions in which references are made to non-Convention law, in order to support and motivate the decision. The first case is in a way counter-intuitive: in *Goodwin v. the United Kingdom*³⁴ the final decision may seem justified, but the way of motivating the judgment leaves much to be desired. In the second case (*Pretty v. UK*) one may have doubts about the considerations that lead to the final decision.

In the case of *Christine Goodwin v. the United Kingdom* (2002), 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

³² C. L. Rozakis (note 13), 279.

³³ Compare *M. Janis/R. Kay/A. Bradley*, *European Human Rights Law, Texts and Materials*, 1995, 18 et seq. Initially, even the installation of a regional court that would be authorized to review state action, was met with resistance. Though Europeans were acquainted with declarations of rights, unlike the Americans, judicial review in the light of those declarations was still unfamiliar to them.

³⁴ Judgment of 11.7.2002, Application No. 28957/95.

was subsequently dismissed from her employment for reasons connected with her health, but she alleges 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 is highly problematic.

Before the Court, the applicant complains that the United Kingdom violated Articles 8 (“family life”); 12 (the right to marry), 13 (the right to an effective remedy) and 14 (the prohibition of discrimination), as far as the legal status of transsexuals in the United Kingdom is concerned, in particular their status regarding work, social security, pensions and marriage.

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”,³⁵ 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”:³⁶

“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.”³⁷

In conclusion, the Court finds that “the respondent Government can no longer claim that the matter falls within their margin of appreciation (...)”. 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, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favor of the applicant.

³⁵ Like for instance in *Rees v. the United Kingdom*, Judgment of 17.10.1986, Series A, No. 106; *Cossey v. the United Kingdom*, Judgment of 27.9.1990, Series A, No. 184; *X, Y and Z v. the United Kingdom*, Judgment of 22.4.1997, Appl. No. 21830/93 and *Sheffield and Horsham v. the United Kingdom*, Judgment of 30.7.1998, Appl. No. 22885/93 and 23390/94.

³⁶ The Court relies for this information on facts which have been put forward by “Liberty” in its “third party intervention” (paras. 55, 56).

³⁷ *Goodwin v. United Kingdom*, Judgment of 11.7.2002, Appl. No. 28057/95, para. 85.

There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.³⁸

Presumably, the final decision will not cause much dissent. But the question is, whether the fact that the Court in this case diverges from its usual way of reasoning concerning the “margin of appreciation”, should not be motivated more extensively.³⁹ Put differently, by referring to the international trend regarding social acceptance and legal recognition of transsexuals, the case has in fact been withdrawn from the national jurisdiction, despite the lack of a European consensus. Does such a decision not demand further justification? And, how could the reference to the international legal order be legitimated?

Pretty v. United Kingdom

Let us consider a second case where the Court refers to the situation in different countries – *Pretty v. the United Kingdom*.⁴⁰ This case is about Ms *Pretty*, who is seriously ill. She is paralyzed from the neck, is unable to talk and is fed through a tube. Mentally she is well however, and capable of making decisions. Ms *Pretty* wants to end her life, but without help that is impossible for her. She is therefore obliged to ask her husband for help. However, her request to the Director of Public Prosecutions to give an undertaking not to prosecute her husband, should he assist her to commit suicide in accordance with her wishes, is denied.

The applicant makes a case for different rights under the Convention. First of all, Article 2, the right to life. The reference to foreign law occurs in the considerations on Article 8, but these are so much intertwined with Articles 2 and 3 of the Convention that I will consider these provisions, too. Reacting to the first complaint, the Court says that Article 2 has several times been interpreted so as to oblige the State to protect life. But, the Court continues:

“Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.”⁴¹

³⁸ *Goodwin v. United Kingdom* (note 37), para. 93.

³⁹ On the lack of consistency in the margin of appreciation doctrine, see *L. Hoffmann*, The Universality of Human Rights, Judicial Studies Board Annual Reference, 19.3.2009, no. 27, <http://www.justice-for-families.org.uk/reports/JStudiesBoardLecture0309.htm>.

⁴⁰ Judgment of 29.4.2002, Appl. No. 2346/02.

⁴¹ *Pretty v. United Kingdom*, Judgment of 29.4.2002, Appl. No. 2346/02, para. 39.

The appeal to Article 3 which Ms *Pretty* invokes in order to substantiate her case is also declined. She believes that the refusal of the Director of Public Prosecutions not to prosecute her husband (when he would assist her to commit suicide) and the prohibition of euthanasia amounts to “inhuman and degrading treatment” ex Article 3, a consequence for which the State would be responsible. The Court, though, is of a different opinion:

“This claim (...) goes beyond the ordinary meaning of the word. (...) While the court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection.”⁴²

As far as the appeal to Article 8 is concerned (“right to family life”), the Court says that the prohibition to offer help in suicide, must be regarded in the light of this provision. After all, Article 8 seeks to protect personal autonomy of which the right to self-determination is a part. The Court recognizes that there has been a breach of Article 8, but as to the question whether this is in accordance with the law, it takes the following steps. In weighing the necessity in a democratic society, (a) the “margin of appreciation” of the Member States is at stake, but this “margin of appreciation” is limited when it comes to (b) an “intimate area of private life”, like in the present case. In order to substantiate the point that Member States are authorized to impose limits, in a situation like the present one, the Court refers to a decision by the Canadian Supreme Court:⁴³ “(...) States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals.”

The decision raises many questions. But for those that concern us here, the latter reasoning is most important. The point is this: why does the Court refer to a decision of the Canadian Supreme Court (*Rodriguez*)⁴⁴ in order to substantiate this crucial case?

⁴² *Pretty v. United Kingdom* (note 41), para. 54. To continue by stating that: “(...) the positive obligation on the part of the State which is relied on in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies. ... It would require that the State sanctions actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.”

⁴³ *Pretty v. United Kingdom* (note 41), para. 74.

⁴⁴ In para. 66 of the *Pretty*-case, the Court refers to *Rodriguez v. the Attorney General of Canada* ([1994] 2 Law Reports of Canada 136), “which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a

3. “Constitutional Comparativism”: A New Trend in the ECtHR’s Case-law?

It is questionable – to say the least – why the Court in some cases refers to an “international trend” in the laws of other countries (among which non-European countries) and in other cases to the Canadian, the American or the South-African Court of Justice. In *Goodwin*, the reference to the international trend appears to be based on empirical information that “Liberty” (as a third party) contributes to the case. In *Pretty*, the reference to the Canadian Court appears a means to be able to reject the appeal decisively.

Despite the fact that the Court in general is not inclined to justify its decisions from a theoretical point of view, it would at least be important for the legitimacy of its decisions, when they would be motivated more profoundly. *Alistair Mowbray* contends in “The Creativity of the European Court of Human Rights” that critics of the Court’s judicial activism believe the Court in *Tyrer* was very reluctant to come to a theoretical elaboration of the “living instrument” doctrine.⁴⁵ In this case, the Court had to decide whether corporal punishment for juveniles amounts to “degrading punishment” (Article 3 of the Convention). The punishment, consisting of bare-skin birching carried out by a policeman at a police station, was prescribed by law and practiced on the Isle of Man, a dependent territory of the United Kingdom with a significant degree of legislative autonomy. At that time, this form of punishment had been abolished in the rest of the United Kingdom and was neither to be found in the vast majority of the Convention States. The Advocate-General for the Isle of Man put forward a remarkable argument: judicial corporal punishment could not be considered degrading because “it did not outrage public opinion in the Isle of Man”. The Court rejects this point of view and says:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”

provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one’s own body.”

⁴⁵ *A. Mowbray*, *The Creativity of the European Court of Human Rights*, HRLR 5 (2005), 60 et seq.

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About this famous passage, *George Letsas* writes: “This piece of legal reasoning inaugurated the Court’s extensive use of evolutive interpretation.”⁴⁶ The case of *Tyrer* was followed by *Marckx*,⁴⁷ a few months later. In this case, the applicants, a child born out of wedlock and his unmarried mother, complained that Belgian legislation violated their right to family life under Article 8 of the Convention. Unlike the case of “legitimate children”, maternal affiliation between a child born out of wedlock and its mother could only be established either by voluntary recognition or by court declaration. The Court admits that at the time of the adoption of the Convention the distinction between “lawful” and “unlawful” children was permissible, but it underlines that “the domestic law of the great majority of the Member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *mater semper certa est*”.⁴⁸ In the rest of the Court’s reasoning it appears that the “living instrument” doctrine is now expanded from the “domestic law of the Member states”, to evolving European convictions and viewpoints.⁴⁹

This development in the case-law of the European Court finds a follow-up (according to *Letsas*) in the case of *Dudgeon*,⁵⁰ which deals with the question whether the penalization of homosexuality in Northern Ireland is an infringement of Article 8 ECHR. According to the Court: “in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.”⁵¹

In my view, the liberal interpretation of the Court which began with the “living document” doctrine in *Tyrer* and continued in *Marckx* and *Dudgeon*, revives in *Goodwin v. UK*. In the latter case, the Court appeals – in the absence of a European consensus – to a “continuing international trend” in favor of the social acceptance and legal recognition of transsexuals. This extension of its legal sources lacks a motivation. Nevertheless, the number of

⁴⁶ *G. Letsas*, A Theory of Interpretation of the European Convention on Human Rights, 2007, 76.

⁴⁷ *Marckx v. Belgium*, 13.6.1979, Series A, no. 31.

⁴⁸ *Marckx v. Belgium* (note 47), para. 41.

⁴⁹ *G. Letsas* (note 46), 77.

⁵⁰ *Dudgeon v. United Kingdom*, 22.10.1981, Series A, no. 45. This case is also cited by the American Supreme Court in *Lawrence v. Texas* in 2003.

⁵¹ *Dudgeon v. United Kingdom* (note 50) para. 60.

cases in which references are made to non-Convention law is growing rapidly.⁵²

Many of the questions that have been put forward in the discussion on constitutional comparativism by the American Supreme Court, seem to have the same relevance for its European counterpart. The problem of the legitimacy (why would foreign law be binding at all?), the selection of decisions and the relative weight of the decisions in the final judgment. All the more when it comes to the motivation of the Court's decisions,⁵³ a further elaboration of the reasons for referring to foreign decisions is indispensable.

IV. Some Reflections on the Legitimacy of Constitutional Comparison by the European Court

Clearly, both the Supreme Court of the US and the European Court of Human Rights tend to be more open towards other sources of law. But the question is whether these institutions are really comparable in this respect. Should we not make a fundamental difference between both courts? In my view, the fact that the Supreme Court is supposed to interpret a constitution, whereas the main legal source for the ECtHR is an international treaty, has major consequences for the legitimacy of constitutional comparativism.

It is possible to distinguish between two perspectives with opposite consequences. In the one perspective, one might regard the American constitution as a unique document which has come into existence at a specific moment in time and which is the expression of a particular political community. From this point of view, reference to foreign law is of course not the most obvious way of constitutional interpretation. Protagonists of "originalism" in particular, object to this way of legal reasoning (as appeared from the abovementioned discussion).⁵⁴ Their main idea is that in interpreting constitutional provisions, judges should remain faithful to the original ideas of the founding fathers. If not, if the constitution is considered a living document which should be regarded in the light of present-day conditions (even world-wide), the judges will become far too powerful.

⁵² See C. L. Rozakis (note 13) and J.-F. Flauss (note 29); T. Groppi, A User-Friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies, *Supreme Court Law Review* 26 (2007), 2d, 1 et seq., here, 23 et seq.

⁵³ On the difference in position of the American Supreme Court and the European Court of Human Rights, see M. Rosenfeld (note 9).

⁵⁴ See A. Scalia, *Modernity and the Constitution*, in: Eivind Smith (ed.) *Constitutional Justice under Old Constitutions*, 1995, 313 et seq.

However, this is only one perspective. A different way of reasoning leads to a much more positive view on constitutional comparison – for the US Constitution, too. As it appears from *The Federalist Papers* and other documents, the framers of the American constitution sought inspiration from political and legal sources, which may well be regarded as manifestations of universal values. *Locke's* philosophy of “self-evident rights” and *Montesquieu's* ideas on the separation of powers are transcendent notions that were not confined to a particular society at a particular time. These theories have had a major influence on American constitutional documents and the political system. Now from this point of view on the American Constitution, as a document influenced by general rather than particular values and theories, reference to foreign sources does not seem to be all that alien.

Quite a different matter, however, is the European Convention on Human Rights, being an *international treaty*. Let us consider this somewhat more closely. The European Convention is largely inspired by the Universal Declaration of Human Rights (UNDHR), which came into existence only two years earlier. Unlike the UNDHR, however, the Convention is a binding charter 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.⁵⁵ 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 monitoring system, in order to be really adequate.⁵⁶ Now the very fact that the Convention is a treaty, not a constitution the Court is expounding, has important consequences. The point is that 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 constitutional comparativism (albeit comparison of the laws of the Member States) is in a way inherent in the case-law of the ECtHR. When the ECtHR considers the Convention to be a living document, it is only a small step further to include the legal systems of non-Convention members when searching for the right solution in interpreting treaty provisions.

Another feature of interpreting the Convention is that it concerns the *interpretation of human rights*, that is to say “moral standards” which are considered to be applicable to a broad community of states. How to inter-

⁵⁵ A. Stone, Heritage Lecture: Comparativism in Constitutional Interpretation, *New Zealand Law Review* (2009), 45 et seq.

⁵⁶ See note 33.

pret 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)? Would constitutional comparison not be a welcome support in finding the right interpretation? Think of the following. It may be helpful – as far as the interpretation of Convention norms is concerned – not so much to think of the provisions in essentialistic ways, but rather to think in terms of a continuum. On the one pole of the continuum there are more universalistic norms (for instance, “inhuman and degrading treatment” or “fair trial”) and, on the other, the more relativistic, particularistic norms, like “morals”, “family life”, etc. For the interpretation of more universalistic norms, constitutional comparativism may be more legitimate than when it comes to interpreting what is supposed to be “morals” – a norm which is *eo ipso* particularistic. From this point of view, constitutional comparativism may indeed be a legitimate way of interpreting (at least) some cases.

A third and in a way inevitable argument in favor of references to foreign law may be that it is, in a way, a self-evident phenomenon in the 21st century. Given the fact that through modern technology, it is so easy to take cognize of foreign decisions and laws, it seems obvious 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”.⁵⁷ “Constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question.”⁵⁸ With this way of putting it, *Hirschl* at the same time demonstrates the limited conditions under which constitutional comparativism is acceptable – namely only when the references to foreign law are not decisive for the case in question.

V. Final Remarks

Constitutional comparativism is more complicated than is commonly thought. The topic is generally underestimated, particularly when it comes to its theoretical foundations. Its advocates tend to present it as simply another way of legal reasoning. But as it appears from the preceding paragraphs, references to foreign law seem gradually to have entered many courts’ case-law, while sound arguments for its justification are lacking.

⁵⁷ *R. Hirschl*, The Rise of Comparative Constitutional Law: Thoughts on Substance and Method, *Indian Journal of Constitutional Law* 2 (2008), 11 et seq.

⁵⁸ *R. Hirschl* (note 57), 11.

Now if constitutional comparativism would be given serious theoretical elaboration, it might – under limited circumstances – be justified. Let us again consider the case of the Isle of Man, on the question whether or not “birching” is to be considered “inhuman and degrading treatment”. It does not seem to overstretch the courts’ powers when in interpreting Article 3, it refers to the practices of the Convention States and possibly to other non-Convention states in order to weigh a specific punishment, in use on a small island community. A “universalist approach” seems acceptable in this case, as has been defended in the preceding paragraph.

But when it comes to the question whether or not euthanasia should be permitted under Convention law, references to foreign law with the consequence of an obligatory permissive attitude in this respect for all Member States, may seem to go beyond the Court’s power. In a world community there are obviously many different jurisdictions. Provided these jurisdictions do not infringe the minimum core of human rights, this diversity of jurisdictions does not really seem problematic. The “margin of appreciation” doctrine which the ECtHR has used since its formative years seems to be a proof of the general acceptance of this perspective.

As will be clear by now, to regard constitutional comparativism as just some form of “inter-judicial dialogue” does not do justice to the complicated matter at hand. To speak with *Alford*: “If at all, ‘constitutional comparativism’ at least needs an underlying theory.”⁵⁹ That holds true for the American Supreme Court as well as for the European Court of Human Rights or, for that matter, for any court referring to foreign law.

⁵⁹ R. P. Alford, In Search of a Theory for Constitutional Comparativism, University of California Law Review 93 (2005), 639 et seq.