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The European Judge as Comparatist

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I. SOME PRELIMINARY REMARKS

In their thorough and comprehensive study, Sir Basil Markesinis and Jörg Fedtke (authors) scrutinise the role of national judges around the world when, in deciding certain cases in their dockets, they act as “comparatists,” resorting to foreign law and alien legal experiences.¹ The authors present in an exhaustive manner a wide spectrum of possible parameters of this multifaceted phenomenon, where judges open a dialogue with laws and legal practices developed outside their jurisdictional confines in their effort to draw inspiration from them and, as a consequence, to enrich, where appropriate, their administration of justice 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.

This phenomenon of interaction of national law with foreign law through the intermediary of judges is not, of course, a novel one seen

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1. See Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005).

from an historical perspective. Yet it is becoming increasingly frequent in certain legal systems, owing to the evolution of interdependence of legal acts and situations, the close relationships of domestic societies between them, and the curtailment of national boundaries for certain human activities. All of these matters have brought forward the acceptance of common values, morals, and aspirations easily applicable to all of them. Still, this phenomenon is distinguishable from another situation with which it bears some resemblance—that of the adoption of a legal system, or part of it, by another legal order, through the means of law-making activity undertaken by a national legislature. Indeed, this latter phenomenon, which again is not totally novel in the history of law creation, has recently acquired significant dimensions in the postcommunist era of Central and Eastern Europe, where it is being applied as a means of adapting local societies to the western European traditions, and as a tool for integrating the “new” Europe into the “old” one. Although the results may be similar, the first phenomenon—the dialogue of judges with foreign law—should not be confused with the second one—the adaptation, through the legislative process, of a legal order to the precepts of another legal system. First, the repercussions of the legislative process on the legal order of a State is usually far wider than the influence judges can exert on it when they decide a specific case inspired by foreign law; and second, the degree of democratic legitimacy is far higher when the legislature undertakes the task of transplanting foreign law into the domestic order than when judges undertake, in their own microcosm of settling specific disputes, to follow foreign law and decide accordingly. After all, if we follow the usual stereotypes, in the well-known tripartite division of power in modern democracies judges are supposed to apply law, not to create it; they acquire their legitimacy (in most of the legal orders of the world) not through the regular consultation of a people’s electoral body but through the people’s consent, given once and for all, to the institution that they represent, rather than to the judges themselves. These elements undoubtedly demarcate the boundaries within which judges may act when determining the crucial questions relating to the applicable law and its interpretation.

International justice is also supposed to follow the same patterns: an international judge is, again according to stereotypes, bound to apply the law—most of the time international law, customary or conventional, general or particular—and not to create it. Yet the now long history of international justice—which has entered its second

century of existence—has witnessed a substantial departure of the role of an international judge from the stereotypical approaches just described. International justice has acted, and is still acting, with formidable leeway, which many times has transgressed judicial restraint and has produced real, fresh law almost *ex nihilo*. The most characteristic examples of a “law-making” pattern of an international judicial body can be found in the work of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice.² In certain fields of international law, such as the law of the sea, this international court has not only contributed to clarifying the law, but also genuinely has moulded legal rules which, in the end, have been adopted by States as part of their law. In this context, we should remind our reader of the law on continental shelf delimitation and the method of “equitable” principles proposed by the ICJ that can easily be traced as judge-made law, later adopted by States through its inclusion in the 1982 Convention on the Law of the Sea.³

There is, of course, a plausible explanation to this practice of the ICJ which may equally apply to other international courts as well: the international legal order is still heavily decentralised and is lacking both a central legislature and a central executive power. It is also suffering (less than in the not so remote past, but still suffering) from considerable lacunae in its legal fabric in the sense that, although international relations have become extremely complex and multifarious, legal rules have not always followed suit to cover in an effective manner all the legal exigencies of the new international realities. Hence the courts—and not only the ICJ—are almost obliged to assume the role of a legislator in situations where the law itself is incapable of providing adequate answers to the problems that they face when they deal with particular disputes.

2. The ICJ is an organ of the United Nations, established under the Charter of the United Nations, while its predecessor was established in the midwar period by the Covenant of the League of Nations. See U.N. Charter art. 7, para. 1; League of Nations Covenant art. 14.

3. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. The case law of the ICJ on matters of continental shelf delimitation has considerably evolved over the years and gradually been clarified through successive judgments. In construing customary international law, but also the Geneva Convention on Continental Shelf (1958), the ICJ gradually built its own “law” on delimitation. This law, sometimes highly contested by certain legal writers, eventually found an echo in the 1982 United Nations Convention on the Law of the Sea, adopted by the great majority of the States of the international community. See, e.g., David J. Bederman, *International Decisions: United States v. Alaska*, 92 AM. J. INT’L L. 82, 83 n.8 (1998) (noting that language derived from an ICJ decision was repeated verbatim in the 1982 United Nations Convention on the Law of the Sea).

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS INTERPRETATION TECHNIQUES

This brings us to the core issue of our discussion: in this short Essay we intend to focus our interest in one international court of a regional nature, the European Court of Human Rights (ECHR).⁴ Unlike the ICJ, the Court works on the basis of a conventional instrument that not only establishes it and determines the means of its functioning, but also provides the substantive legal rules on which its jurisdiction is founded: together with its additional Protocols, the European Convention on Human Rights (Convention) contains a number of protected human rights which must be enjoyed without exception by all those who are under the jurisdiction of the European States which are parties to it.⁵

This difference between these two courts—which is not, of course, the only one—is still not very substantial. In reality the ECHR faces the same dilemmas and the same uncertainties that are common to most international courts, regardless of whether they work within the slippery field of general or particular international law, or are governed by conventional instruments providing them with substantive rules of law. The main reasons that make their difference rather insignificant are the fact that the Convention with which the ECHR works has now reached an age approaching sixty years and that, having been conceived by the founding fathers to form a rudimentary text, it has proved because of its rudimentary character to be a long-living instrument that has never been modified through substantive legislative intervention. These two factors, namely, the rudimentary nature of its provisions and the age of the instrument, have acted as the

4. The European Court of Human Rights is established by the European Convention on Human Rights through article 19 (as amended by Protocol No. 11), which provides: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as 'the Court.' It shall function on a permanent basis." Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Europ. T.S. No. 155 (amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 19, Nov. 4, 1950, Europ. T.S. No. 5).

5. The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)) was adopted in Rome on 4 November 1950. *See id.* Over the years it has been enriched by a number of additional Protocols, which have added new substantive rights. Protocol No. 11 came into force on 1 November 1998 and contains the most recent amendment of the Convention to date by merging the two jurisdictional bodies originally existing under the Convention, the European Commission of Human Rights and the European Court of Human Rights, into the Court. *See id.*

main driving forces for an evolitional interpretation of its clauses by the ECHR. The very text of the Convention requires a specification of the concepts and notions contained therein, while the passing of time in a rapidly evolving world (and, with it, a rapidly evolving Europe) requires such specification in each instance to be given its current meaning, the one which is acceptable in European societies at the time of the application of a rule by the ECHR. To give but one example, it is clear that the concept of "family life" contained in article 8 of the Convention cannot be interpreted today by the ECHR as it was originally conceived by the drafters of its text in the late 1940s.⁶ Hence, in order to keep abreast of new developments in societal habits and morals, the ECHR is obliged to detect the new mentalities that have emerged and to adapt the relevant concepts accordingly.

This interpretative latitude, which is dictated by the very nature of the Convention but also by the very nature of a judicial body which is called upon to apply a long-living instrument, has over the years been disciplined by the emergence of "internal" principles through the ECHR's case law, which delimit the ECHR's capacity to develop its own approach of what law is at a specific point in time. The case law also indicates the sources of inspiration to which the ECHR may have recourse in order to find assistance in the conceptual determination of the state of law in time and space. In this respect, "foreign law" is a generic term covering the law of the European States party to the Convention, judicial decisions of other "brother" courts or influential domestic courts ranking high in the conscience of the legal world, and international conventions (or even acts of international bodies carrying weight at the level of international or European relations). Insofar as they are pertinent to the interpretation of the Convention, they are taken into consideration by the European judge before deciding specific cases and they may all contribute either to the creation of new case law or to the preservation or modification of the existing case law.

III. THE BASIC CONCEPTS GOVERNING INTERPRETATION

It seems that the paramount concept which permeates the whole case law of the ECHR and conceptually determines the evolution of the interpretation of the clauses of the Convention is that of the Convention as a "living instrument." In its judgment in the case of

6. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, Europ. T.S. No. 5.

Tyrer v. United Kingdom, the ECHR enunciated it for the first time when it stated:

The [ECHR] 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 [ECHR] 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.⁷

The finding in *Tyrer* not only stresses that the ECHR may adopt an evolutionary interpretation to streamline its case law with current realities, but also indicates one of the possible sources to which it may resort in order to determine how to interpret the clauses of the Convention; in the context of *Tyrer* the sources of inspiration are the commonly accepted standards of the Member States of the Council of Europe (in other words the standards commonly applicable in the States party to the Convention) in the field of penal policy.⁸

The concept of a "living instrument" allows judges of the ECHR to engage in a number of cases in judicial activism which does not seem common to most of the domestic jurisdictions.⁹ As Paul Mahoney rightly has pointed out in one of his studies, "the open-textured language and the structure of the Convention leave the [ECHR] significant opportunities for choice in interpretation; and in exercising that choice, particularly when faced with changed circumstances and attitudes in society, the [ECHR] makes new law."¹⁰

One of the jurisprudential peaks of the ECHR in applying the "living instrument" technique is, undoubtedly, the adoption of the "autonomous concepts" approach. Its appearance dates back to the

7. 22 Eur. Ct. H.R. (ser. A) at 33-34 (1978).

8. See *id.* at 15-16.

9. Yet, one should not rush to the wrong conclusions. The Court does not act every day as a legislator constantly changing its case law and inventing new approaches to the European protection of human rights. Judicial restraint is usually the name of the game and, as the Court has rightly said in a number of instances,

[w]hile the Court is not formally bound to follow its previous judgments, in the interests of legal certainty and foreseeability it should not depart, without good reason, from its own precedents However, it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. It is a living instrument which must be interpreted in the light of present-day conditions.

Mamatkulov v. Turkey, App. Nos. 46827/99 & 46951/99, at *35 (Eur. Ct. H.R. Feb. 4, 2005), available at <http://www.echr.coe.int/eng>.

10. Paul Mahoney, *The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights: Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 2 (1998).

early 1970s, when the ECHR, in the case of *Engel v. Netherlands*, refused to accept that a sanction against the applicants, characterised by the domestic legal order as disciplinary, escaped the guarantees offered by the Convention under article 6 (fair trial) only because—despite its serious repercussions on the applicants—the penalty and the relevant proceedings were not regarded by the State concerned as criminal in nature.¹¹ In its analysis, the ECHR asked the question, “[d]oes Article 6 [dealing with criminal charges] cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?”¹² The ECHR gave this answer: “If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal . . . the operation of the fundamental clauses of Article 6 and 7 would be subordinated to their sovereign will.”¹³

As a consequence of this answer, the ECHR applied article 6 to the circumstances of that case, considering that where the repercussions of a sanction against an applicant are serious enough for an individual (for instance, a serious penalty of imprisonment), then the domestic characterisation of the proceedings is no longer a determining factor, and the guarantees offered by article 6 in cases of criminal proceedings are applicable.¹⁴ This approach by the Court which inaugurated a new phase in the applicability of article 6 and the notion of “criminal charge” contained therein closely follows an earlier position taken by the European Commission of Human Rights in the case of *Twenty-One Detained Persons v. Germany*, in which it said that the Convention terms “criminal charge” and “civil rights and obligations” contained in article 6

cannot be construed as a mere reference to the domestic law of the High Contracting Party concerned but relate[] to an autonomous concept which must be interpreted independently, even though the general principles of the domestic law of the High Contracting Parties must necessarily be taken into consideration in any such interpretation.¹⁵

11. 22 Eur. Ct. H.R. (ser. A) at 33-34 (1976).

12. *Id.* at 33.

13. *Id.* at 34.

14. *Id.* at 35-36.

15. App. Nos. 3134/67, 3172/67, & 3188 to 3206/67, 27 Eur. Comm’n H.R. Dec. & Rep. 97, 116 (1968).

In today's case law the "autonomous concept" has been expanded to cover a great number of terms of the Convention, such as the concepts of "possessions" under article 1 of Protocol No. 1, "association" under article 11, "victim" under article 34, "civil servant" (linked to article 6 case law), "lawful detention" under article 5, and "home" under article 8 of the Convention.¹⁶ It is clear that the preference of the ECHR not to rely solely on the domestic characterisation of certain notions but to give its own independent definition of some terms contained therein is part and parcel of the "living instrument" concept. In determining the autonomy of a term used in the Convention, the ECHR does not necessarily rely only on general trends in the States party to the Convention, but it may decide to "autonomise" a term when it considers that the context of protection of human rights, the very purpose and object of its governing legal instrument, or, even, justice and moral values so require.

The concept of the "living instrument" is also behind a great number of other jurisprudential achievements which have marked the case law of the ECHR. It is difficult to catalogue here all the cases that have ended in a judgment bearing such landmark characteristics. We may content ourselves to say simply that in the history of the development of the case law of the ECHR we may detect two categories of major jurisprudential trends which serve the concept of the "living instrument": the first is wide interpretation of the rights and freedoms contained in the Convention, favouring the individual vis-à-vis the respondent State, or, at the other extreme of the same spectrum, restrictive interpretation of the Convention's clauses to the State's benefit, thereby limiting the rights and freedoms provided for by the Convention.¹⁷ The second—not necessarily systematically different—category concerns the changes which occur in the case law of the Court, through its own initiative, and which usually follow

16. See the very interesting article by George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, (2004) EUR. J. INT'L L. 279, 281-85 (2004).

17. In the case of *Wemhoff v. Germany*, we find the famous dictum which has since influenced the Court in usually opting for a wide interpretation of the Convention favouring the protection of human rights. 7 Eur. Ct. H.R. (ser. A) 4, 23 (1968). The Court held in that case that it was necessary "to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties." *Id.* For a full discussion of this matter, with some criticism of the Court's position in its recent decisions in *Bankovic v. Belgium* and *Al Adsani v. United Kingdom*, see Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. OF INT'L L. 529 (2003).

societal or other developments in Europe (or in the world), convincing the ECHR that it is time to adapt its position to these new situations.

With regard to the second category, among a great number of the ECHR's judgments, we can cite indicatively to two recent ones, showing how the judicial body has changed its own case law and conceded that its past decisions are no longer consistent with new developments that have occurred, on the one hand, in European social life, and, on the other, in the law applicable in the circumstances of a case. The first is the case of *Goodwin v. United Kingdom*, which concerns the right of a post-operative transsexual applicant to enjoy her private life and her right to marry.¹⁸ The settled case law of the Court prior to this judgment had been to refuse to secure to postoperative transsexuals the right under article 8 to regularise their new gender by asking the Government to alter the official register of births or to issue birth certificates whose content and nature differed from those of the original entries concerning the recorded gender of an individual at the time of his/her birth.¹⁹ The ECHR consistently had held:

[T]here was no positive obligation on the [United Kingdom] to alter [its] existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly there was no duty on the government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties.²⁰

In *Goodwin*, however, the ECHR made an impressive departure from its previous case law. In the crucial paragraph 92 of its judgment, the ECHR, after having examined a number of changes or trends which had occurred in the meantime, both in U.K. society and in the European order, noted:

In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments. . . . Most recently in 1998, in *Sheffield and Horsham*, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which

18. 2002-VI Eur. Ct. H.R. 1.

19. See *id.* at 10-20 (providing a full account of the domestic law in the United Kingdom, including changes which have occurred in the meantime, and the previous case law of the Court).

20. *Id.* at 26 (citations omitted).

transsexuals are confronted. . . . Even though it found no violation in that case, the need to keep this area under review was expressly reiterated. Since then, a report has been issued in April 2000 by the Interdepartmental working group [in the United Kingdom] which set out a survey of the current position of transsexuals in, *inter alia*, criminal law, family, and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so. . . . It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex.²¹

On the basis of these findings, the ECHR concluded that the respondent Government had failed to respect the right of the applicant under article 8.²² Equally it concluded that the United Kingdom was in violation of article 12, concerning the right to marry, where the Convention expressly refers to the right of a "man and a woman" to marry.²³ In this landmark decision the ECHR expanded this right to transsexuals when it held:

It is true that the first sentence [of article 12] refers in express terms to the right of a man and a woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria. . . . There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. . . . The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women. . . .²⁴

To continue:

It may be noted from the materials submitted . . . that although there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded, however, that this supports an argument for leaving the matter entirely to the Contracting States [to the Convention] as being within their

21. *Id.* at 32 (citations omitted).

22. *Id.*

23. *Id.* at 35.

24. *Id.* at 34 (citations omitted).

margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine, *inter alia*, the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages. . . , the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.²⁵

In *Goodwin*, the ECHR reversed its previous position on the basis of a number of developments which have occurred in societal habits and morals, the evolution of science, and the approach taken by a more recent text (than the Convention) for the protection of human rights—the Charter of Fundamental Rights of the European Union—and by the European Court of Justice.²⁶ In another case, *Mamatkulov v. Turkey*, there is likewise a change in the case law, but this time the main incentive which persuaded the ECHR to change its approach was based on international law developments which had occurred between the time of its previous judgments and the new case before it.²⁷

In *Mamatkulov*, the main issue of interest in terms of case law was whether the respondent Government had failed to comply with the interim measures indicated by the ECHR under Rule 39 of the Rules of Court.²⁸ Previous case law had widely accepted that States parties to the Convention were not obliged to apply a request under Rule 39 since that request was only an indication, and had as its sole legal basis the Rules of the Court, an internal document of the judicial body setting out the procedures to be followed by it, and not the binding text of the Convention.²⁹ This time the ECHR considered that it had enough material before it to reverse that position.³⁰ Through a comparative study of different international procedures, such as those followed by the United Nations Human Rights Committee, the United Nations Committee against Torture, the Inter-American Court of Human Rights, and the International Court of Justice (more

25. *Id.* at 35.

26. *Id.* at 25-35.

27. *Mamatkulov v. Turkey*, App. Nos. 46827/99 & 46951/99, at *33-37 (Eur. Ct. H.R. Feb. 4, 2005), available at <http://www.echr.coe.int/eng>.

28. *Id.* at *27.

29. *Id.* at *30.

30. *Id.* at *35-36.

particularly with reference to the latter's change of case law in the *La Grand* case³¹) it observed:

[T]he International Court of Justice [and the other bodies referred to above]. . . , although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represent an essential objective of interim measures in international law. Indeed it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending. . . .³²

The ECHR, having solved through comparative analysis the question whether interim measures of protection are to be considered binding in the sphere of international legal relations within which it works, proceeded to the next step: how to legitimise the binding character of interim measures in a situation where the Convention itself was silent on this matter and where the sole basis for their "indication" were the Rules of Court.³³ In addressing this question, it adopted a technique which it had rejected in a previous case, and considered that the legal basis of the obligations on the parties was article 34 of the Convention—with which Rule 39 is intertwined—which provides that the Contracting States are bound not to hinder in any way an individual application.³⁴

IV. THE COURT'S SOURCES OF INSPIRATION

The two instances of the ECHR's recent case law that we have just presented are illustrative of the way in which this judicial body works in deciding cases. It clearly transpires from these examples that the legal system of the Convention is not a watertight, self-sufficient system. It is in constant dialogue with other legal systems, including, of course, other courts (both domestic and international or, more particularly, regional). This dialogue basically serves two distinct purposes. The first, inherent in the function of the ECHR as determined by the Convention, is to detect the domestic legal parameters of a case before it; in other words, to have a close look at the legal system governing the facts of a case in order to be able to

31. For the relevant parts of the judgment, see *id.* at *34-35. See also *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

32. *Mamtkulov*, App. Nos. 46827/99 & 46951/99, at *36.

33. *Id.* at *37.

34. *Id.* For a different view, see *id.* at *50 (Caflisch, Türmen & Kovler, JJ., dissenting).

decide whether an applicant has exhausted domestic remedies, whether he or she has complied with the six-month rule, whether an interference by the State with an individual's right was duly provided for ("established") by domestic law, and, more generally, whether the legal treatment of an application by the bodies exercising power over him/her was consistent with the legal precepts of the State concerned. The second, of more importance for the discussion in this Essay, is to construe the Convention taking into account its "natural" legal environment, namely, first and foremost, the European legal order. At this juncture, it should be pointed out that the ECHR has recurrently referred in its case law to the Convention as an instrument of the European *ordre public*.³⁵ Moreover, the international legal order also constitutes part of its environment. The Convention is an international treaty and, as such, is bound to follow those rules of international law which determine the life of international conventions.³⁶ Admittedly, a human rights convention is not a common treaty, and, as the European Commission of Human Rights affirmed as long ago as 1978, "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement.'"³⁷

Yet its particularity does not isolate it from the whole corpus of international law dealing with treaties. It simply requires those construing its clauses and applying it to pay particular attention to its special nature and also to interpretations based on general international law that may be contrary to its object and purpose which demand "broader interpretation of individual rights on one hand and restrictions on State activities on the other."³⁸ After all, the Convention is no longer the sole international treaty in the international legal system and enough experience has been accumulated at the level of the

35. See Orakhelashvili, *supra* note 17, at 531; see also *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995) (rejecting territorial restrictions on the application of the European Convention on Human Rights and Fundamental Freedoms as diminishing the effectiveness of the Convention as a constitutional instrument of the European *ordre public*).

36. See, e.g., Lucius Caflisch & Antonio A. Cançado Trindade, *Les conventions Américaine et Européenne des Droits de l'Homme et le Droit International Général*, in 108 *REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC* 5, 31-32 (A. Pedone ed., 2004).

37. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 90 (1978).

38. Rudolf Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights*, 42 *GERMAN Y.B. INT'L L.* 11, 14 (1999).

international legal order concerning the ways in which these treaties should be interpreted and applied.

Finally, the ECHR has in certain instances opened a dialogue with extra-European jurisdictions, namely, courts or tribunals operating in domestic legal orders outside Europe, such as the Supreme Court of the United States and other judicial bodies of internationally recognised calibre.

A. The Dialogue with the European Legal Order

The dialogue of the ECHR with the European legal order takes place in three distinct forms: (1) a dialogue with domestic legal systems of States party to the Convention, to which the ECHR resorts in order to decipher the state of law prevailing at a particular moment on the European continent concerning a matter *sub judice* before the ECHR; (2) a dialogue with the European Union's legal system—and particularly the case law of its courts—whenever the ECHR realises that a matter before it requires an examination of the corresponding solutions already given by the former, in situations of “overlapping” jurisdiction or competence, or when European Union's law is involved; and (3) a dialogue with its immediate interlocutor which is the Council of Europe, its bodies, and the law or the decisions they produce.

Insofar as the dialogue with domestic legal systems of the States party to the Convention is concerned, other than the respondent State in a specific case before it, the ECHR usually resorts to such dialogue whenever new issues are submitted to it for which no established case law supports a secure solution, or when the Court feels that developments in the European continent call for a change to its established case law. There are an infinite number of cases where the ECHR has found assistance in interpreting the law of the Convention through recourse to the domestic solutions given by States party to it. In matters concerning freedom of expression, the right to life, transsexuals and their right to private life, or the right of “possession,” the ECHR has recurrently relied on the domestic law of European States, with the understanding that this law mirrors the societal mentalities existing at a particular time in Europe.

Instead of interminable references to the rich arsenal of the case law of the ECHR on this matter, we shall merely present its recent decision in the case of *Stec v. United Kingdom*, which effectively

illustrates the techniques it applies in the interpretation of the law.³⁹ In this case, the applicants complained that certain pension schemes in the United Kingdom, as applied to them, were discriminatory and in breach of article 14 (prohibition of discrimination) taken in conjunction with article 1 of Protocol No. 1 (protection of property).⁴⁰

The main issue that occupied the ECHR in this case at the stage of admissibility was whether these pension schemes, which were not contributory in nature, attracted the protection of article 1 of Protocol No. 1.⁴¹ Previous case law had favoured the approach that non-contributory schemes did not enjoy the protection of article 1, while an erosion of this attitude started to emerge in the recent case law of the Court's Chambers.⁴² Hence, the ECHR considered that it was its task—particularly because it was sitting as a Grand Chamber—to clarify its position on this matter, and to establish a clear and unambiguous position.⁴³ In doing so it had regard to the legal rules of various European States.⁴⁴ In paragraphs 50 and 51 of the decision it held:

The Court's approach to Article 1 of Protocol No. 1 [whether noncontributory pension schemes are protected by this article, as a "possession"] should reflect the reality of the way in which welfare provision is currently organised within the Member States of the Council of Europe [all of them being at the same time States party to the Convention]. It is clear that within those States there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status. . . . Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No. 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of systems also contribute to its financing through the payment of tax.

39. App. Nos. 65731/01 & 65900/01 (Eur. Ct. H.R. July 6, 2005), *available at* <http://www.echr.coe.int/eng>.

40. *Id.* at *8.

41. *Id.* at *10-16.

42. *Id.* at *12-13.

43. *See id.* at *14-15.

44. *Id.* at *15.

In modern, democratic States, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.⁴⁵

The quest for the legal standards applied by the States party to the Convention on issues raised in cases before the ECHR is primarily justified by the fact that its role is not solely to settle disputes between individuals and States, but also to construe the law of the Convention in a manner which may apply at pan-European level. In other words, the role of the ECHR is one of “integration,” in the sense that, through its decisions and judgments, it is attempting to create a coherent body of human rights rules applying equally and indiscriminately in the sphere of the legal relations of all of the States party to the Convention. For this reason, and in order to avoid the risk of arbitrariness, the ECHR is obliged to consult the legal systems of the States party to the Convention before announcing what the law is and to produce law which, if possible, is the common denominator of the existing law in the States involved. It goes without saying that this peculiarity of the ECHR’s functioning, which makes it *par excellence* a comparatist court, contains some features of creating law, particularly if one takes into account the fact that the European judge retains, at the end of the day, the faculty to determine what the common denominator of European legal trends is and to lean towards one or another solution accordingly.

There exists, nonetheless, a barrier against this otherwise unlimited capacity and this is the judge-made concept of “margin of appreciation.” Founded on the premise that a local society and its representative organs (mainly the domestic courts) are better equipped than the Strasbourg Court to determine what legal solution should be applied to the facts of a case, and that the ECHR, as a subsidiary organ for the protection of human rights, should not, as a matter of principle, have the primary duty of determining what is correct or what is wrong in all circumstances, the margin of appreciation has many times acted as a vehicle of judicial restraint, limiting the spectrum of the ECHR’s interference in certain matters to an “external” review of the

45. *Id.*

compatibility of domestic acts with the Convention.⁴⁶ Still, it should be noted that the margin of appreciation does not apply uniformly and blindly, when applied at all. The rule is that a State party to the Convention has a wider margin of appreciation to construe its obligations under it whenever there is no established European consensus delimiting a right protected by the Convention.⁴⁷ The more a consensus matures on a certain issue involving a right protected under the Convention, the smaller the margin of appreciation of the domestic authorities to determine freely the purview.⁴⁸

As far as the dialogue of the ECHR with the European Union and the Council of Europe is concerned, there are again abundant instances of regular exchanges. The ECHR has developed a dialogue with the European Union, and more frequently with its courts, as a result of the overlapping competence of the two mechanisms at the European level.⁴⁹ The example that we have already given of the references made to the European Union's law in the ECHR's judgment in *Goodwin v. United Kingdom* is characteristic.⁵⁰ Another, equally characteristic, example may be found in the judgment of *Pellegrin v. France*, where the ECHR, in its search for new criteria to determine in what circumstances civil servants were covered by the protection of article 6 of the Convention when they were party to civil proceedings, "borrowed" the tests applied by the European Union for the definition of the term "civil servant" and provided for by article 48(4) of the Treaty of Rome (1957) establishing the European Economic Community.⁵¹ A passing reference should also be made here to another interesting development which links the ECHR with the European Union's legal system. There is increasingly a tendency on the part of individual applicants to resort to the ECHR for protection of human rights allegedly violated by the European Union's institutions

46. The literature with regard to the margin of appreciation is indeed very extensive. See generally, Symposium, *The Doctrine of the Margin of Appreciation Under the European Convention on Human Rights*, 19 HUM. RTS. L.J. 1 (1998).

47. See Mahoney, *supra* note 10, at 5.

48. See *id.*

49. The overlapping has become more extensive since the European Union started institutionalising its competence to deal with European human rights issues. The Charter of Fundamental Rights (2001) and its further inclusion in the draft European Constitution belong to the most recent vintage in this field. See, e.g., Deny Simon, *Des influences réciproques entre CJCE et CEDH: 'je t'aime, moi non plus?'*, (2001) POUVOIRS 31; Dean Spielmann, *Jurisprudence des Juridictions de Strasbourg et de Luxembourg dans le Domaine des Droits de l'Homme: Conflits, Incohérences et Complémentarité*, in L'UNION EUROPEENNE ET LES DROITS DE L'HOMME 789 (Phillip Alston ed., 2001).

50. 2002-IV Eur. Ct. H.R. 7, 32.

51. 1999-VIII Eur. Ct. H.R. 207, 217-19, 225-26.

and bodies or by Member States of the European Union in applying the latter's law.⁵² To date, the ECHR has shown considerable restraint in interfering with the activities of the European Union but still the fact remains that another aspect of dialogue has been opened which enlarges the interdependence of those legal systems and their common fate.

The Council of Europe is, as we have already mentioned, a privileged interlocutor of the ECHR for obvious reasons: because the ECHR works under its auspices and is institutionally linked with it, and because a number of activities of the Council of Europe, transformed into regional agreements, decisions or recommendations of its bodies are interwoven with specific human rights issues.⁵³ As has been rightly pointed out, the ECHR uses all of this material with a certain degree of liberty, usually disregarding whether or not an instrument of the Council of Europe is binding on the respondent State concerned, or, we could add, whether it has binding force at all.⁵⁴ Yet, to be fair in regard to the way in which the ECHR assesses the value of these documents, reference to one of them does not automatically lead it to rely solely or exclusively on it in reaching its decisions; the ECHR is free to consider all the material before it, in full knowledge of its legal value and validity, and to decide accordingly.⁵⁵ Even trends showing societal reorientations or reappraisal of the status quo may have an impact on the ECHR, which is always open and sensitive to "environmental" changes.

B. The Dialogue with the International Legal Order

The international legal order is frequently reflected in the decisions and judgments of the ECHR in various forms: the law of

52. See, e.g., *Bosphorus Airways v. Ireland*, App. No. 45036/98, at *3-17 (Eur. Ct. H.R. June 30, 2005), available at <http://www.echr.coe.int/eng>.

53. The Convention was adopted by the member States of the Council of Europe, and it is still linked with it institutionally. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms arts. 22-23, 46, 48, 50, 52, 54, 58-59, Nov. 4, 1950, Europ. T.S. No. 5.

54. Syméon Karagiannis, *La Multiplication des Juridictions Internationales: Un Système Anarchique?*, in *LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL* 7, 65 n.214 (A. Pedone ed., 2003).

55. To mention but one example of the use of the Council of Europe's legislative instruments, the Court has made reference to—and sometimes relied heavily on—the clauses of the European Social Charter, adopted by the Member States of the Council of Europe (1961). See *Schmidt v. Sweden*, 21 Eur. Ct. H.R. (ser. A) at 15-16 (1976); *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H.R. (ser. A) at 15-16 (1976); *Nat'l Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) at 17-18 (1975).

treaties—as codified by the Vienna Convention on the Law of Treaties (1969)—appears recurrently in the ECHR’s judgments and decisions when matters are linked to procedural rules common to an international convention. Questions of interpretation of treaties or of reservations, for example, are regularly addressed by the ECHR, which in each case may (or may not) follow the general rules governing the life of treaties.⁵⁶ Substantive rules of customary or conventional law are also frequently mentioned by the ECHR, usually in situations where a pending case is inextricably intertwined with international law (in the sense that international law is part of the facts of the case), or where the ECHR has to resort to international law because the nature of the dispute before it requires reference to it as a condition for reaching a solution. As an example of the first category of cases, we may cite the case of *Bosphorus Airways v. Ireland*.⁵⁷ In this case, the Irish authorities impounded an aircraft in application of a United Nations Security Council decision, under the United Nations Charter (and a subsequent decision of the European Union), and the ECHR duly took this factor into account.⁵⁸ As an example of the second category of cases, we may mention the recent cases of *Bankovic v. Belgium*⁵⁹ and *Ila cu v. Moldova & Russia*,⁶⁰ where the ECHR dealt with questions of jurisdiction linked closely with the more general question of State responsibility under international law.⁶¹

The dialogue of the ECHR with the international legal order is not limited to rules of general or particular international law. It also embraces decisions of international courts or tribunals, as well as pronouncements of international bodies carrying out activities of a semi- or quasi-judicial nature. We have already mentioned the impact that the change in the case law of the International Court of Justice concerning interim measures of protection—through the *La Grand* decision—had on the Court’s construction of the relevant term in its

56. See, e.g., *Mamatkulov v. Turkey*, App. Nos. 46827/99 & 46951/99, at *36 (Eur. Ct. H.R. Feb. 4, 2005) (Caflisch, Türmen & Kovler, JJ., dissenting), available at <http://www.echr.coe.int/eng>.

57. App. No. 45036/98 (Eur. Ct. H.R. June 30, 2005), available at <http://www.echr.coe.int/eng>.

58. *Id.* at *40–43.

59. 2001-XII Eur. Ct. H.R. 335.

60. App. No. 48787/99 (Eur. Ct. H.R. July 8, 2004), available at <http://www.echr.coe.int/eng>.

61. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 23–24.

own Rules of Court.⁶² We should also mention that the ECHR is in constant dialogue with all the international bodies—both of universal and regional calibre—which deal with human rights issues relevant to the rights protected by the Convention.⁶³ A prominent place in the ECHR's dialogue is given to the Inter-American Court of Human Rights, the closest “ally” of the ECHR in the protection of human rights at a regional level, which has been a source of inspiration for the Court in many instances, mainly in cases which concern articles 2 (the right to life) and 3 (prohibition of torture, inhuman or degrading treatment) of the Convention.⁶⁴ The focus of the ECHR on the case law of the Inter-American Court of Justice in relation to these latter issues is readily explainable; it is due to the fact that this “brother” court has extensively dealt with them as a result of the political conditions on the American continent, and its experience is easily transposable to analogous conditions in Europe.

C. *The Dialogue with Foreign Jurisdictions*

The most interesting aspect of the ECHR's dialogue with judicial bodies and their case law (other than the domestic courts or tribunals which have ruled on the legal issues concerning a case submitted to it) is the interaction with high courts lying outside Europe and working under different legal systems—and, probably, different societal conditions from the ones existing in the majority of European States party to the Convention. We say “the most interesting aspect” because this dialogue is contributing, more than the dialogue with the European or international legal orders, to a real “globalisation” of the ECHR's functions in the sense that it brings within the ECHR's consideration laws and experiences relating directly to societies other than European ones, and, consequently, to mentalities, customs, and morals which are

62. See *Mamatkulov v. Turkey*, App. Nos. 46827/99 & 46951/99, at *35 (Eur. Ct. H.R. Feb. 4, 2005) (citing *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27)), available at <http://www.echr.coe.int/eng>.

63. The example given in the text of the judgment in *Mamatkulov* is illustrative. *Id.* See generally *Öcalan v. Turkey*, App. No. 46221/99 (Eur. Ct. H.R. May 12, 2005), available at <http://www.echr.coe.int/eng> (referencing the case law of the United Nations Human Rights Committee). For a critical assessment of the Court's case law and the way it has used the case law of the latter body, see Karagiannis, *supra* note 54, at 108-09 n.375.

64. See, e.g., *Ertak v. Turkey*, 2000-V Eur. Ct. H.R. 199, 229 (using the case law from the Inter-American Court of Human Rights in determining defendant State violated article 2 of the European Convention of Human Rights and Fundamental Freedoms); *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192, 1211 (referencing the Inter-American Court of Human Rights in resolving a claim involving articles 3 and 26).

linked with conceptions not necessarily intended in the conscience of those applying them to operate as ecumenical principles or values.

In this situation, the most frequent interlocutor of the ECHR has been the United States Supreme Court. In sharp contrast to the attitude of the latter, which had never mentioned the case law of the ECHR until 26 June 2003 (when the first express reference to it was made in the case of *Lawrence v. Texas*⁶⁵), the Strasbourg institutions have a tradition, however sparsely it may have been used, of resorting to a dialogue with the highest court of the United States.⁶⁶ As early as May 1980, the European Commission of Human Rights made reference to the famous decision of *Roe v. Wade* to justify its position that the right to life under article 2 of the Convention does not cover an unborn child.⁶⁷ Some years later, in 1986, in the case of *James v. United Kingdom*, the ECHR accepted certain arguments of the parties before it, based on their reference to a United States Supreme Court decision in *Hawaii Housing Authority v. Midkiff*.⁶⁸ Since then, and with increasing frequency, the ECHR has many times sought enlightenment from the American Court, by relating its case law to the facts of a case before it, or by referring to its case law in the part of a judgment covering the relevant law and domestic and international practice. In some cases, reference to the American case law has also been made in the very reasoning of the ECHR's judgment in support of its own position on certain matters.⁶⁹ It should also be noted that in a considerable number of cases, individual judges have appended separate (concurring or dissenting) opinions to the judgment of the majority in which they have wholly or partly relied on certain decisions of the United States Supreme Court.⁷⁰

The United States Supreme Court is not, however, the only foreign court with which the ECHR has developed a dialogue. In some instances—albeit, admittedly, in a more limited number of cases—the ECHR has sought advice from the highest courts of South Africa, New Zealand, and Canada. South Africa appears in the already

65. 539 U.S. 558 (2003).

66. See generally Jean-François Flauss, *La Présence de la Jurisprudence de la Cour Suprême des Etats-Unis d'Amérique dans le contentieux Européen des Droits de l'Homme*, 16 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 313 (2005).

67. *X. v. United Kingdom*, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 251-54 (1980) (citing *Roe v. Wade*, 410 U.S. 113 (1972)).

68. See *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 9, 30 (1986) (relying on *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

69. Flauss, *supra* note 66, at 323-24.

70. *Id.* at 318-19.

cited cases of *Goodwin v. United Kingdom*⁷¹ and *Öcalan v. Turkey*,⁷² New Zealand appears in the former case; while in the case of Canada, reference to its case law is more extensive: in the recent cases of *Morris v. United Kingdom*,⁷³ *Pretty v. United Kingdom*,⁷⁴ *Appleby v. United Kingdom*,⁷⁵ *Allan v. United Kingdom*,⁷⁶ and *Hirst v. United Kingdom*,⁷⁷ the ECHR has made extensive reference to the Canadian Supreme Court's case law, and, in some of them, it has relied on it to support its own reasoning and conclusions. In the case of *Pretty*, for instance, the ECHR held that its conclusion that States have the right to control, through their criminal laws, activities prejudicing the life and security of a third person, found support, *inter alia*, in the decision of the Canadian Supreme Court in the case of *Rodriguez v. Prosecutor General*.⁷⁸

V. CONCLUDING REMARKS

The endeavour of this modest Essay was to demonstrate—as a first, hasty attempt—that the European Court of Human Rights and its judges do not operate in the splendid isolation of an ivory tower built with materials originating solely from the ECHR's interpretative inventions or those of the States party to the Convention. The nature of the ECHR as an international court—working in a regional environment and aiming simultaneously to protect, provide for and integrate human rights in Europe—is undoubtedly the main reason behind its cosmopolitan tendencies, which are gradually becoming a solid feature of its way of functioning and which seem to be influenced by the more general evolution of the protection of human rights around the world (at national and international levels), the universal character of most of the protected rights enshrined in the Convention, and (why not?) the confidence that the ECHR now has as far as its place in the protection of human rights in Europe—and beyond that—is concerned.

71. 2002 VI Eur. Ct. H.R. 7.

72. App. No. 46221/99, at *33 (Eur. Ct. H.R. May 12, 2005), *available at* <http://www.echr.int/eng>.

73. 2002-I Eur. Ct. H.R. 387, 404.

74. 2002-III Eur. Ct. H.R. 155, 195.

75. 2003-VI Eur. Ct. H.R. 185, 196.

76. 2002-IX Eur. Ct. H.R. 41, 51-52.

77. App. No. 74025/01, at *21-24 (Eur. Ct. H.R. Oct. 6, 2005), *available at* <http://www.echr.coe.int/eng>.

78. *See Pretty*, 2002-III Eur. Ct. H.R. at 195 (citing [1994] 2 L.R.C. 136).

We should, however, put a damper on this idyllic picture of the ECHR's cosmopolitanism. It would be an exaggeration to argue that the ECHR is working with constant vigilance to observe possible developments that may occur every day in its surrounding landscapes. Most of its cases are decided with reference to its established case law, which is impressively extensive after half a century of judicial accomplishments, and which is not lightly abandoned by a judicial body eager to prove that legal certainty is one of its merits. It should also be underscored that when the ECHR opens a dialogue with the "external world" this dialogue does not automatically and indiscriminately lead to an adoption of "foreign" preferences or choices in the ECHR's decisions. When we speak of a "dialogue," we mean a "dialogue."

The ECHR may discuss "foreign" law or experiences in analysing the facts of a case (in the "relevant law" part of its judgment or even in its reasoning) but such a matter does not necessarily mean that its final conclusions will rely solely or even partly on them. It still retains sovereign power to use all the evidentiary material before it freely and to assess it accordingly. 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.
