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Communication Breakdown: The (Scarce) Use of the US Supreme Court. Precedents in the Case Law of the European Court of Human Rights

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1. *Introduction*

A sub-issue of a larger and deeper topic - that of the relationship between globalization and law[1] -, cross-fertilization or judicial dialogue[2] or comparative law method[3] as the use made by courts of foreign and international legal sources has

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[1] As far as the relationship between globalization and law is concerned, see J. WIENER, *Globalization and the Harmonization of Law*, London, 1999, A.-M. SLAUGHTER, *A New World Order*, Princeton, 2005, L. BOULLE, *The Law of Globalization: An Introduction*, Alphen aan den Rijn, 2009, S. CASSESE, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, Torino, 2009.

[2] The terms used to describe the recourse to foreign and international law by judges are various: conversation (see for instance M. CLAES ET AL., *Introduction: On Constitutional Conversations*, in M. CLAES ET AL. (eds.), *Constitutional Conversations in Europe: Actors, Topic and Procedure*, Cambridge, 2012, p. 1), dialogue (G. CANIVET, *Trans-Judicial Dialogue in a Global World*, in S. MULLER, S. RICHARDS (eds.), *Highest Courts and Globalisation*, Deen Haag, p. 21), engagement (V.C. JACKSON, *Constitutional Engagement in a Transnational Era*, Oxford, 2013), and migration (S. CHOUDRY, *The Migration of Constitutional Ideas*, Cambridge, 2006), just to name a few.

[3] For what concerns the comparative law method, one should remember that this is «the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems,

been the object of a major debate in the last twenty years, both in the US and outside[4].

In this regard, the practice of the US Supreme Court from the early ages to the present days has been deeply analyzed, proving that the Court has recalled foreign legal sources since the 19th century[5]. Those in favor of that practice have said that citing to foreign law and practices may be useful to determine the scope of US constitutional rights[6], while others have expressed a pragmatic point of view since similar problems might be solved through similar solutions[7]. Those opposing that practice have argued that foreign and international law material should not be considered in constitutional interpretation as they lack democratic legitimacy in the US legal and political system[8]. Both the justifications and the purposes for quoting foreign sources have been put under scrutiny: as far as the former, the US Supreme Court has been criticized for not providing a clear and consistent motivation for referring to foreign sources[9]; while as far as the latter, it has been noticed that this practice may signify a nose-counting approach which paves the way to an attack to domestic practice when they are deemed contrary to a predominant conception of

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jurists work with specific rules and general categories» (see R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in *Am. Jour. Comp. Law*, 2001, 1, p. 25).

[4] For a general overview and introduction to the topic, see V.C. JACKSON, M. TUSHNET, *Comparative Constitutional Law*, Eagan, 1999, p. 153-189, A.-M. SLAUGHTER, *A Global Community of Courts*, in *Harv. Int. Law Jour.*, 2003, 1, p. 191. More generally speaking, see M. GRAZIADEI, *Comparative Law as the Study of Transplants and Receptions*, in M. REIMANN, R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2006, p. 441-475.

[5] Besides the articles cited below, for a survey see S.G. CALABRESI, S.D. ZIMDAHL, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, in *William & Mary Law Review*, 2005, 3, p. 752-53 and S.H. CLEVELAND, *Our International Constitution*, in *Yale Jour. Int. Law*, 2006, 1, p. 1.

[6] See for instance V.C. JACKSON, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harv. Law Rev.*, 2005, 1, p. 109-112 and S.G. CALABRESI, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court Practice of Relying on Foreign Law*, in *Boston University Law Review*, 2006, 5, p. 1337.

[7] D.M. BODANSKY, *The Use of International Sources in Constitutional Opinion*, in *G.J. Int. Comp. Law*, 2004, 2, p. 421 and H.H. KOH, *International Law as Part of Our Law*, in *Am. Jour. Int. Law*, 2004, 1, p. 43.

[8] J.O. MCGINNIS, *Foreign to Our Constitution*, in *Northwestern University Law Review*, 2006, 1, p. 303.

[9] J.L. LARSEN, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, in *Ohio State Law Journal*, 2004, 5, p. 1283.

morality[10]. American exceptionalism has also been taken into account as a reason to reject foreign practices[11].

Truth be told, in the debate among legal scholars one can hear echoing the controversy among the Justices of the Supreme Court[12]. Justice Kennedy, writing for the majority in *Roper v. Simmons*, stated that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions[13]". In the same case, Justice O' Connor expressed the same idea in terms that sounded more vocal: "We should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement expressed in international law or in the domestic laws of individual countries-that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus[14]".

Justice Breyer mentioned foreign legal sources regarding European federalism balances in *Printz*[15] and has spoken in favor of interdependence as the need for expanded awareness that requires the US Supreme Court to take into account information coming from outside the US. This would make it possible to understand the nature of the threats the American legal system face and find an effective way to tackle them. From his point of view, this would not mean the

[10] See E.A. YOUNG, *Foreign Law and the Denominator Problem*, in *Harv. Law Rev.*, 2005, 1, p. 148 who also considered the divergence between the values and culture of European countries and the American ones, the US constitutional structure with regard to foreign affairs, and the likelihood of misunderstanding foreign law as reasons against the use of foreign sources.

[11] For a starting point, see G. BRINTON LUCAS, *Structural Exceptionalism and Comparative Constitutional Law*, in *Virginia Law Review*, 2010, 8, p. 1965.

[12] A controversy that actually dates back to 1793 and the case of *Chisholm v Georgia*, 2 U.S. 419 (1793). With regard to the issue of sovereignty immunity from suit, Justice Wilson looked to the laws and practice of particular States and Kingdoms (*Ibid.*, 459) while Justice Iredell responded that «if, upon a fair construction of the Constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist, upon that authority, ten thousand examples of similar powers would not warrant its assumption» (*Ibid.*, 449).

[13] *Roper v. Simmons*, 125 U.S. 1183, 1200 (2005).

[14] *Ibid.*, 1215-1216 (O' Connor, J., dissenting).

[15] *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

Supreme Court should bend over foreign solutions: on the contrary, that approach may help the Court find the most proper solutions in the American Constitution itself[16].

On the other hand, it is well renowned what Justice Scalia wrote in the dissenting opinion he delivered in *Lawrence*. He stated that the Court's discussion of foreign views is "meaningless dicta"[17] which may turn into "dangerous dicta" as the Court should not impose foreign fashions on Americans[18]. In this regard, he quoted Justice Thomas in *Foster v. Florida*[19] whose words in *Knight v. Florida* sound unequivocal still today: "I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council[20]".

Over time, this has become a political issue too, as it is confirmed by the fact that questions relating to the use of foreign law have been asked to Justices during their Senate confirmation hearings and the suggestions to censure or even impeach judges who cites foreign sources made by some members of Congress[21]. Thus, one can say that the American debate over the use of foreign legal material has focused

[16] S. BREYER, *The Court and the World: American Law and the New Global Realities*, New York, 2015, p. 81-83, 93.

[17] *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

[18] *Ibid.* See also *Roper v. Simmons*, 543 U.S. 551, 626-27 (2005) (Scalia, J., dissenting), where, with regard to British law, he wrote: «it is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War–and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists–a legal, political, and social culture quite different from our own.»

[19] *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari).

[20] *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari).

[21] For further references, see M. MINOW, *The Controversial Status of International and Comparative Law in the United States*, in M. ANDENAS, D. FAIRGRIEVE (eds.), *Courts and Comparative Law*, Oxford, 2015, p. 515-516.

on whether American courts could recall that material in their judgments and resort to that in their legal reasoning[22].

For what concerns the European debate, the legitimacy of judicial comparison was originally not considered a problem; therefore, one could hardly find any reference to a debate on the topic[23]. European legal scholars seemed to have focused more on how make use of foreign legal material rather than the reasons in favor or against that[24]. That could be explained from an historical point of view. In this regard, the medieval roots of the European legal experience should be taken into careful consideration: in fact, in the XI century, some Italian scholars rediscovered the Roman *Corpus Juris Civilis* and it became the new legal foundation of a changing society. Thus, it was made the object of analysis in the newly founded Universities, first of all in Bologna. Young scholars, eager to learn, moved to Italy and France and studied the Roman texts and the interpretation of them provided by the masters of that time. Then, they moved back to their countries of origin, taking the knowledge they had acquired with them and using it to influence the development of law in those countries. Latin as the *lingua franca* of that time smoothed that process. This way, a truly European legal reality, usually referred to as *ius commune europaeum*, came to existence and lasted for five centuries, until

[22] On the topic, see also S.K. HARDING, *Comparative Reasoning and Judicial Review*, in *Yale Jour. Int. Law*, 2003, 2, p. 408 and V.C. JACKSON, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harv. Law Rev.*, 2005, 1, p. 109.

[23] As it is confirmed by C. MCCRUDDEN, *Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, in *Oxf. Jour. Legal St.*, 2000, 4, p. 503, where the Author defined that as a topic «relatively ignored in the theoretical literature.»

[24] In this regard, it seems that European scholars acted as networkers or matchmakers. According to B.N. MAMLYUK, U. MATTEI, *Comparative International Law*, in *Brooklyn Jour. Int. Law*, 2011, 2, p. 393, this is the role that comparative international lawyers should play: «Comparative international lawyers are not meant to be legal philosophers or great legal historians weaving tales of how nations used to solve functionally equivalent legal problems in unique ways by reference to archives or diplomatic histories. Rather, they are institution builders, conference organizers, and networkers. They are strategists, advisors, and diplomats who intuitively understand […] distinct approaches to identical problems». The same role might be played by lawyers who deal with the issues related to (judicial) cross-fertilization, as they focus their analysis on the processes of norm diffusion across jurisdictions (see also L.C. BACKER, *Harmonizing Law in an Era of Globalization: Convergence, Divergence, and Resistance*, Durham, 2007).

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national States were born and substituted national laws spreading from the will of the sovereigns to that law which was - one could say - a scholar-made one[25].

Thus, for a long time, scholars did not focus on the issues related to the legitimacy of judicial comparison. In recent years, however, things have changed, especially in the field of human rights protection.

It has been said that "human rights practice is often driven by a strong moral or ethical dimension" and that "lawyers in the human rights context often use comparison to legitimate their argument that a particular interpretation of an existing human rights norm should be adopted"[26]. However, as far as the European Court of Human Rights (ECtHR) is concerned[27], one could justify the use of the comparative law method by considering its peculiar nature and functions[28].

In fact, the ECtHR takes into account national patterns because fundamental rights pre-exist in national legal systems that are democratic in nature and abide by the rule of law[29]. Therefore, the ECtHR compares laws and legal systems of its

[25] For an introduction to the topic, see P. GROSSI, *A History of European Law*, Hoboken, 2010. For a critical analysis, see P.G. MONATERI, T. GIARO, A. SOMMA, *Le radici comuni del diritto europeo*, Roma, 2005.

[26] C. MCCRUDDEN, *Judicial comparativism and Human Rights*, in E. ÖRÜCÜ, D. NELKEN (eds.), *Comparative Law – A Handbook*, Oxford, 2007, p. 376.

[27] On the ECtHR, see generally C. PADULA (a cura di), *La Corte europea dei diritti dell'uomo. Quarto grado di giudizio o seconda Corte costituzionale?*, Napoli, 2016, A. DI STASI, *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell'uomo e l'impatto nell'ordinamento italiano*, Padova, 2016, C. BINDER, K. LACHMAYER (eds.), *The European Court of Human Rights and Public International Law: Fragmentation or Unity?*, Baden-Baden, 2014, J. CHRISTOFFERSEN, M. RASK MADSEN (eds.), *The European Court of Human Rights between Law and Politics*, Oxford, 2013 and P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, 2011.

[28] For an introduction to the issue of the use of the comparative method by the ECtHR, see G. CANIVET, M. ANDENAS, D. FAIRGRIEVE (eds.), *Comparative Law before the Courts*, Oxford, 2004 and H.C.K. SENDEN, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Cambridge, 2011, p. 111-144. For what concerns the influence of legal scholarship on the European highest courts, see R. DE CARIA, S. MONTALDO, *L'influenza della dottrina sulla giurisprudenza delle Corti europee*, in *Annuario di diritto comparato e di studi legislativi*, 2015, 1, p. 89.

[29] P. MAHONEY, R. KONDAK, *Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?*, in M. ANDENAS, D. FAIRGRIEVE (eds), *Courts and Comparative Law*, cit., p. 120. See also R. BERNHARDT, *Comparative Law in the Interpretation and Application of the European Convention on Human Rights*, in S. BUSUTTIL (ed.), *Mainly Human Rights: Studies in Honour of J.J. Cremona*, Valletta, 1999, p. 33.

Member States "in order to find a consensus on human rights"[30]. Basically, the ECtHR counts numbers of similar laws and rules in order to identify a minimum standard regarding the protection of fundamental rights. If such comparison is successful, a State's discretion to deviate from that standard is severely limited. Otherwise, the State can enjoy a wide margin of appreciation in assessing the matter[31].

The margin of appreciation has been defined as "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws"[32] and one of its function is to balance between the powers of the ECtHR and the sovereignty of the States[33]. As stated by the Court in a freedom of expression case, "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. […] Nevertheless, Article 10(2) does not give the Contracting States an unlimited power of appreciation. The Court which […] is responsible for ensuring the observance of those States' engagements, is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with European supervision"[34].

Thus, the comparative law method can be regarded as the tool the ECtHR makes use of to assess the existence of a European consensus concerning the protection of fundamental rights and the evolution of national legislations and case

[30] S. GLESS, J. MARTIN, *The comparative method in European Courts: A comparison between the CJEU and ECtHR?*, in *Bergen Journal of Criminal Law and Criminal Justice*, 2013, p. 37.
[31] J.A. BRAUCH, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, in *Howard Law Journal*, 2008-2009, 1, p. 277.
[32] H.C. YOUROW, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Leiden, 1996. More generally, see E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, in *New York University Journal of International Law and Policy*, 1998, p. 843 and Y. SHANEY, *Toward a General Margin of Appreciation Doctrine in International Law*, in *European Journal of International Law*, 2006, p. 907.
[33] N. MUHAMMAD, *A Comparative Approach to Margin of Appreciation in International Law*, in *The Chinese Journal of Comparative Law*, 2019, p. 217.
[34] *Handyside v. the United Kingdom*, para. 48, http://hudoc.echr.coe.int.

law[35]. As it has been said, "on the one hand, the Court may assert that a comparison of Member State laws reveals an emerging or established consensus among them, thus contributing to the evolution of the Convention's normative requirements. […] On the other hand, where the Court emphasizes that there is a great diversity of laws among the Member States and no common European legal standard, it is likely to find that the matter is within the margin of appreciation of the Member State in question"[36]. Consequently, the scope of the margin of appreciation may vary according to the circumstances, the subject matter and its background[37].

The universal afflatus of human rights should support in itself a form of reason-borrowing. Therefore, the use of the comparative law method made by the ECtHR may be explained by the fact that the ECHR is "not a superstructure imposed on the Contracting States from above, but a system of rules which are part of the common European heritage"[38]. However, this approach has drawn some criticism as it would lack transparency and coherence[39]. The ECtHR would carry

[35] G. CANIVET, *The Practice of Comparative Law by the Supreme Courts: Brief Reflections on the Dialogue Between the Judges in French and European Experience*, in *Tulane Law Review*, 2006, p. 1390.
[36] G. CAROZZA, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, in *Notre Dame Law Review*, 1998, p. 1221.
[37] *Schalk & Kopf v. Austria*, para. 98, http//hudoc.echr.coe.int. On the one hand, the States enjoy a narrow margin of appreciation in cases where an individual's identity or existence (*Evans v. the United Kingdom*, http//hudoc.echr.coe.int), the authority of the judiciary (*Sunday Time v. the United Kingdom (no. 1)*, http://hudoc.echr.coe.int) or absolute rights (*Pretty v. the United Kingdom*, in http://hudoc.echr.coe.int) are at stake or racial or ethnic discrimination (*D.H. and others v. Czech Republic*, in http://hudoc.echr.coe.int) are implicated. On the other hand, they enjoy a wide margin of appreciation in cases regarding public emergency (*Brannigan and McBride v. the United Kingdom*, http://hudoc.echr.coe.int), national security (*Klass v Germany*, http://hudoc.echr.coe.int), the protection of morals (*Handyside v. the United Kingdom*, http://hudoc.echr.coe.int) or social and economic policies (*Hatton v the United Kingdom*, http://hudoc.echr.coe.int).
[38] E. BREMS, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, in *Zeitschrift für Auslandisches Offentliches Recht und Volkrecht*, 1996, p. 276-277.
[39] This is why some scholars avoid calling the Court's approach comparative method or comparative analysis, as there would be no method and little analysis involved. See for instance P.G. CAROZZA, cit., p. 1219, where the Author speaks of "inter-state comparative references".

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the comparison out randomly, superficially and arbitrarily, and this would not be consistent with the very idea of rule of law[40].

Nevertheless, one should not forget that the protection of fundamental rights requires judges and scholars to seek common understandings of the concept of human dignity[41], and the comparative law method plays a key role in this quest[42]. Furthermore, it may restrict judicial arbitrariness and consequently, legitimize a court's judgment[43].

The purpose of this Article is to analyze the case law of the ECtHR in order to understand whether the US Supreme Court rulings have had an impact on its development. Thus, Part 2 and its subparagraphs focus on the ECtHR case law, dealing with the use of the US Supreme Court precedents with regard to several Articles of the ECHR (namely, Articles 6, 7, 8, 10, 11, and 14). Part 3 is devoted to some final remarks.

2. *The Use of the US Supreme Court precedents in the ECtHR case law*

In almost every judgment passed by the ECtHR, one can found a section devoted to international and comparative material. In this section, an overview of national and international legal acts is provided. Case law makes non-exception so one can find reference to judgments passed by national and international courts on the same topic brought before the ECtHR or a very similar one. The most common

[40] M. AMBRUS, *Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the light of the Rule of Law*, in *Erasmus Law Review*, 2009, p. 354.

[41] C. MCCRUDDEN, *Using Comparative Reasonging in the Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, in *Cambridge Yearbook of European Legal Studies*, 2012-2013, p. 410, refers to "the complex nature of the 'cultural practice' of rights production and interpretation". See also G. REPETTO, *Argomenti comparative e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale*, Napoli, 2011, p. 121.

[42] See E. ÖRÜCÜ, *Whither Comparativism in Human Rights Cases?*, in E. ÖRÜCÜ (ed), *Judicial Comparativism in Human Rights Cases*, London, 2003, p. 237.

[43] M. DELMAS-MARTY, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, in *Journal of International Criminal Justice*, 2003, p. 25. This is why, according to some, "comparative law analysis serves two purposes: to inform and to persuade" (see K. DZEHTSIAROU, *Comparative Law in the Reasoning of the European Court of Human Rights*, in *University College Dublin Law Review*, 2010, p. 112).

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sources to that part are the Court of Justice of the European Union (CJEU) and the Contracting Parties national Supreme or Constitutional courts case law.

However, it is not difficult to find references to the US Supreme Court precedents. In many cases, the impact of these references is limited as they are not recalled in the Court's reasoning so one may call these ornamental references. In this regard, one can find out that the Supreme Court case law has been recalled in cases that concerned the interpretation and application of Articles 2[44], 3[45], and 5[46] of the ECHR, Articles 1[47], 2[48], and 3[49] of Protocol no. 1 to the ECHR, Article 4 of Protocol no. 4 to the ECHR[50], Article 4 of Protocol no. 7 of the ECHR[51], and in order to question the Court's jurisdiction[52] or the previous exhaustion of domestic remedies[53].

Leaving those cases aside, the following subparagraphs focus on the judgment where the citing to the Supreme Court precedents play a more substantial role.

2.1. *The use of US Supreme Court precedents with regard to Article 6 of the ECHR*

[44] Article 2 of the ECHR protects the right to life. As far as the topic of the article is concerned, see *Vo v. France*, 2004-VIII Eur. Ct. H.R., *Selahattin Demirtaş v. Turkey*, http://echr.coe.int (dissenting opinion of judge Kūris), *F.G. v. Sweden*, http://echr.coe.int.

[45] Article 3 of the ECHR prohibits torture, inhuman or degrading treatment, and inhuman or degrading punishment. As far as the topic of the Article is concerned, see *Al-Adsani v. the United Kingdom*, 2001-XI Eur. Ct. H.R., *Harkins and Edwards v. the United Kingdom*, http://echr.coe.int, *Vinter and Others v. the United Kingdom*, http://echr.coe.int.

[46] Article 5 of the ECHR protects the right to liberty and security. As far as the topic of this article is concerned, see *Al-Jedda v. the United Kingdom*, http://echr.coe.int.

[47] Article 1 of Protocol no. 1 protects the right to property. See *James and Others v. the United Kingdom*, http://echr.coe.int (recalled by the parties).

[48] Article 2 of Protocol no. 1 protects the right to education. See *Ponomaryovi v. Bulgaria*, http://echr.coe.int.

[49] Article 3 of Protocol no. 1 protects the right to free elections. See *Zdanoka v. Latvia*, 2006-IV Eur. Ct. H.R. (dissenting opinion of judge Rozakis).

[50] Article 4 of Protocol no. 4 prohibits collective expulsion of aliens. See *Hirsi Jamaa and Others v. Italy*, http://echr.coe.int.

[51] Article 4 of Protocol no. 7 concerns the double jeopardy clause. See *Zolotukhin v. Russia*, http://echr.coe.int.

[52] *Blečić v. Croatia*, 2006-III Eur. Ct. H.R. (dissenting opinion of Judge Zupančič, joined by judge Cabral Barreto).

[53] *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. (partly dissenting opinion of judge Marcus-Helmons).

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Article 6 of the ECHR protects the right to a fair trial. Among the many aspects of fair trial that are considered under the article, three are quite significant: the access to a lawyer; the right to remain silent and the privilege against self-incrimination; and the prohibition of excessively lenghty proceedings[54].

In *Imbrioscia v. Switzerland*, an Italian national who had been found guilty of drug smuggling by the Swiss judicial authorities claimed Article 6 of the ECHR had been infringed in that before the trial, he had been questioned by the police and the prosecutors without being assisted by a lawyer[55]. The Court held that his right to a fair trial had not been breached because Switzerland had actually done what was necessary to allow him to be properly defended while his lawyers were to be blamed for the shortcomings in performing their activity.

Dissenting from the majority, judge De Meyer recalled *Miranda v. Arizona*[56] where the US Supreme Court listed the rules on custodial interrogation, holding that the person taken in custody must be warned prior to any questioning that he/she has the right to remain silent, anything he/she says can be used against him/her in a court of law, he/she has the right to the presence of an attorney, and if he/she cannot afford an attorney one will be appointed for him/her prior to any questioning if he/she so desires. He/she may knowingly and intelligently waive those rights but unless and until the warnings and the waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him/her. Since these principles express the essence of fair trial and since they had not been applied in the actual case, judge De Meyer did not agree with the majority of his colleagues.

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[54] Some ornamental references to the US Supreme Court precedents in cases concerning Article 6 of the ECHR can be found in *Fayed v. the United Kingdom*, http://echr.coe.int, *Saunders v. the United Kingdom*, 1996-VI Eur. Ct. H.R. (concurring opinion of judge Walsh), *A. v. the United Kingdom*, 2002-X Eur. Ct. H.R. (dissenting opinion of judge Loucaides), *McVicar v. the United Kingdom*, 2002-III Eur. Ct. H.R., *Cooper v. the United Kingdom*, 2003-XII Eur. Ct. H.R. (recalled by the applicant), *Jalloh v. Germany*, 2006-IX Eur. Ct. H.R., *Gäfgen v. Germany*, http://echr.coe.int, *McFarlane v. Ireland*, http://echr.coe.int, *Al-Khawaja and Tahery v. the United Kingdom*, http://echr.coe.int, *Dvorski v. Croatia*, http://echr.coe.int.

[55] *Imbrioscia v. Switzerland*, para. 10-26 http://echr.coe.int.

[56] *Ibid.* (dissenting opinion of judge De Meyer). See *Miranda v. Arizona*, 384 U.S. 436 (1966).

In another case, the Court found that the drawing of incriminating inferences against someone for his refusal to answer to the police questions did not amount to a violation of the right to remain silent, since no direct compulsion was performed and the applicant was able to remain silent[57]. Some judges did not agree with the majority on this point, stressing that where the accused has maintained silence that choice cannot be used against him/her in a trial, and in this regard they referred to *Miranda v. Arizona* and *Griffin v. State of California*, the latter being a case where the US Supreme Court held that a Californian law that permitted courts to make adverse comments on the accused decision's not to testify was unconstitutional[58].

Miranda v. Arizona was later recalled in a case where the applicants - two drivers who had not complied with the provision of the UK Road Traffic Act concerning speed limit - claimed they had been victim of compulsion to give incriminating evidence in violation of their right to remain silent and the privilege against self-incrimination[59]. They had received a written notice that informed them someone who had used their cars had not complied with the speed limit provided by the law, so they were asked to reveal whether it was they who did that. Under UK law, failure to comply with that request would have amounted to an offense and they would have been fined. One of the applicant willingly revealed his identity while the other refused to make any statement that could be used against him in this regard. The ECtHR could not find that there had been a substantial violation of the right to a fair trial since the former acted on his own will and the latter did not say anything. Judge Pavlovschi dissented and his reasoning was mainly based on *Miranda v. Arizona* and *Malloy v. Hogan*[60]. Given the nature of the privilege against self-incrimination, he considered that the law allowed the police

[57] *John Murray v. the United Kingdom*, 1996-I Eur. Ct. H.R., para. 41-58. However, the Court held there had been a violation of the right to a fair trial because the applicant was denied access to a lawyer during the first 48 hours of police detention (para. 59-70).

[58] *Ibid.* (partly dissenting opinion of judge Walsh, joined by judges Makarczyk and Lohmus), and *ibid.* (partly dissenting opinion of judge Pettiti, joined by judge Valticos). See *Griffin v. State of California*, 380 U.S. 609 (1965).

[59] *O'Halloran and Francis v. the United Kingdom*, 2007-III Eur. Ct. H.R., para. 32.

[60] *Ibid.* (dissenting opinion of judge Pavlovschi). See *Malloy v. Hogan*, 378 U.S. 1 (1964).

authorities to compel the suspects: in fact, it provided for criminal sanctions to apply in the event of non-compliance with the request to reveal the driver's identity, which amounted to a denial of the right to remain silent.

In the case of a twelve-year-old Russian national who had been placed in a temporary detention center for juvenile offenders, the ECtHR focused on an irksome topic: that of the litigability / non-litigability of status crime. The Court considered that the legal classification of a child as a juvenile delinquent must not lead to the focus being shifted from the examination of the act they have been accused of and the need to adduce proof of their guilt in conditions of fairness to their status as such. That is not compatible with both due process and the principle of legality[61].

In his concurring opinion, judge Zupančič clarified that topic by recalling some US Supreme Court cases in order to stress both the needs to apply due process protection in juvenile proceedings and oppose to conviction of someone because of a status - thus, for being someone who is perceived as wrong - and not because of their act - thus, for doing something wrong[62]. In this regard, he quoted - *inter alia* - *In re Gault*[63] where the US Supreme Court found that «the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it». Then he also quoted *Robinson v. California*[64] where the Court held that a Californian statute was unconstitutional in breach of the Eighth and Fourteenth Amendments[65] since it had been used to convict a person for being a drug addict and not for the act of taking narcotics[66].

[61] *Blokhin v. Russia*, para. 196 http://echr.coe.int.
[62] *Ibid.* (concurring opinion of judge Zupančič).
[63] *In re Gault*, 387 U.S. 1 (1967).
[64] *Robinson v. California*, 370 U.S. 660 (1962).
[65] Under the Eighth Amendment, excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The Fourteenth Amendment addresses citizenship rights and equal protection of the laws.
[66] Judge Zupančič also recalled *Kent v. the United States*, 383 U.S. 541 (1966) and *In re Winship*, 397 U.S. 358 (1970).

In the same case the same precedents were recalled by judge Motoc to criticize the ECtHR and their reasoning. In fact, in a partly dissenting opinion that can be regarded as a strong caveat on the risks related to cross-fertilization, she wrote that the Court did not rely on their own precedents when dealing with the general principles. According to judge Motoc, the Court borrowed «without citations, ideas from the US Supreme Court expressed in several cases, such as *Kent v. the United States*, *In re Gault* and especially *Robinson v. California* [but] it is essential that the cross-fertilisation take into account the differences between legal cultures and rebut any attempt at the axiomatisation of similarity. […] Whilst the evolution of criminal justice in the US, especially in California in the 1960s, had determined a need for the US Supreme Court to intervene and to ensure against "processing a child offender through the justice system on the sole basis of his status of being a juvenile offender", there is no counterpart to this in the member States of the Council of Europe nowadays[67]».

In *Ibrahim and Others v. the United Kingdom*, the ECtHR dealt with the case of four applicants who had detonated four bombs on three underground trains and a bus in central London. Luckily, the bombs failed to explode and nobody was killed. Therefore, the bombers were found guilty of conspiracy to murder. However, they complained that the lack of access to lawyers during the initial questioning by the police and the admission at trial of the statements they made amounted to an infringement of Article 6 of the ECHR[68].

Inter alia, the Court recalled *New York v. Quarles*[69] where the US Supreme Court found that questioning can take place in the absence of a lawyer and before the suspect has been read their rights when there is a concern for public safety. In such a case, the evidence is admissible at trial. Considering that, in the actual case brought before the ECtHR, the police had relied on a general risk of leaks of information concerning the investigation, but the Court denied that could constitute a compelling reason that could justify a restriction on the access to a

[67] *Blokhin v. Russia*, cit. (partly dissenting opinion of judge Motoc).
[68] *Ibrahim and Others v. the United Kingdom*, http://echr.coe.int.
[69] *Ibid.*, para. 230. See *New York v. Quarles*, 467 U.S. 649 (1984).

lawyer. However, according to the ECtHR, in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, which led them to rule that there had been no violation of Article 6 in the actual case[70].

2.2. *The use of US Supreme Court precedents with regard to Article 7 of the ECHR*

Article 7 of the ECHR enshrines the principle of legality. In a case where the ECtHR was to face some issues concerning drug trafficking and recidivism under French law, the Court had to assess whether the text of the statutory rule regarding recidivism as interpreted by French courts, was consistent with the principle of legality of criminal provisions[71]. More specifically, the Court had to ascertain whether that text complied with the basic requirements of accessibility and foreseeability that spread from that general principle. The Court observed that the text was clear and the French case law on recidivism was consistent with itself. Therefore, the applicant could and should have known what legal consequences may have derived from the criminal acts he committed. Thus, the Court ruled there had been no violation of Article 7[72].

[70] In the end, the Court found there had been no violation at all with regard to three of the applicants. For what concerns the fourth one, the situation was quite different: while the other three had been interviewed as suspects since the very beginning, the fourth one was initially interviewed as a witness, so without any legal advice. During the interview, he started to incriminate himself but the police neither stopped the questioning nor cautioned him with regard to his rights. Since there was no compelling reason to do that, the Court found Article 6 had been infringed. However, two judges did not agree with the majority and seemed not to agree with the solution provided by the US Supreme Court in *New York v. Quarles* too. As far as this issue was concerned, they commented that, assuming it does not cause delay, «the fact that there is an urgent need to save lives does not explain why and how the advice and presence, in particular, of a lawyer, that is, of a right, would, as a matter of principle, be detrimental to saving lives» (see the joint partly dissenting, partly concurring opinion of judges Sajó and Laffranque, para. 20-21, where one can also find a reference to *US v. Gonzalez*, 548 U.S. 140 (2006)).

[71] *Achour v. France*, 2006-IV Eur. Ct. H.R.

[72] Some ornamental references to the US Supreme Court precedents in cases concerning Article 7 of the ECHR can be found in *Welch v. the United Kingdom*, 1996-II Eur. Ct. H.R.; *Kononov v. Latvia*, http://echr.coe.int.

When dealing with the concept of recidivism, the Court provided a basic explanation of what recidivism is: that is to say, an aggravating factor, which is linked to the offender's conduct and warrants a harsher punishment when the offender commits a second offense within the period laid down in the relevant legislation.

In his concurring opinion, judge Zupančič expanded on this reasoning and expressed his criticism to the status liability, as he had already done in the above-mentioned case of the twelve-year-old Russian national. Once again, he recalled *Robinson v. California* where the US Supreme Court decided that a California statute was unconstitutional because it made the status of being a drug addict a criminal offense, rather than the act of drug taking.[73] In light of that, he wrote that an act is a one-time historical event that falls in the past the very moment it is committed while a status is something that endures. Therefore, while criminal responsibility for a past criminal act is always retrospective, the responsibility spreading from a status coincides in real time, is simultaneous, and thus is a violation of every basic canon concerning criminal liability.

2.3. ***The use of US Supreme Court precedents with regard to Article 8 of the ECHR***

Pursuant to Article 8, para. 1 of the ECHR, everyone has the right to respect for his private and family life, his home and his correspondence[74].

In *Oliari and Others v. Italy*, the ECtHR found that the absence of a legal framework recognizing and protecting gay relationships in Italy amounted to an infringement of Article 8 of the ECHR.[75] When analyzing the copious comparative

[73] *Ibid.* (concurring opinion of judge Zupančič).

[74] Some ornamental references to the US Supreme Court precedents in cases concerning Article 8 of the ECHR can be found in *Dudgeon v. the United Kingdom*, http://echr.coe.int; *Bykov v. Russia*, http://echr.coe.int (concurring opinion of judge Cabral Barreto), *X v. Latvia*, http://echr.coe.int (concurring opinion of judge Pinto de Albuquerque), *Roman Zakharov v. Russia*, http://echr.coe.int (concurring opinion of judge Dedov), *Bărbulescu v. Romania*, http://echr.coe.int (partly dissenting opinion of judge Pinto de Albuquerque), *Fürst-Pfeifer v. Austria*, http://echr.coe.int (dissenting opinion of judge Motoc).

[75] *Oliari and Others v. Italy*, para. 159-187 http://echr.coe.int.

material at its disposal, the Court also recalled *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al*., where the US Supreme Court held that same-sex couples have a right to marry in all States, and States have no legal basis to deny recognition of a same-sex marriage lawfully performed in another State on the ground of its same-sex character. In this regard, the US Supreme Court found that the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the US Constitution prohibited that kind of denial[76].

2.4. *The use of US Supreme Court precedents with regard to Article 10 of the ECHR*

Article 10 of the ECHR protects freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[77].

In *Vejdeland and Others v. Sweden*, the ECtHR ruled on the case of some people who had distributed leaflets expressing criticism against teachers for not opposing homosexuality. These people were found guilty of agitation against a national or ethnic group for their ideas on homosexuality had crossed the borders of an objective discussion on the topic. According to the leaflets, homosexuality was «a deviant sexual proclivity» that had «a morally destructive effect on the substance of society». The leaflets also contained allegations regarding the fact that homosexuality had made it possible for HIV and AIDS to spread and that the «homosexual lobby» wanted to play down pedophilia[78]. In light of this content, and since none of the applicants was sentenced to imprisonment, the ECtHR held that

[76] *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al*., 576 U.S. (2015).

[77] Some ornamental references to the US Supreme Court precedents in cases concerning Article 10 of the ECHR can be found in *Barthold v. Germany*, http://echr.coe.int (concurring opinion of judge Pettiti), *Groppera Radio AG and Others v. Switzerland*, http://echr.coe.int (dissenting opinion of judge De Meyer), *Observer and Guardian v. the United Kingdom*, http://echr.coe.int (partly dissenting opinion of judge Morenilla), *Grigoriades v. Greece*, 1997-VII (concurring opinion of judge Jambrek), *Kasabova v. Bulgaria*, http://echr.coe.int (recalled by third parties), *Fáber v. Hungary*, http://echr.coe.int, *Peta Deutschland v. Germany*, http://echr.coe.int (concurring opinion of judge Zupančič, joined by judge Spielmann), *Pentikäinen v. Finland*, http://echr.coe.int.

[78] *Vejdeland and Others v. Sweden*, para. 7-17 http://echr.coe.int.

the decision taken at the national level was proportionate and did not amount to a violation of Article 10.

The Court also took into account that the leaflets had been left in the pupils' lockers, meaning that young people who were at an impressionable age had found them and had not been granted the possibility to decline them. With regard to this specific topic, Judge Zupančič concurred with the majority considering that that was the only correct reason to rule out any infringement of Article 10, and signaled some US Supreme Court judgments in order to make his position clearer[79]. In *Snyder v. Phelps*[80], the Supreme Court ruled on the case of an anti-homosexual demonstration that had taken place close to a church where the funeral of a corporal killed in Iraq was taking place. According to the protesters, God hated the US for their tolerance of homosexuality, especially in the military. In its judgment, the US Supreme Court found that freedom of speech could not be limited by considerations of proportionality as long as the statement could be fairly considered as relating to community's concerns. In this regard, the Court set a significantly high standard for the applicable law to be consistent with the Constitution since it must avoid both content and viewpoint discrimination. This led judge Zupančič to the conclusion that, should that standard apply to the case he was considering, the relevant Swedish law would have not passed it. So, dealing with the issue by taking into account its content and viewpoint could have led to swinging outcomes. However, he also quoted *Bethel School District v. Fraser*[81] where the US Supreme Court held that «the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour». Thus, from his point of view, the proportionality test had no relevance since the only thing that should have been taken into account to rule out the violation of freedom of speech was that the leafltes had been left in the pupils' lockers.

[79] *Ibid.* (concurring opinion of judge Zupančič).
[80] *Snyder v. Phelps*, 562 U.S. 443 (2011).
[81] *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

In *Mouvement Raëlien Suisse v. Switzerland*, the ECtHR faced the case of a non-profit association whose purpose was to make first contact and establish good relations with extraterrestrials that had been denied the authorization to conduct a poster campaign by Swiss authorities. This decision was based on the fact that the association advocated «geniocracy» - a political model based on intelligence -, human cloning, and «sensual meditation», a practice that may lead to pedophilia, incest, and abuse. The Swiss judicial bodies confirmed that decision, as it was consistent with the principle of proportionality since it determined a restriction that was deemed necessary in a democratic society for the protection of morals[82].

The ECtHR held that there had been no violation of Article 10 of the ECHR since the national authorities had acted within the margin of appreciation afforded to them, given that their reasons to deny the authorization were relevant and sufficient and met a pressing social need. In this regard, the Court found that the poster campaign was not political in nature, but commercial as its purpose was to draw attention on the association and not on political issues that were relevant at that time in Switzerland. According to the Court, the campaign had a proselytizing function that made it similar to commercial advertising. Thus, Swiss authorities enjoyed a margin of appreciation broader than the one they would have enjoyed in the case of a political campaign.

This point of the Court's reasoning was strongly criticized by some judges in their dissenting opinions. In light of the US Supreme Court case law on public advertisements[83], Judges Sajó, Lazarova Trajkovska, and Vučinić denied the commercial or quasi-commercial nature of the advertisements as there was no interest in influencing consumer behaviors or promoting products, and highlighted the role of billboards as public fora for the exercise of free speech, even when public authorities fear of being associated to unpopular or offensive opinions. Deeming otherwise would lead to a violation of the principle of neutrality as a

[82] *Mouvement Raëlien Suisse v. Switzerland*, para. 10-22 http://echr.coe.int.

[83] Such as *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972), *Carey v. Brown*, 447 U.S. 455 (1980) and *Widmar v. Vincent*, 454 U.S. 263 (1981).

fundamental principle that national authorities must comply with when it comes to worldviews[84].

For its part, judge Pinto de Albuquerque[85] provided a deep analysis of the US Supreme Court public-forum doctrine by mainly referring to *Perry Education Association v. Perry Local Educators' Association*[86]. In this judgment, the Court identified three categories of public fora: *a*) traditional public fora, meaning places that have been devoted to public debate by a government decision or by long tradition, where the State cannot limit free speech unless that is necessary to serve a compelling State interest and the regulation is narrowly tailored to do so; *b*) limited public fora, that is to say, public property that have been opened by the State as a place for expressive activities, where the same rules as those applicable for limitation of free speech in traditional public fora apply; and *c*) non-public fora, where the State can limit free speech through regulations that concern space, time, manner, and purpose as long as the regulations are reasonable and not a mean to suppress free expression. In light of that, he recalled *Metromedia, Inc. v. City of San Diego*[87] where the US Supreme Court found that an ordinance which allowed on-site commercial advertising but prohibited other commercial advertising and non-commercial advertising using fixed-structure signs, unless permitted by specified exceptions, such as temporary political-campaign signs, breached the freedom of expression of companies that were engaged in the outdoor advertising business. That led him to write that «the public-forum doctrine is of paramount importance for democratic regimes, because it is based on the principle of content-neutrality of State regulation of expression in the public arena. According to this principle, the State is not assumed to support all the messages that are communicated in public facilities and spaces. When a certain message is circulated in public space there is no presupposition that the State endorses tacitly or expressly the content of that message. This principle derives directly from the principle of equality of all citizens

[84] *Ibid.* (joint dissenting opinion of Judges Sajó, Lazarova Trajkovska, and Vučinić).
[85] *Ibid.* (dissenting opinion of judge Pinto de Albuquerque).
[86] *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).
[87] *Metromedia, Inc. v. City of San Diego*, 453 US 490 (1981).

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before the law and the corresponding prohibition of discrimination of citizens by public authorities[88]».

In *Bédat v. Switzerland*, the case of a journalist who was found guilty and sentenced to a fine for having published secret documents relating to an ongoing trial was brought before the ECtHR. As the applicant failed to demonstrate how that publication could have contributed to the public debate on the investigation and the State had acted within the margin of appreciation in order to balance a number of various competing interests–such as freedom of expression, presumption of innocence, protection of private life, the authority and impartiality of the judiciary, and the effectiveness of criminal investigations–the Court held there had been no violation of Article 10 of the ECHR[89].

Dissenting with the majority, judge Yudkivska[90] quoted *Bridges v. California*[91], *Sheppard v. Maxwell*[92], and *Nebraska Press Association v. Stuart*[93]. Her purpose was to prove that it is no easy task to find a balance between free speech and fair trials, free report and debate contribute to public understanding of the rule of law as well as the improvement of the criminal justice system quality by subjecting it to public accountability, and a balance may be reached for instance by changing the trial venue, giving instructions to jurors, or sequestering the jurors. In this regard, she wrote that she subscribed to *Sheppard v. Maxwvell* where the US Supreme Court had held that where there was no threat or menace to the integrity of the trial, the press must have a free hand, even though sensationalism must be deplored.

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[88] The case law on public fora was also recalled by the parties in *Appleby v. the United Kingdom*, 2003-VI Eur. Ct. H.R., but the ECtHR considered that the US Supreme Court had not ascertained the existence of a constitutional right of free speech in a privately owned shopping mall, so they ruled out that consensus had emerged on that kind of issue.

[89] *Bédat v. Switzerland*, para. 8-16 http://echr.coe.int.

[90] *Ibid.* (dissenting opinion of judge Yudkivska).

[91] *Bridges v. California*, 314 U.S. 252 (1941).

[92] *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

[93] *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

2.5. ***The use of US Supreme Court precedents with regard to Article 11 of the ECHR***

Pursuant to Article 11, para. 1 of the ECHR, everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests[94].

In *Vona v. Hungary*, the Budapest Regional Court ruled in favor of the dissolution of an association that had abused of the right to freedom of assembly and had conducted activities, which violated the rights of the Roma people by generating fear among them through speeches and actions, spreading anti-Roma sentiments. In particular, the Court noted that the participants used to wear armbands that looked quite similar to those worn by the officers of the Arrow Cross, a national socialist party that led a government in Hungary in 1944 and 1945 and was responsible for the murder and deportation of many people, especially Jews and Roma. Therefore, the Court underlined that the Association's activities, with participants dressed in that way, were objectively capable of wounding historical sensitivities. The decision was upheld by the Budapest Court of Appeal and the Hungarian Supreme Court and after that, the association's chairperson lodged an application against Hungary with the ECtHR, claiming that the dissolution of the association amounted to an infringement of Article 11 of the ECHR[95].

In the part of the judgment devoted to comparative law, the ECtHR recalled the way the US Supreme Court had dealt with the problem of intimidation in *Virginia v. Black*. Under a Virginia statute, it was forbidden to burn a cross on the property of another, a highway or other public place with the intent of intimidating any person or group and any such burning would have been *prima facie* evidence of an intent to intimidate a person or a group. In its ruling, the US Supreme Court held that burning a cross in the United States was inextricably linked to the history

[94] Some ornamental references to the US Supreme Court precedents in cases concerning Article 11 of the ECHR can be found in *Refah Partisi (The Welfare Party) and Others v. Turkey*, 2003-II Eur. Ct. H.R. (referred by the applicants), *Gorzelik and Others v. Poland*, 2004-I Eur. Ct. H.R. (concurring opinion of judges Costa and Zupančič, joined by Judge Kovler).

[95] *Vona v. Hungary*, para. 11-16 http://echr.coe.int.

of the Ku Klux Klan as its members had often used cross burning as a tool of intimidation and a threat of impending violence. A burning cross was therefore a symbol of hate and since the First Amendment of the US Constitution permitted a State to ban true threats, the State of Virginia had every right to outlaw cross burning done with the intent to intimidate, as that was a very serious form of intimidation[96].

Therefore, when dealing with the alleged violation of Article 11 of the ECHR, the ECtHR considered that, in light of the Hungarian historical experience, «the reliance of an association on paramilitary demonstrations which express racial division and implicitly call for race-based action must have an intimidating effect on members of a racial minority, especially when they are in their homes and as such constitute a captive audience. In the Court's view, this exceeds the limits of the scope of protection secured by the Convention in relation to expression […] or assemblies and amounts to intimidation, which is – in the words of the United States Supreme Court's judgment in *Virginia v. Black* […] – a "true threat". The State is therefore entitled to protect the right of the members of the target groups to live without intimidation[97]».

Thus, the Court concluded that there had been no violation of Article 11 of the ECHR.

2.6. *The use of US Supreme Court precedents with regard to Article 14 of the ECHR*

Under Article 14 (Prohibition of discrimination) of the ECHR, the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[98].

[96] *Virginia v. Black*, 538 U.S. 343 (2003).

[97] *Vona v. Hungary*, para. 66.

[98] Some ornamental references to the US Supreme Court precedents in cases concerning Article 14 of the ECHR can be found in *Fretté v. France*, 2002-I Eur. Ct. H.R., *Zarb Adami v. Malta*, 2006-

In a case that concerned the death of a young Roma as a result of ill-treatment while in police custody, the ECtHR found there had been violation of Articles 2, 5, and Article 13 of the ECHR but denied there had been violation of Article 14 because the applicant[99] could not prove beyond reasonable doubt that discrimination had been a decisive factor in the police's attitude and acts[100].

In his partly dissenting opinion, Judge Bonello strongly criticized both that standard and the burden of proof established by the ECtHR with regard to racial discrimination. In doing so, he recalled - *inter alia* - *Griggs v. Duke*[101] and *McDonnell Douglas Corp. v. Green*[102], arguing that when the applicant has established an arguable claim the burden of proof then shifts to the defendant to satisfy the court of the legitimacy and justification of the action impugned. He then urged the ECtHR to leave the standard of proof beyond reasonable doubt aside as it is unreal, unrealistic, and unachievable.

3. *Concluding Remarks*

It has been said that American and foreign jurists have found out that they confront similar problems; therefore, it should not be an issue to make use of foreign and international law material as far as similar legal systems that provide similar protection to democratic government and individual human rights are concerned: in fact, this form of reason-borrowing makes it possible for the rule of law to advance further and for the fight against arbitrariness all over the world to be fought properly[103]. Former Canadian Supreme Court Justice Claire LaHeureux-

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VIII Eur. Ct. H.R. (recalled by the party), *D.H. And Others v. the Czech Republic*, 2007-IV Eur. Ct. H.R., *Biao v. Denmark*, http://echr.coe.int (dissenting opinion of judge Yudkivska).

[99] The application was lodged by the young Roma's mother.

[100] *Anguelova v. Bulgaria*, 2002-IV, para. 163, 168.

[101] *Ibid.* (partly dissenting opinion of judge Bonello). See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[102] *Mc Donnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[103] S. BREYER, *The Court and the World*, cit., p. 249, 280. More generally speaking, one should consider that «industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation - and nothing has contributed more to this than the greater ease with which people move from place to place» (see O. KAHN-FREUND, *On Uses and Misuses of Comparative Law*, in *The Modern Law Review*, 1974, 1, p. 9 and more generally, E. STEIN, *Uses, Misuses--and Nonuses of Comparative Law*, in

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Dubé stated: «The Warren Court's two decisions in *Brown v. Board of Education* are cited in judgments ranging from a decision about the expulsion of a student from school in Trinidad and Tobago for wearing a hijab, to a judgment in New Zealand applying a treaty on Maori fishing rights, not only because the cases are directly applicable, but because they stand for a principle and an approach to constitutional interpretation taken by the court that rendered it[104]».

Then, cross-fertilization should be regarded as a tool jurists can use today as their predecessors did in the Middle Ages: that is to say, as a tool to advance the reasons of law in a dark world[105].

In addition, the comparative approach may be regarded as the most feasible form of global law since it is not based on a top-down approach but on a bottom-up one. It is not an imposition from a political, economic, or legal entity that in light of its power decides to impose the law it deems the best. Actually, the comparative approach relies on the curiosity that animates any jurist and pushes them to check what is going on somewhere else from time to time. This does not mean one should believe that the grass is always greener on the other side of the fence and therefore a jurist should not subscribe to a legal doctrine only because someone else abroad did or does that. Truth be told, the comparison between different legal solutions to the same problem may lead to confirm our own vision and criticize the foreign ones. However, that seems to be the most adequate way to create a global community of lawyers who can communicate with each other: this can make it possible to pursue the aim of soft harmonization and provide an alternative to legislative harmonization[106].

Thus, the comparative approach is beneficial and should be used more and more all over the world in order to spread democratic values. Yet, in light of the analysis that provided in this article, one may say that, as far as the relationship

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Northwestern University Law Review, 1977, 1, p. 198-216.

[104] C. LAHEUREUX-DUBÉ, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, in *Tulsa Law Review*, 1998, 1, p. 28.

[105] See in this regard E. STEIN, T. SANDALOW, *On the Two Systems: An Overview*, in E. STEIN, T. SANDALOW (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Oxford, p. 1.

106 T.K. GRAZIANO, *Is It Legitimate and Beneficial for Judges to Compare?*, in M. ANDENAS, D. FAIRGRIEVE (eds.), *Courts and Comparative Law*, cit., p. 52.

between the US Supreme Court and the ECtHR is concerned, that outcome is far from being reached. At first sight, one may believe that the problem depends on the American debate on the topic and the issues that debate has raised over time. Nevertheless, it does not seem that things work better on the other side of the Atlantic Ocean. Of course, as underlined above, European legal scholars are more willing to adopt and apply the comparative approach and for some time have not called into question its legitimacy.

For what concerns the ECtHR, one can find many references in its judgments but - exception made for some cases that have been highlighted above - those references do not have a truly substantial value. Usually, they just help understand the overall debate on a topic and assess the existence of a consensus on the practice concerning the protection of human rights. It has happened quite often that the judges have made use of the Supreme Court case law to provide a strong legal basis to their concurring or dissenting opinions. Anyway, the cases where the US Supreme Court case law played a decisive role and helped the Court rule are so few they can be counted on the fingers of one hand.

It is not easy task to say why the ECtHR - that has constantly referred to other courts' case law in a not merely ornamental fashion[107] - do not do the same with the US Supreme Court case law. It is quite likely though that its members - or at least, the majority of its members - think this is a way to preserve its independence and autonomy. Regardless of what the reason is, the outcome is not a positive one, at least as far as the protection of fundamental rights is concerned.

Therefore, one may say that, with regard to the relationship between the US Supreme Court the ECtHR, cross-fertilization is still an illusion or, at best, a challenging target that is far away from being attained.

[107] See note 25.