3 The Comparative Approach of the European Court of Human Rights – Shared Criticism with the United States Supreme Court

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3.1 Introduction

The recent worldwide trend of 'judicial comparativism'[1] can be defined as the increasing citation of foreign precedents by national and international judges, especially in deciding cases involving human rights claims. Such an attitude has always been considered an inherent character of the European Court of Human Rights (ECtHR) system of protection.[2]

The basic assumption of the paper is that, although the European Court's comparative approach does not seem controversial at all throughout the Court's case law, over the past few years the most significant disputes in legal scholarship have started to emphasise several aspects of criticism. To the extent that recourse to comparison may be more properly described as an 'approach' rather than a 'method'; it seems, in fact, far from being both methodologically settled and conceptually grounded, still having to fill practical and theoretical lacunas.

Such comparativism is not an isolated practice used exclusively by the ECtHR. As suggested in the opening sentence of the paper, 'the phenomenon of borrowing and transplantation from the international to national, from the national to international, from national jurisdiction to national jurisdiction is now commonplace.'[3]

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1 C. McCrudden, 'Judicial Comparativism and Human Rights', *Oxford Legal Studies*, Research Paper No. 29/2007.

2 Cf., C. Rozakis, 'The European Judge as Comparatist', *in* B. Markesinis, J. Fedtke, '*Judicial Recourse to Foreign Law: A New Source of Inspiration?*', London, Routledge, 2006.

3 C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, Vol. 20, No. 4, 2000, p. 501.

Many national courts, too, are engaged in a similar endeavour. The comparative approach of the Strasbourg Court falls neatly in line with the growing global phenomenon variously defined also as 'transjudicial communication' or 'judicial dialogue',[4] 'cross-pollination'[5] or 'cross-fertilization',[6] and again 'dialogical interpretation',[7] 'global or transnational community of judges',[8] or 'constitutional migration of ideas.'[9] Comparative constitutional law scholarship all over the world has greatly debated about such topic, which has been mostly developed in the United States, especially in the opinions of the Supreme Court Justices.

Strasbourg judges confront the similar kinds of problems that their counterparts on domestic supreme and constitutional courts do; and they use similar techniques and methodologies to address these problems. Theoretical and practical issues which have been raised by European commentators are quite similar to the major criticism surrounding comparative references in a national context, especially the United States one. Therefore, a joint inquiry between the European Court of Human Rights and the United States Supreme Court may be meaningful for a number of reasons. A combined analysis may be relevant in furthering our understanding of comparative interpretation, in the first place contributing to the broader debate about the nature of legal interpretation. Moreover, a comparative study may shed light and give new perspectives on a number of criticism, among others, the legitimacy of reliance on foreign law and the validity of the consensus argument.

First, the paper, from the perspective of comparative constitutional law, will advocate that European Court of Human Rights deserves to be compared to a national highest court as the United States Supreme Court. Second, the paper will focus on a critical description of the comparative approach of the European Court. Last, the shared criticism between the two experiences will be outlined. By juxtaposing two different ways to deal with the same problems, the inquiry intends to contribute to better appraise the question, gain alternative perspectives, and formulate new insights and possible solutions to common challenges.

4 A.M. Slaughter, 'A tipology of transjudicial communication', in 29 *U. Richmond Law Review*, 1994; Id., '40th Anniversary Perspective: Judicial Globalization', in 40 *Va. J. Int'l L.*, 2000.

5 C. L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Renquist Court', in 34 *Tulsa L. J.*, 1998.

6 S. Choudhry, 'Globalization in Search of Justifcation: Towards a Theory of Comparative Constitutional Interpretation', in 74 *Indiana L. J.*, 1999.

7 Ibid.

8 A.M. Slaughter, 'A Global Community of Courts', in 44 *Harv. Int'l L. J.*, 2003, p. 191.

9 S. Choudhry, 'The Migration of Constitutional Ideas', University of Toronto, 2007.

3.2 European Convention and United States Systems as Two Comparable Entities

In the previous paragraph, it has been stated that the European Court of Human Rights deserves to be compared to a national high court as United States Supreme Court. The reason is that they have some features in common, even though the European Convention and the United States Bill of rights are different types of documents serving different purposes, and the European Court and the United States Supreme Court are different types of judicial organs having different mandates, operating in different legal, social and political contexts.

The way the Convention's provisions are structured is similar to the one of a national Constitution.[10] International human rights instruments, just as national bill of rights, tend to formulate rights provisions in a vague and general language, leaving to the judiciary the power to interpret and adapt them to the ever-changing standards and opinions in society. Most of the provisions of the European Convention were drafted in an indeterminate and abstract language, far from being straightforward. It is interesting to note that during the *travaux préparatoires* to the Convention, proposals for a more precise formulation of provisions had advanced but, at the end, all the members of the preparatory committe agreed upon general formulation.[11]

As a consequence, Strasbourg judges have gained a new space in interpreting those norms and adapting them to the current circumstances, acquiring a role similar to the one of the judges in common law traditions. Most of all, similar to the United States tradition, considering that one of the most distinctive character of the Court's case law is its case-by-case or tailor-made approach, namely a concrete approach resulting in a flexible and highly individualized jurisprudence.

In the *Sunday Times* judgment, the Court recognized that the decisions have to be made 'having regard to the facts and circumstances prevailing in the case before it.'[12] However, although the primary purpose of the Convention system is to provide individual relief, the Court has not accepted the ultimate consequence of such an approach, which would be that no general conclusions may be drawn from the interpretations and criteria elaborated in its case law. Indeed, the Court admitted, already in 1978, that the aims of its jurisdiction 'is not only to decide those cases brought before the Court, but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention.'[13] A purely

10 See, G. Zagrebelsky; J.A. Brauch; A. Stone Sweet.

11 The official version of the *travaux préparatoires* are published in eight volumes from 1975-1985 by Martinus Nijhoff in The Hague. The Registry's internal working documents provide a full text access at the following address: http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf (latest access on November 11, 2015).

12 *Sunday Times v. United Kingdom*, ECtHR (1979), Appl. No. 6538/74.

13 *Ireland v. United Kingdom*, ECtHR (1978), Series A, Vol. 24, Para. 154.

individualized, case-by-case approach versus a more general, constitutional case law is one of the main elements that distinguish an international court from a national high court. Even if in practice no complete transition is envisaged from an individualized approach to a constitutional case law, it is also self-evident that a shift in the attitude of the European Court towards the search of a balance between the desire for individual relief and the need for general interpretation exists.[14]

3.3 A Critical Analysis of the Comparative Endeavour of the European Court of Human Rights

The Nature and the Scope of the European Convention on Human Rights

The comparative approach of the ECtHR has been enthusiastically recognized and given for granted by many comparative lawyers: 'the European Court serves as a laboratory for the circulation of legal models that comparativists have dreamt of for many years.'[15] In contrast to the heated debate between American scholars, the ECtHR's comparativism has almost unanimously been considered a sign of 'cosmopolitanism',[16] and of the fact that judges do not lock themselves in an ivory tower, but have an open attitude toward the 'inevitable globalization of law.'[17]

European judges commonly resort to comparison as well as judicial references to foreign law are generally accepted and undisputed among academics due to the very nature of the Convention system.

Adopted under the aegis of the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[18] is the oldest and most comprehensive system protecting rights of individuals in the world. The oldest, as it was signed in 1950 and came into force in 1953. The most comprehensive, as it counts 47 member States. However, as a matter of fact, the Court started functioning only in 1959 and, still until the end of the 1960s, a modest number of submissions were received. The

14 J. Gerards, 'Judicial Deliberations in the European Court of Human Rights', *in* N. Huls, M. Adams, J. Bomhoff (Eds.), "*The Legitimacy of Highest Courts' Rulings*", The Hague, T.M.C. Asser Press, 2009.

15 V. Grementieri, "Comparative Law and Human Rights in Europe", *in* A.M. Rabello (Ed.), "*European Legal Traditions and Israel*", The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, Jerusalem, 1994, p. 375.

16 C. Rozakis, "European Judge as Comparatist", *above* n. 2, p. 279.

17 See, M. Tushnet, "The Inevitable Globalization of Constitutional Law", *Virginia Journal of International Law*, Vol. 50, Issue 1, 2009; see also, M. Shapiro, "The Globalization of Law", 1 *Ind. J. Global Legal Stud.*, 1993.

18 The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, The European Convention on Human Rights), http://www.echr.coe.int/Documents/Convention_ENG.pdf (latest access November 11, 2015).

number of 47 signatures has been reached only during the 1990s, after the fall of communism and the accession to the Council of Europe of new countries from Central and Eastern Europe, South-Eastern Europe, and the former Soviet Union.[19]

So, in an early stage, the Court had a slow start together with a weak competence. In 1950, the jurisdiction of the Court was not compulsory, and neither a right of petition for individuals was provided.[20] Though, the Convention system has undergone fundamental, deep, structural changes, most notably through Protocol No. 11.[21]

Enacted in 1998, Protocol 11 set up a single permanent Court, in place of the existing two-tier system of a Court and a Commission,[22] directly accessible by citizens, and with a compulsory jurisdiction for all member States. Since then, the main competence of the Court has become that of hearing cases brought by individuals against member States; more rarely, a member State files a complaint against another.[23] Notwithstanding the slow start, the ECHR has eventually grown into one of the largest, most accomplished and exemplary international judicial authorities, developing the most extensive jurisprudence in the field of the protection of human rights.

The Convention, thus, has created a multilevel system of human rights protection where protection afforded by the European Court is a supplemental tool, in addition to the national judiciary systems and always depending on them. Article 35 ECHR stresses the subsidiary nature of the supervisory mechanism established by the Convention and the fundamental role national authorities must play in guaranteeing and protecting human rights at the national level.[24] The subsidiary role of the Court to the national legal systems provides a justification for and strenghtens the legitimacy of reference to member States.

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19 For a profile of each member States, see, http://www.coe.int/en/web/portal/country-profiles (latest access November 11, 2015).

20 As it appears from the *travaux préparatoires*, even the establishment of a regional court has been heatedly debated.

21 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, conventions.coe.int/Treaty/en/Treaties/Html/155.htm (latest access on November 11, 2015). Signed on 11 May 1994 and come into force on 1 November 1998. See, R. Bernhardt, 'Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11', 89 *American Journal of International Law*, 1995, pp. 145-154.

22 In the original system, individuals had access to the Commission, which produced non-binding reports. As from October 1, 1994, Protocol No. 9 enabled individual applicants to also bring their cases before the Court, subject to the ratification by the respondent State and a screening panel of the Court accepting the case for consideration.

23 The combination of the entry into force of Protocol 11 and the Court's expanded geographic jurisdiction have made the number of potential claimants soar to more than eight hundred million. To contrast such trend, Protocols 14 and 14bis, which come into force respectively on October 1, 2009 and June 1, 2010, has been enacted.

24 Art. 35 ECHR Admissibility criteria. '1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.'

The aim of such a system of rights protection can be easily drawn from the wording of the Preamble of the Convention referring to 'further realization of human rights' and 'being resolved […] to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.'[25]

In order to achieve such goals, the Court has taken on the power and duty to apply and interpret the Convention rights provisions in a dynamic and progressive way, designed to reflect changing standards in each contracting State.[26] The Court, in fact, is an overarching body that has to operate in conjunction with national legal orders that have signed and ratified the Convention, gathering indications about the way a particular legal matter is normally dealt with ideally in each member State.[27] The Court uses a simple, comprehensive comparative method for determining the state of the art in each national system. The nature and scope of Convention rights are identified, clarified, and expanded through the Court's judgments, over time, in light of changing circumstances at the European level. A natural inclination of the Court towards comparison is easily explained.

Furthermore, the open-ended nature itself of norms protecting human rights requires them to be applied only passing through a dynamic and evolutive process of interpretation.[28] Human rights norms are abstract in nature and acquire a concrete meaning in the particular context in which they are invoked.

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25 Preamble of the European Convention on Human Rights: '[…] Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and *further realization of Human Rights and Fundamental Freedoms*; Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the *first steps for the collective enforcement* of certain of the Rights stated in the Universal Declaration; […]' (emphasis added). Rights to be protected by the Convention have been selected from the Universal Declaration of Human Rights, which came into existence only two years earlier, in 1948.

26 The reference is to the method of evolutive interpretation, which will be deepen in the paragraphs below.

27 The reference is to the search of consensus method, but also to the margin of appreciation doctrine: they are, in fact, inversely proportional. If there is no consensus among member States, the ECHR, through the margin of appreciation doctrine, leaves up to each member State to choose the measures to implement the Convention on its territory. A well-known example of this kind of judicial deference or self-restraint is the Grand Chamber judgment in *Lautsi and Others v. Italy* of 18 March 2011. The Grand Chamber stated that the decision whether crucifixes should be present in classrooms was a matter falling within the margin of appreciation of the State party concerned. In general, the ECtHR respects the margin of appreciation 'where a case raises sensitive moral or ethical issues on which no consensus has been reached between the member States' (Speech given by Prof. Dr. Andreas Voßkuhle, President of the German Federal Constitutional Court, on the occasion of the opening of the judicial year, 31 January 2014, 'Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts', http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf, latest access November 11, 2015).

28 Note the difference between application and interpretation.

As the Convention frequently uses general and vague formulations that necessitate "fleshing out' through interpretation',[29] Strasbourg judges have to become active law-makers, performing 'an oracular function.'[30] This function is inevitably not carried out in a vacuum: comparative references represent a constant persuasive source of inspiration in the decision-making process of the Court. Therefore, 'comparative law is no longer simply an amusing puzzle',[31] rather serves the practical purposes enunciated in the Preamble of the Convention, and can or should affect the final judgment of the Court.

Adopting the opposite view and analysing the influence of the ECtHR's jurisprudence on the national level, it can be said that Convention rights have impact beyond any individual case only to the extent that national officials take into account the Court's precedents in their own decision-making. Generally, in fact, national authorities may decide to ignore the Court's interpretation of the Convention, even when on point, and even where Convention rights have been incorporated into the national system.[32] A decisive factor seems the frequency of reliance on comparison: the more comparative references the Court makes, the more the Court's decisions gain legitimacy and possibilities to be implemented by domestic authorities.

The most recent protocol to have been opened for signature, Protocol No. 16,[33] if ratified, will extend the Court's competence to give advisory opinions. Its aim is to 'further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention.'[34] This is the reason why Dean Spielmann, President of the Court, has referred to it as the 'Protocol of dialogue',[35] promoting the desirable transition 'from pyramid to network.'[36]

Such instrument will enable highest domestic courts, in the context of cases that are pending before them, to refer requests to the Court for advisory opinions on questions of

29 E. Örücü, 'Whither Comparativism in Human Rights Cases?', *in* E. Örücü (ed.), "*Judicial Comparativism in Human Rights Cases*", London, United Kingdom National Committee of Comparative Law, 2003, p. 239.

30 A. Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', *Yale Law School Faculty Scholarship Series*, Paper 71, 2009, p. 5.

31 K. Dzehtsiarou, 'Comparative Law in the Reasoning of the European Court of Human Rights', 10 *University College Dublin Law Review*, 2010, pp. 109-140.

32 A. Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', *Yale Law School Faculty Scholarship Series*, Paper 71, 2009, p. 4.

33 Protocol No. 16, opened for signature on 2 October 2013, http://www.echr.coe.int/Documents/Protocol_16_ENG.pdf (latest access on November 11, 2015). The Protocol will come into force after 10 ratifications. So far, only 11 member States have signed and 5 ratifications have followed (see, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=214&CM=8&DF=01/08/2014&CL=ENG, latest access on November 11, 2015).

34 Protocol No. 16, Preamble.

35 Annual Report 2014 of the European Court of Human Rights, Council of Europe, Speech given by Mr Dean Spielmann, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 31 January 2014.

36 F. Ost, M. Van de Kerchove, 'From Pyramid to Network? For a Dialectal Theory of Law', Brussels, Facultés Universitaires Saint Louis, 2002.

principle concerning the interpretation or application of the rights and freedoms defined by the Convention. As an additional means of judicial dialogue, European Court's advisory opinion will provide reasoning but will not be binding. However, if domestic highest courts do choose to rule in accordance with the Strasbourg opinion, their authority will be greatly strengthened. Cases may thus be resolved at the national level rather than being brought before the ECtHR, even though that option will remain open to the parties after the final domestic decision.[37]

3.4 Defining Comparative Interpretation

3.4.1 In the Context of the European Convention on Human Rights

The text of the European Convention on Human Rights does not mention comparison as a method of judicial interpretation. In fact, there are only a few international treaties or constitutional documents that explicitly allow for comparative arguments to be taken into consideration; a famous example being the South African Constitution.[38] Most courts, like the Strasbourg Court, do not operate on the basis of a document that explicitly provides for taking foreign experiences into account.

As a matter of fact, the Convention does not mention *any* method of interpretation, giving no guidance on how the Court should interpret its provisions.

However, since the Convention is a multilateral international treaty, its interpretation should be governed by the general rules of interpretation as identified in the Vienna Convention on the Law of Treaties of 1969 (VCLT).[39] In particular, Article 31 holds that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' (Art. 31.1 VCLT). In its second and third clauses, the Article establishes what should be

37 Annual Report 2014 of the European Court of Human Rights, Council of Europe, Speech given by Mr Dean Spielmann, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 31 January 2014, p. 32.

38 Art. 39(c) of the Republic of South Africa Constitution allows (or requires, according to some scholars) the Constitutional Court to take international and other foreign experiences into account when interpreting the Constitution. Art. 39 Interpretation of Bill of Rights.' (1) When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and *(c) may consider foreign law*. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.' (emphasis added).

39 The Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (latest access on November 11, 2015).

considered to constitute the 'context' (Art. 31.2 VCLT), and what shall be taken into account apart from the context (see in particular, Art. 31.3(c) VCLT).[40] Then, Article 32 adds the possibility to recourse to supplementary means of intepretation.[41]

The Vienna Convention, according to Article 5, applies to 'any treaty adopted within an international organization without prejudice to any relevant rules of the organization.'[42] Such provision implies that next to the application of the general interpretation principles, the Court is entitled to develop its own methods and principles of interpretation.

The legal basis for comparison is, in fact, two-folded. On the one hand, comparative method can be justified as means of interpretation in light of the international interpretative principles of the Vienna Convention. On the other hand, and for the most part, comparative method is one of the numerous interpretative guiding lines developed by the Court within the context of the European Convention itself. The Strasbourg judges have affirmed several interpretative methods or principles: among others, the evolutive interpretation, the autonomous interpretation, the margin of appreciation doctrine.[43] To the purposes of the paper, only a few of these methods will be investigated and only as far as concerns their relationship with the comparative approach.

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40 Article 31 VCLT, General rule of interpretation. 1. 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.' (emphasis added).

41 Article 32 VCLT, Supplementary means of interpretation. 'Recourse may be had to *supplementary means of interpretation*, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' (emphasis added).

42 Art. 5, The Vienna Convention on the Law of Treaties.

43 To give another example, in the *Soering* case, the judges elaborated the principles of practical and effective right and of teological interpretation. *Soering v. United Kingdom*, ECHR (1989) Series A, No. 171, Para. 87: 'In interpreting the Convention, regard must be had to its special character as a treaty for the *collective enforcement of human rights and fundamental freedoms* […] Thus, the object and purpose of the Convention as an instrument for the *protection of individual human beings* require that its provisions be interpreted and applied so as to make its safeguards *practical and effective* […] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "'the general spirit of the Convention, an instrument designed to *maintain and promote the ideals and values of a democratic society*.' (emphasis added).

3.4.2 According to the European Court of Human Rights Case Law

The European Court of Human Rights hardly ever expressly employs the terms 'comparative method', 'comparative reasoning', 'comparative arguments', or 'comparative interpretation.' The Court does extensively discuss its use of comparison only on rare occasions, such as in the Grand Chamber judgment *Demir and Baykara v. Turkey*[44] in 2008.

The *Demir* Court unanimously articulated its understanding of the comparative method as follows:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The *consensus emerging from specialized international instruments and from the practice of contracting States* may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[45]

Such formulation referring to a notion of emerging consensus is what probably comes closest to a definition of the comparative method in the entire case law of the Court.

According to the Court, comparative method encompasses the use of all non-Convention material: both elements of international law and the practice of contracting States. Furthermore, the unanimity of the *Demir* decision shows once again that the application of the comparative method is far from being contested within the Court, even if the references are made to *external*, foreign sources (laws of third countries, or other international

44 *Demir and Baykara v. Turkey*, ECHR (2008), Appl. No. 34503/97. The *Demir and Baykara* case concerns a Turkish union for civil servants that had concluded a collective agreement with a local government, which was the employer. The local government, however, failed to meet its obligations under the collective agreement. The union went to court to try to enforce the collective agreement. The Court of Cassation determined that civil servants did not have a right to form a union and as a result they did not have the power to conclude legally binding collective agreements. The union complained in Strasbourg about a violation of their rights of freedom of association under Art. 11 ECHR. In its judgment the Court heavily relied on some provisions of the European Social Charter, which had not been ratified by Turkey. Before the Grand Chamber, Turkey objected to this practice of interpreting the Convention on the basis of instruments that the respondent government had not ratified: the Court could not 'by means of an interpretation of the Convention, […] create for contracting States new obligations that were not provided for in the Convention.' Before deciding on the merits, the Grand Chamber dealt with the methodological aspects of the case. The ECtHR did not extensively mention 'comparative interpretation', but it referred to the method as 'interpretation in light of international texts and instruments.' The Court concluded that in order to find the 'consensus', it was not necessary that the respondent State had ratified all the relevant instruments. 'A continuous evolution in norms and principles applied in international law' or a common ground in the member States of the Council of Europe appears to provide a sufficient basis for the Court to give a novel interpretation to one of the terms contained in the Convention.

45 *Demir and Baykara v. Turkey*, ECHR (2008), Appl. No. 34503/97, Para. 85. (emphasis added).

treaties, that are outside the framework of the treaty in question) rather than to *internal* sources (the Convention or laws of member States, which are considered material for internal comparison). Such kind of doctrinal distinction between external and internal comparison is completely ignored by the pratice of the Court.[46] As already pointed out, comparison in general is a well-accepted form of reasoning throughout the whole Court's jurisprudence.

3.5 Comparative Interpretation as Search for Consensus

In a number of cases, comparative analysis is used by the European Court of Human Rights to determine the presence or absence of a common trend regarding a particular legal issue. It can even be argued that the comparative method in the context of the ECHR is almost the equivalent of a search for consensus, or common ground, or common denominator method.

The Convention system must strive to seek a consensus among member States, considering and respecting national identities and traditions, at the same time without ever turning its back on its own guiding principles. 'This is the dilemma constantly facing our Court',[47] stated Dean Spielmann, President of the Court, during the opening of the judicial year in 2014.

Such an important relation has to be stressed. Using comparative interpretation to establish present-day circumstances[48] means that the ECtHR mostly looks for a Europe-wide consensus to establish present-day conditions of a certain right. In other words, the laws of the contracting States will be compared in order to check whether a consensus on a certain legal issue can be found at the European level.

If one examines the way the ECtHR has employed the search for consensus method in its case law, many questions arise. Are there any criteria for establishing a consensus? Are there any standards of inquiry for selecting the member States to be considered? Or are all the contracting States always considered? Accordingly, could the use of the consensus approach lead to a lower degree of protection after the accession of several new contracting

46 The ECtHR does not seem to conceive that a distinction between internal and external comparison could be relevant. While indications for such an approach can already be found in earlier judgments, the 2008 case *Demir and Baykara* clearly implied that this distinction does not matter. The Court was presented with the question whether the fact that a respondent State had not ratified a certain instrument mattered for comparative arguments. The Court answers that question in the negative, thus treating internal and external material in exactly the same way.

47 Annual Report 2014 of the European Court of Human Rights, Council of Europe, Speech given by Mr Dean Spielmann, President of the European Court of Human Rights, on the occasion of the opening of the judicial year, 31 January 2014.

48 Cf. *Sunday Times v. United Kingdom* judgment, *above* n. 12, and *Tyrer v. United Kingdom* judgment, *below* n. 55.

States? Is consensus established on the basis of a simple majority or is a real unanimity needed? How does the comparison itself take place in such context?

All these questions remain unanswered today. Searching for consensus seems more gathering 'hunches about European commonality and patterns of legal, social, and moral development.' 'The Court's haphazard and overly casual assertions of similarities or divergences in national laws constitute a serious weakness that undermines the legitimacy of the Court.'[49]

The European Court of Human Rights' case law is not the only breeding ground for criticism on consensus. It may not come as a surprise that the use of consensus argument gives rise to conflict in any context where such a nebulous concept is used for the interpretation or application of human rights. The United States Supreme Court is one of these contexts.[50]

Unlike the European Court of Human Rights, a very important consideration in order to evaluate the use of consensus in the United States Supreme Court is the direct enforceability of its judgments. Accordingly, references to comparative law in the Supreme Court of United States' reasonings are not guided by a quest for legitimacy to secure enforcement. The need for more authoritative power is an argument in support of reference to consensus by the European Court of Human Rights,[51] whereas this need is much less present in the United States Supreme Court, as its judgments are directly enforceable. Rather, for the American Court, constitutional comparativism is a tool for well-informed decision-making.[52] In such context, the search for consensus serves other purposes: facilitating acceptability of the outcomes, and enhancing the judges' high esteem.

Therefore, it can be argued that the criticism regarding definition and delineation of the consensus concept and methodology is much more pertinent for the European Court of Human Rights than for the United States Supreme Court.

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49 P. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights', Scholarly Works, Paper 208, 1998, p. 1225.

50 The *Roper* case, for instance, has been greatly debated because it is based on an uncertain measure of what constitutes 'the evidence of national consensus against the death penalty for juveniles', *Roper v. Simmons*, 543 U.S. 551 (2005), p. 567.

51 On the contrary, when there is no clear consensus among member States, the level of acceptance of the European Court's decision is increased by leaving to the States the margin of appreciation, thus demonstrating respect for the diversity of each national tradition.

52 K. Dzehtsiarou, V. Lukashevich, 'Informed decision-making: the comparative endeavours of the Strasbourg Court', 30 *Netherlands Quarterly of Human Rights*, 2012, pp. 272-298.

3.6 Comparative Interpretation and Evolutive Interpretation

In order to understand the role of comparative references in the European Court of Human Rights decisions, the role that comparative interpretation plays in relation to other methods and principles in the interpretative framework of the ECtHR should be discussed.

Leaving aside the autonomous interpretation[53] and the margin of appreciation doctrine,[54] this section will focus on evolutive interpretation, which, for the purposes of the article, has the most significant relation with the comparative method.

The evolutive interpretation, or the living instrument doctrine, is one of the best known principles of the Strasbourg case law. It expresses the idea that the Convention evolves through the intepretation of the Court in the light of ever-changing circumstances.

In 1978, the *Tyrer v. United Kingdom*[55] judgment clearly established that 'the Convention is a living instrument which […] must be interpreted in the light of present-day conditions.' In this way, 'this piece of legal reasoning inaugurated the Court's extensive use of evolutive interpretation.'[56] Despite the fact that the Court is generally not inclined to justify its decisions from a theoretical point of view, critics of judicial activism claim that the *Tyrer* Court has been reluctant to elaborate a rationale of the living instrument doctrine.[57]

The facts of the controversy. On the Isle of Man, a self-governing British crown dependency, Tyrer, then aged fifteen, was subject by a policeman to the judicial corporal punishment of the bare-skin birching, prescribed by law and regularly practiced on the island. The Court uses comparative interpretation to establish present-day circumstances: birching had been abolished in the rest of United Kingdom and has never been imposed in the vast majority of the Convention States. Therefore, 'the Court cannot but be influenced

53 The Court establishes that the European Convention is an 'autonomous' normative system. In other words, although the Convention draws its vocabulary from ordinary usage and from the constitutional traditions of the member States, the Court will give those words a meaning specific to the Convention, drawn from sources internal to the conventional system, such as the Court's precedents or the object and purpose of the treaty.

54 The Court has developed the so-called 'margin of appreciation' doctrine, which can be defined as 'the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations' (S.C. Greer, 'The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights', Vol. 88, Council of Europe, 2000, p. 5). The margin of appreciation doctrine has no basis in the Convention, but was created and developed by the Strasbourg Court. The Brighton Declaration of 20 April 2012, however, heralds the inclusion of the margin of appreciation in the Preamble to the Convention. In Brighton, the Council of Europe has presented Protocol No. 15 to the Convention, which incorporates into the Preamble to the Convention a reference to the principle of subsidiarity and the doctrine of the margin of appreciation (Art. 1 of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms).

55 *Tyrer v. United Kingdom*, April 25, 1978, Series A, No. 26.

56 G. Letsas, 'A Theory of Interpretation of the European Court of Human Rights', Oxford University Press, 2007, p. 76.

57 A. Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights L. Rev.*, 2005, pp. 60-61.

by the developments and commonly accepted standards in the penal policy of the member States.'[58] Notwithstanding, according to the defense, the corporal punishment could not be considered degrading for juveniles as 'it did not outrage public opinion in the Isle of Man',[59] the Court held Tyrer's birching to constitute degrading treatment violating Article 3 ECHR.

The close relation between comparative interpretation and evolutive interpretation cannot be discarded: comparative interpretation is the best tool to use to provide the evidence that is needed to substantiate an evolutive interpretation.

In 2009, in *Scoppola v. Italy (No. 2)*[60] concerning the right to a fair trial (Art. 6 ECHR), the Court makes its first attempt to illustrate the rationale for the evolutive interpretation.

> Since the Convention is first and foremost a system for the protection of human rights, the Court must […] have regard to the *changing conditions* in the respondent State and in the Contracting States in general and respond, for example, to *any emerging consensus* as to the standards to be achieved […]. 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. A failure by the Court to maintain a *dynamic and evolutive approach* would risk rendering it a bar to reform or improvement.[61]

3.7 Process of Comparison in the European Court of Human Rights

Within the European Court of Human Rights, comparative research has usually taken place in a rather informal manner, depending on the personal knowledge and willingness of the judges themselves. In recent years, instead, a research unit dedicated to comparative studies has been established. The Court now has a Research Division, a department within the Court's Registry,[62] which is designed to undertake comparative analysis following the request of the Judge Rapporteur.[63] Lawyers from the department send requests to national lawyers working within the Registry commissioning a report on the way a particular legal issue is dealt with by their national legislation. Then, each national report is signed by the judge of the Court elected in respect of the country concerned. Afterwards, the national

58 *Tyrer v. United Kingdom*, *above* n. 55, Para. 31.

59 Ibid.

60 *Scoppola v. Italy (No. 2)*, ECtHR (2009), Appl. No. 10249/03.

61 *Scoppola v. Italy (No. 2)*, *above* n. 60, Para. 104. (emphasis added).

62 For the functions and organization of the Registry, see, http://www.echr.coe.int/pages/home.aspx?p=court/howitworks&c= (latest access on November 11, 2015).

63 According to Rule 49 of the Rules of Court, a *Judge Rapporteur* is the judge who examines the application and is appointed by the President of the section to which the case has been assigned. For the Rules of Court, see, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (latest access on November 11, 2015).

reports are compiled by the Research Division in a composite report which is then sent to the Judge Rapporteur.

Even if the Strasbourg Court is potentially in a more advantageous position than a domestic high court, like the United States Supreme Court, being provided of a more scientific approach, there are still some limitations.

First, the reports are confidential and not accessible to the general public, and often they are not even cited in the judicial reasonings so that the decision results not informed.

Second, it is not entirely clear whether this research unit is sufficiently equipped to undertake thorough and exhaustive comparative studies; in particular, it has to be noted that systematic studies are mostly conducted in respect to cases to be decided by the Grand Chamber, which only constitute a small proportion of all the cases decided by the Court.[64]

Third, the lawyers and the judges of the Court cannot specialise in all of the particular legal areas under review. Alternative sources of information can mitigate the possible limitations of the research conducted by the Court. The role of the parties and the third parties, like NGOs,[65] universities,[66] non-respondant governments,[67] should not be forgotten. The Court's practice of considering third parties' submissions and other sources of information should be welcomed as they collectively can provide a multifaceted description of a given legal issue. 'In any decision-making process, the greater the amount of information and views considered, the greater the chance for a good outcome.'[68]

Last, due to the heavy workload of the Court,[69] it is extremely burdensome for the lawyers to engage in lenghty and detailed research on a particular legal topic.[70]

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64 The initiation of proceedings before the Grand Chamber takes two different forms: referral and relinquishment. After a Chamber judgment has been delivered, the parties may request referral of the case to the Grand Chamber and such requests are accepted on an exceptional basis. Cases are also sent to the Grand Chamber when relinquished by a Chamber, although this is also exceptional. At its last meeting (Monday 16 February 2015), the Grand Chamber panel of five judges decided to refer two cases and to reject requests to refer 19 other cases. See, Grand Chamber's Panel Decisions, ECHR 057 (2015) 17.02.2015, http://hudoc.echr.coe.int/webservices/content/pdf/003-5016676-6159979 (latest access November 11, 2015). At its previous meeting (Monday 14 April 2014), the Grand Chamber panel of five judges decided to refer four cases and to reject requests to refer 14 other cases. See, Grand Chamber's Panel Decisions, ECHR 105 (2014) 16.04.2014, http://hudoc.echr.coe.int/webservices/content/pdf/003-4735701-5755259 (latest access November 11, 2015).

65 *KU v. Finland*, ECtHR [2009], Appl. No. 2872/02, Paras. 33-34.

66 *Z and others v. UK*, ECtHR [2001], Appl. No. 29392/95, Para. 7.

67 *Lautsi v. Italy*, ECtHR [2011], Appl. No. 30814/06, Paras. 47-49.

68 G.C. Umbricht, 'An '*Amicus Curiae* Brief'" on *Amicus Curiae* Briefs at the WTO', *Journal of International Economic Law*, Vol. 4, No. 4, 2001, pp. 773-794, p. 774.

69 The total number of pending applications was 69,900 in 2014; 99,900 in 2013; 128,100 in 2012; 151,600 in 2011. Even if it is steadily diminuishing, the number of cases remains enormous.

70 In 2014 the Division prepared a total of 56 reports: 22 on the Court's case-law, 15 on international law and 19 on comparative law. See, Annual Report 2014 of the Council of Europe, *above* n. 35, p. 72.

3.8 Justifying the Recourse to Comparative Interpretation

Manifold justifications can be adduced in favour of the use of comparative arguments in judicial reasoning; and they have long been discussed in a general fashion in the constitutional debate of the past two decades.[71] Probably, more than one of the purposes discussed in a theoretical manner can be found important for the ECtHR.

The next section will identify the purposes considered particularly relevant in the context of the Court or elaborated by the Court itself.

3.8.1 A ECHR-Oriented Means of Justification: the Common European Tradition

The forementioned Preamble of the Convention describes the treaty as an agreement among 'the Governments of European Countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law.'[72] The norms of the Convention were drawn originally from such common European tradition, creating a system of rules which, in turn, become part of and nourish the same common heritage.

The idea of a common European tradition provides some justification for the European Court to make comparative references, although it seems to give a theoretical foundation only for the *internal* component of comparative interpretation. The reference to European countries and their common heritage cannot really be seen as a basis for invoking references from outside the context of the European Convention.

On the other hand, the text of the Convention does not seem to provide any other basis for relying on the external component of comparative interpretation. The question remains whether the ECtHR, instead, provides in its reasoning a rationale for the external component of comparative interpretation.

3.8.2 Another ECtHR-Oriented Means of Justification: Promoting Effective Implementation

A second, very different type of justification focuses less on the historical traditions, and more on the current social, legal, political situation in the member States: the effective implementation and perceived legitimacy of the Court's judgments depend only on acceptance at the national level.

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71 See, e.g., B. Markesinis, J. Fedtke, 'Judicial Recourse to Foreign Law: A New Source of Inspiration?', Routledge, 2006.

72 ECHR, Preamble, *above* n. 25.

A European judgment can be ignored by domestic authorities. It is a sound hypothesis that seeking to ground decisions, especially the more controversial ones, in the practice of the member States can help enhance the trust in the Court's decisions.

Furthermore, by apparently displacing the source of developing norms from the personal opinions of judges on the Court to the consensus shared among the European States, the comparative exercise protects the Court from charges of overreaching judicial activism.

3.8.3 A Means of Conferring Objectivity and Authority

Comparative arguments may be also used to indicate that other judges in similar cases have considered a similar solution; in so doing, the attempt would be to objectify the chosen solution in a specific case. A slightly different way of viewing such purpose would argue that sometimes foreign citations can add authority or prestige to a particular decision. Especially in the past, when American constitutionalism was the model for the rest of the world, different courts, in particular of the so-called emerging democracies, have included in their decisions references to the United States Supreme Court's case law as a way to enhance the force of their arguments.[73]

3.8.4 A Means of Keeping Up with Evolving Standards

A fourth reason of resorting to comparative interpretation is keeping up with evolving national and international standards.

Such purpose motivated the comparative openness of some well-known Eighth Amendment cases decided before the United States Supreme Court. In *Roper v. Simmons*,[74] for instance, the Justices had to address the question whether it was constitutional to

73 See, C. L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court', 34 *Tulsa L. J.*, 1998, p. 18: 'As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. This is particularly true in the field of constitutionalism and human rights. The very concept of judicial review of legislation in accordance with guaranteed rights originated in the US Supreme Court, in the classic case of *Marbury v. Madison*.'

74 *Roper v. Simmons*, 543 U.S. 551 (2005). 'Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is *the only country in the world* that continues to give official sanction to the juvenile death penalty. This reality does not become controlling for the task of interpreting the Eight Amendment remains our responsibility. [reference is also made to the United Nations on the Rights of the Child] […] only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum it is fair to say that *the United States now stands alone in a world that has turned its face against the juvenile death penalty* […] *The opinion of the world community*, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.'. (emphasis added).

impose the death penalty on a juvenile offender who was at the time of committing the crime older than fifteen, but younger than eighteen. The reference to the 'opinion of the world community' in the reasoning of the *Roper* Court has been deeply contested as it has been accused to be used as principal justification of the decision, and even more so since the alleged world opinion is not so clear-cut as could be on other questions, such as whether or not birching is to be considered inhuman and degrading treatment.[75]

In the European context, a similar search for consensus seems to be less controversial. On the contrary, the existence of a consensus among contracting States might increase the acceptance of an interpretation provided by the ECtHR. It helps to build a bridge between the national and international level by engaging the member States in the decision-making process. But, in the absence of a European consensus, it occurs that also the ECtHR appeals to a 'continuing international trend',[76] for instance in favour of the social acceptance and legal recognition of transsexuals as in the *Goodwin v. United Kingdom* case.

3.8.5 A Means of Evolutive Interpretation

A final justification provided for looking at comparative material from both the contracting and non-contracting States is based on the link between evolutive and comparative interpretation.

The principle of evolutive interpretation is invoked to justify the use of comparative arguments. The idea that evolutive interpretation helps the ECtHR to keep pace with developments within the Council of Europe can be supported as a justification for the use of member States' material. This explanation is, however, far less convincing when developments at the international level or developments in non-contracting States, such as the United States of America, are mentioned. A separate justification that explains the relevance of looking at these non-Convention materials would be desirable.

Similar considerations may be put forward for the United States context. References to foreign law makes sense when a constitution is being regarded as a living document, which should be interpreted according to a broad set of sources.

In sum, the European Court of Human Rights has relied on comparative arguments for a variety of reasons. However, these justifications are usually somewhat succinctly mentioned and it should be questioned whether they suffice to legitimize the use of comparative method by the Court. These concerns are by no means limited to the European context, and are likely to be more pronounced outside of it. In fact, although part of these justifications have some merit in explaining the ECtHR's reliance on comparison, they seems to

75 Cf., *Tyrer v. United Kingdom, above* n. 55.
76 *Goodwin v. United Kingdom*, ECtHR (2005), Para. 85.

fail to address some of the basic questions raised by the use of comparative references more generally.

3.9 Shared Criticism between the European Court of Human Rights and the United States Supreme Court

All along the article, there have already been given some hints on the 'shared criticism' mentioned in the title. Concluding, it would be useful to sum them up.

The major debate surrouding the intepretation of human rights provisions using comparative approach involves two interconnected questions:

1. a methodological one: the *how* question. How can judges identify and reflect the changing conditions of societies when interpreting rights provisions?
2. a conceptual one: the *why* question. Should they do so at all?

This twofold debate has featured prominently in the case law and literature surrounding both the European Convention on Human Rights and the Bill of Rights of the United States Constitution.

3.9.1 The 'How' Question

There are serious methodological concerns regarding comparative interpretation. The problem is that no consistent application of this method has been developed, which leads to any sorts of criticism.

The major problem is related to the process of selecting the relevant sources. The question is how judges can select foreign sources without being accused of 'looking over the heads of the crowd and picking out his friends.'[77] This phenomenon has also been described as the risk of 'cherry-picking', which refers to the fact that, without any guidance on where to look, judges can simply pick the references that support their own opinion and use these references as a justification for a result already decided.

Certainly, it is impossible for judges to analyse every relevant national judgment or piece of legislation, not only because of a mere lack of time, but also due to lack of accessibility. Therefore, a certain amount of selectivity will always be present in any use of com-

77 The quotation, with respect to legislative history, is from P.M. Wald, 'Some Observations on the Use of Legislative History in the 1981 Supreme Court Term', 68 *Iowa L. Rev.*, 1983, p. 214: 'It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.' Extended to comparative constitutional law by Justice Stephen Breyer in a debate with Antonin Scalia over whether the United States Supreme Court should look to foreign law in making its decision, the same point applies.

parative interpretation as well as a certain amount of subjectivity will always be present in any judicial decision-making process. The question is, however, how to avoid accusations of deliberate cherry-picking, that can ultimately affect the legitimacy of the method itself, bringing the debate straight to the conceptual issue.[78]

The problem of deliberate cherry-picking has been noted as one of the major concerns about this method in the European national and supranational courts as well as in the United States Supreme Court.

A different issue is related to the risk of misunderstanding or misinterpreting foreign materials. Even leaving the language obstacles aside, it is difficult to correctly comprehend legal concepts elaborated in a foreign system. And a correct understanding does not only require knowledge of the foreign legal system, but also an understanding of the particular social, cultural and political context of that legal system. If such an obstacle can be overcome within the ECtHR due to the establishment of the Research Division, it remains a major problem for the American Justices. However, the common issue that arises is whether the court in question has sufficient resources to undertake a thorough examination of the comparative materials.[79]

One further category of methodological criticism is directed at the specific way comparative interpretation is used in order to find a consensus. As mentioned above, this criticism has mainly been expressed in the context of the European Court of Human Rights. A peculiar ECtHR problem is that the search for a consensus in practice does not entail that there should be absolute agreement among all the consulted sources, nor that all member States have to adhere to the same practice. As a result, member States who belong to a numerical minority could be forced to adhere to an interpretation that is based on the practice in other member States that together form some kind of majority. If only a limited number of member States can constitute a 'consensus', this could be problematic for reasons of state sovereignty and legitimacy that have been referred to above.

The major common concerns are that it is unclear how a consensus will be established, which countries will be taken into consideration, what is being compared, what is necessary to constitute a consensus, and what are the consequences of finding a consensus. A lack of transparency on how judges employ this form of comparative reasoning may result once again in an accusation of cherry-picking.

3.9.2 The 'Why' Question

In national context, many scholars and judges argue that invoking foreign materials constitutes a threat to the sovereignty of the legal system to which the court employing these

78 See, G. Zagrebelsky.

79 See *above*, the criticism related to the Research Division of the ECtHR.

references belongs. Critics appear to be mainly concerned about the lack of democratic legitimacy of these foreign materials, which 'have no democratic provenance, no democratic connection to this legal system, to this constitutional system, and thus lack democratic accountability as legal materials.'[80]

For the ECtHR, a different version of such criticism has emerged. If the European judges invoke references to international and foreign materials and use them as a basis for a far-reaching or controversial interpretation, they run the risk that member States will complain about introducing obligations that they never agreed to.

The second and major objection put forward by opponents of the use of comparative arguments concerns the role of the judge and judicial activism. The main concern with evolutive and comparative interpretation, again in both the national and international context, is that the judge should not overstep its role.

In the United States, there is a wide debate also in relation to the theories of constitutional interpretation underlying the choice of the interpretative method: the well-known living constitution versus originalism dispute.

Since its very early days, the European Court has been criticised for having installed a 'gouvernement des juges.'[81] This criticism reached higher peeks during the past few years and culminated in the Brighton Declaration.[82] The Brighton Declaration embodies a call for judicial restraint from the Court and consequently more deference to the contracting States' sovereignty; to that effect, the Committee of Ministers was invited to include the margin of appreciation in the Preamble of the Convention. As already said, this inclusion does not impose an obligation for the Court to apply the doctrine, but only creates a general principle of interpretation.

In conclusion, any comparative endeavour should necessarily comply with the high standards of methodological rigour, consistency, and expertise. In order for the comparative analysis to achieve its intended effect, it must not only demonstrate awareness of the different foreign realities but also be supported by an adequate analytical apparatus. Furthermore, to quote Alford, 'if at all, 'constitutional comparativism' at least needs an underlying theory.'[83] These remarks apply to both the European Court of Human Rights and United States Supreme Court, as well as to any court referring to foreign law.

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80 N. Dorsen, 'The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Stephen Breyer', 3 *Int'l J. Const. L.*, 2005.

81 Such an expression has been used for the first time by Eduard Lambert in 'Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis' in 1921.

82 High Level Conference on the Future of the European Court of Human Rights, 19-20 April 2012, http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (latest access on November 11, 2015).

83 R. Alford, 'In search of a theory for constitutional comparativism', 52 *UCLA Law Review*, 2005.

The combined analysis of the European and United States comparative approach, two different courts sharing similar problems, should have set a new scene for the resolution of old problems. The article has started to lay the foundations: the elaboration of possible solutions to such criticism is open to debate and left to deepen in future research.