

More Information

INDEX

ACHR. See American Convention on Human Rights (ACHR) Ackermann, Bruce, 458n63 Adler, Emanuel, 495 Advantages of judicial dialogue, 4, 7-8 African Charter on Human and Peoples' Rights, 161n29, 424 African Commission on Human and Peoples' Rights, 424 African Court on Human and Peoples' Rights, 16, 161 Ahern, Sinéad, 9, 348n40, 364, 364n119 AIRE Centre (NGO), 361-62, 379n190 Ambiguity in judicial dialogue, 9–10 American Convention on Human Rights (ACHR) Canada and, 116 Chile and, 102 Colombia and, 103-04 South America and, 74, 84-85 Uruguay and, 97, 105-06 Venezuela and, 510 Amicus curiae briefs overview, 339-41, 378-80 Canada, judicial dialogue in, 140-41, 140n87, 359, 364-65, 372-74, 377-78,512 cases analysed, 383-97 in CJEU, 355-56, 368, 374-75 Committee against Torture and, 355 Committee on Economic, Social and Cultural Rights and, 355 Committee on the Elimination of Discrimination against Women and, 355

Committee on the Elimination of

Racial Discrimination and, 355

Committee on the Rights of the Child and, 355 contracting states and, 357 Council of Europe and, 343, 357, 361 Czech Republic, judicial dialogue in, 363 Eastern Europe, judicial dialogue in, 363 effects of judicial dialogue and, 371-78 empirical findings, 350-53 "European consensus" and, 372 extent of judicial dialogue and, 367 - 70,378external component, 363 Human Rights Committee and, 343n17, 354-55, 368 in IACtHR, 355, 356-57, 368, 376 ICC and, 354 ICCPR and, 354 ICJ and, 354, 368 ICTR and, 354 ICTY and, 354 internal component, 361-62 international courts and, 353-54 methods of judicial dialogue and, 345-48, 370-71, 378, 512 non-contracting states and, 357-59 Nuremberg Tribunal and, 354 Poland, judicial dialogue in, 363, 512 purposes of judicial dialogue and, 348-50,524research methodology, 341-44, 359-67 Romania, judicial dialogue in, 363 statistics of judicial dialogue, 342, 342n13, 369



More Information

Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index

556

INDEX

Amicus curiae briefs (*cont*.) table, 383-97 United Kingdom, judicial dialogue in, 363, 372-74, 377-78, 512 United States, judicial dialogue in, 358-59, 358n93, 364-66, 368, 377-78 Western-centric nature of judicial dialogue and, 365-66 Amnesty International (NGO), 372 Amnesty laws in Brazil, 106-07 in Uruguay, 105-06 Appropriateness of judicial dialogue, 9 Arab Charter on Human Rights, 159-61, 159n20 Arab Human Rights Committee, 160-61 Arendt, Hannah, 439n5 Argentina Constitution, 98-100, 99n115 judicial dialogue in Brazil, with, 106-07 Chile, with, 81-82 Colombia, with, 99 France, with, 99 freedom of expression and, 83 majority versus minority opinions, 80-81 Paraguay, with, 86, 96n101 South America, with, 86 synchronizing rights evolution and, 98-100 United Kingdom, with, 99 United States, with, 68, 99 Uruguay, with, 79, 86, 105-06 Supreme Court, 98-100 Armenia, conscientious objection in, 429 Article 19 (NGO), 366-67, 377-78 Association of Councils of State and Supreme Administrative Jurisdictions of the European Union, 46-47, 47n81, 256 Asylum. See also Complementary protection in Denmark, 188n64 in Hong Kong, 175n6

Australia Administrative Appeals Tribunal, 208-09 Federal Court, 191, 192-93, 208-09 High Court, 180n23 judicial dialogue in Canada, with, 126, 131-32, 204, 206 complementary protection and, 175, 178-79, 186, 192-93, 196, 204, 206 Convention against Torture and, 178-79 ECtHR, with, 521 extent of, 507 Mexico, with, 190 New Zealand, with, 204, 206 non-involved parties, with, 414, 415 Refugee Convention and, 178-79 United Kingdom, with, 192-93, 206, 208-09, 254, 255 Migration Act (1958), 174n3, 178-79, 186, 186n54, 191n75 Refugee Review Tribunal, 190, 193, 196, 204, 206 Austria Constitution, 245–46 Constitutional Court, 245-46, 248 judicial dialogue in Chile, with, 81-82 Poland, with, 41–42 same-sex marriage and, 238-40, 245-46, 248 Switzerland, with, 245-46 Registered Partnership Act, 245-46, 246n128 same-sex marriage in, 225 Socialist Party, 245-46 Supreme Court, 245-46 Authority, judicial dialogue and, 457-60 Autonomy, judicial dialogue and, 457–60 Bahdi, Reem, 366 Bauböck, Rainer, 447 Bedjaoui, M., 493, 493n106 Belgium non-involved parties, judicial dialogue

with, 412



More Information

INDEX 557

same-sex marriage in, 221-22 United Kingdom, judicial dialogue with, 203 Benhabib, Seyla, 446-49, 448n31, 462-63 Bertelsmann Foundation, 199n108 Biernat, Stanisław, 61, 61n126 Binding authority, 116n10 Bingham, Tom, 91 Binnie, Ian, 128, 138, 141, 143 Bioethics Committee (CoE), 417 Björgvinsson, David Thór, 407n27 Bobek, Michael, 45, 456n56 Bohmer, M., 92n94 Bolivia Constitution, 77-78, 102-03 "constitutional bloc" doctrine, 79n39 Constitutional Tribunal, 77-78, 80, 102-03, 103n139 judicial dialogue in Colombia, with, 80, 86, 102-03 evolution of, 78-79 freedom of expression and, 83 frequency of, 77-78 human rights treaties, compliance with, 102-03 ILO Convention 169 and, 102-03, 103n139 majority versus minority opinions, 80 Peru, with, 102-03 Bratza, Nicholas, 408 Brazil amnesty laws in, 106-07 Civil Code, 100-01 Constitution, 80n40 Constitutional Court, 90-91, 101 differences from domestic solutions, defending, 516 judicial dialogue in Argentina, with, 106-07 Chile, with, 81-82, 106-07 Colombia, with, 97-98 evolution of, 79-80 France, with, 98 Germany, with, 98 Portugal, with, 98 Spain, with, 98

synchronizing rights evolution, 100-01 unavoidable dialogue, 106-07 United Kingdom, with, 98 United States, with, 98 Uruguay, with, 106-07 where no clear answers in domestic law, 98 Supreme Court, 90, 91n88, 98, 100-01, 101n129, 106-07, 516 Bricolage, 498, 501, 502 Burger, Warren, 135n71 Burgogue-Larsen, Laurence, 356-57 Bushnell, S.I., 132n66 Cairo Declaration on Human Rights in Islam, 159-61, 159n18 Canada Bill of Rights (1960), 121-22, 121n32 British Columbia Supreme Court, 377-78 British North America Act (1867), 119, 129n56, 130n61 Charter of Rights and Freedoms overview, 114-15, 117 amicus curiae briefs and, 359, 372-74 claims under, 130n61 death penalty and, 142 domestic particularities and, 130–31 human rights and, 121-23, 122n34, 122n38, 122n39, 123n40, 125t4.1, 135, 135n73, 505 judicial dialogue and, 138, 144-45, 507-08 limitations clause, 137, 508 rights under, 147n118 United States compared, 132-34, 132n68, 148-49 Constitution Act (1867), 132 Constitution Act (1982), 121-22, 123 Courts of Appeal, 143 Federal Court of Appeal, 196, 208–09 Governor General, 120 Immigration and Refugee Board, 193, 204, 205n135 Immigration and Refugee Protection Act (2001), 176–77, 186

judicial dialogue in



More Information

Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index

558 INDEX

Canada (cont.) overview, 114-18, 148-49 ACHR and, 116 amicus curiae briefs and, 140-41, 140n87, 359, 364-65, 372-74, 377-78, 512 Australia, with, 126, 131-32, 204, 206 CJEU, with, 116 Commonwealth legal tradition and, 131-32 comparative material, use of, 136-37 complementary protection and, 175, 176-77, 186, 196, 204 Convention against Torture and, 176-77, 205n135 counsel, role of, 140-41 death penalty and, 142, 146-47, 519 Denmark compared, 204 development over time, 137-38 differences from domestic solutions, defending, 516 difficult cases, resolving, 513 domestic particularities, 130–31 ECHR and, 121-22, 146, 147n119 ECtHR, with, 116, 124-26, 135, 138, 146-47, 146n116, 147n119, 507-08, 515, 521 effects of, 144-48 extent of, 123-24, 505, 506-09 France, with, 126 France compared, 138 frequency of, 137-38 Germany, with, 135-36, 210 human rights and, 514-15, 526-27 Hungary compared, 130 IACtHR, with, 116, 147, 147n120 ICCPR and, 135n73 ICESCR and, 135n73 India compared, 121-22 interveners, role of, 140-41, 140n87 Ireland compared, 121-22 Israel compared, 138 Justices, attitudes of, 128-30 language, impact of, 126, 135-36 letter used in interviews, 150-51 "living tree" metaphor, 129n56 Malawi compared, 137-38

methods of, 138-39 Mexico and, 190 New Zealand, with, 124-26, 131-32, 196, 208 New Zealand compared, 121-22 non-involved parties, with, 413-14, 415 number of citations, 125t4.1 Privy Council and, 119, 129n56, 131-32, 132n67 purposes of, 142-44 questions used in interviews, 151-52 Refugee Convention and, 141, 176-77 rejection of judicial reasoning, 518 research by judges, 139-40, 511 South Africa, with, 126 South Africa compared, 121-22, 130, 137-38 Sweden compared, 204 trends in citations, 131-36 United Kingdom, with, 124-26, 131-32, 206, 208-09, 254, 255 United Kingdom compared, 121-22, 138 United States, with, 124–26, 132–35, 132n66, 145–46, 145n110, 507-08, 519 Justices of Supreme Court, 120n25 Narcotic Control Act (1970), 122n39 OAS membership, 116, 116n11 Refugee Protection Division, 204n131 Statute of Westminster (1931), 119 Supreme and Exchequer Courts Act (1875), 119Supreme Court overview, 114-18, 148-49 amicus curiae briefs in, 140-41, 512 attitudes of Justices, 128-30 comparative material, use of, 136-37 counsel in, 140-41 domestic particularities and, 130-31 ECtHR and, 521



Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index More Information

INDEX 559

effects of judicial dialogue in, 144–48,	Ecuador, with, 81–82
518,519	France, with, 102
extent of judicial dialogue in, 123–24	freedom of expression and, 83
frequency of judicial dialogue in,	Germany, with, 102
137–38, 507–08	Honduras, with, 81–82
human rights and, 119–20, 124–26	human rights treaties, compliance
interveners in, 140–41	with, 102
methods of judicial dialogue in,	ICCPR and, 102
138–39, 511	India, with, 81–82
number of citations, 125t4.1	majority versus minority
purposes of judicial dialogue in,	opinions, 81–82
142–44, 516	Mexico, with, 81–82
research by judges, 139–40	Netherlands, with, 81
trends in citations, 131–36	Paraguay, with, 81–82
Supreme Court Act (1985), 119–20,	Peru, with, 81–82
120n21	South Africa, with, 81–82
Supreme Court Reports, 120	United States, with, 81–82
Carnwath, Lord, 22	Uruguay, with, 81–82
Carozza, P., 348n38	China, growth of wealth and power
Chang, Wen-Chen, 456, 456n54, 467n1	in, 480
Charter of Fundamental Rights	CJEU. See Court of Justice of the
CJEU, judicial dialogue in, 227, 235	European Union (CJEU)
cosmopolitanism and, 447	Clinton, Bill, 478
Germany, judicial dialogue	CoE. See Council of Europe
in, 261–62	Cohen, Harlan Grant, 495
Italy, judicial dialogue in, 274n17	Cold War, effect of end of, 475-76
Poland, judicial dialogue in, 39–41,	Colombia
39n51	Constitution, 79, 79n37, 97-98,
same-sex marriage and, 227, 227n46,	97n106, 103-04
235, 241, 242–43	"constitutional bloc" doctrine, 79
Chernobyl disaster, 53n101	Constitutional Court, 90, 97–98,
"Cherry-picking," 145n109,	100, 103–04
347-48, 360-61	Criminal Code, 103–04
Chile	judicial dialogue in
Civil Code, 102	ACHR and, 103–04
Constitution, 102	Argentina, with, 99
Constitutional Tribunal, 81	Bolivia, with, 80, 86, 102–03
Criminal Code, 81	Brazil, with, 97–98
judicial dialogue in	Chile, with, 81
ACHR and, 102	crimes against humanity
Argentina, with, 81–82	and, 83–84
Austria, with, 81–82	Ecuador, with, 86
Brazil, with, 81–82, 106–07	evolution of, 79
Colombia, with, 81	human rights treaties, compliance
crimes against humanity	with, 103–04
and, 83–84 ECHR and, 81	ICCPR and, 103–04
	Mexico, with, 97–98
ECtHR, with, 81–82	South America, with, 86



560 INDEX

Colombia (cont.) exclusion from, 207-10 extent of judicial dialogue, 179, synchronizing rights evolution, 100 506, 509 "forum shopping," 201n117 UDHR and, 103-04 harmonisation of standards, 195-96 United States, with, 97-98, 103-04 Uruguay, with, 97-98 High Commissioner for Refugees and, 174, 181-83, 182n32, 193-94, Venezuela, with, 86 208n147, 209-10 vertical judicial dialogue, 79 where no clear answers in horizontal judicial dialogue and, 212-14 domestic law, 97-98 Human Rights Committee and, 184-85 IACtHR, judicial dialogue in, 184-85 Supreme Court, 79 indiscriminate violence and, 210-14 Committee against Torture, 355, 424-25 interaction with Refugee Committee for the Prevention of Torture, 417, 418 Convention, 204-05 judicial independence, protection Committee on Economic, Social and of, 516 Cultural Rights, 355, 423 methods of judicial dialogue, 192-94 Committee on the Elimination of All Forms of Discrimination Mexico, judicial dialogue in, against Women, 355, 423 175, 189-90 New Zealand, judicial dialogue in, Committee on the Elimination of 175, 177, 185, 196, 197-98, 203, Racial Discrimination, 181, 355 Committee on the Rights of the Child, 206, 208 181, 355 non-refoulement, 186n51, 207-08 Comparative law, 73n21, 344n22, 361n103 prevalence of horizontal judicial Complementary protection dialogue, 179-86 overview, 173-76, 214-15 purposes of judicial dialogue, 194–95 Australia, judicial dialogue in, 175, regimes of, 176 178-79, 186, 192-93, 196, standard of proof, 205-06 204, 206 United Kingdom, judicial dialogue Canada, judicial dialogue in, 175, in, 185, 187, 192-93, 194, 196, 176-77, 186, 196, 204 203, 208-10, 212, 213 case studies, 202 United States, judicial dialogue in, CJEU, judicial dialogue in, 183-84, 175, 188-89 201, 210-11, 213-14 vertical judicial dialogue and, contours of horizontal judicial 179,213-14dialogue, 186-91 Concept of judicial dialogue Convention against Torture and, 184-86 overview, 12-15 Council of Europe and, 193-94 shari'ah courts and, 155–57 country-of-origin information, 202-03 Conference of European Constitutional diluting standards, 198-202 Courts, 46, 46n76 Conference of Portuguese Language ECHR and, 210-11 ECtHR, judicial dialogue in, 184–85, Constitutional Jurisdictions, 89, 201, 210-11 89n78, 90 effects of judicial dialogue, 194-95 Confirmative judicial dialogue, 402–04 enhancing standards, 196-98 Conscientious objection in European Union, judicial dialogue Armenia, 429 in, 174n5, 175, 177-78, 180-84, "Constitutional bloc" doctrine, 79,

187,200-02

79n39, 519



More Information

INDEX 561

Constructive misunderstanding, 486-90 Consultative Council of European Judges, 417 Contingency of judicial dialogue, 499-500 Continuity, judicial dialogue and, 458-59 Convention against Torture overview, 141, 175n6, 179n22 Australia, judicial dialogue in, 178-79 Canada, judicial dialogue in, 176-77, 205n135 complementary protection and, 184-86 European Union, judicial dialogue in, 177-78 New Zealand, judicial dialogue in, 177 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) overview, 103n135 Bolivia, judicial dialogue in, 102-03, 103n139 Convention on the Prevention and Punishment of the Crime of Genocide, 183n37 Convention Refugee Status and Subsidiary Protection Working Party, 193n89 Convention Relating to the Status of Refugees (1951). See Refugee Convention "Cooperative system" between ECtHR and domestic courts overview, 287-92, 338 domestic particularities and, 298-99, 315 effects of judicial dialogue in, 318-19 "European consensus" and, 318, 318n140 evidence and, 293-96, 313-14, 319-20,524evolutive interpretation of ECHR, encouraging, 317-18, 335 - 37,524extent of judicial dialogue in, 293 facts and, 293-96, 313-14, 319-20, 524 family law and, 304n79 implementation of ECHR rights, encouraging, 315-16, 322 - 35,524

judicial reasoning and, 306-09, 331-35 judicial review and, 323-31 jurisprudence of ECtHR and, 300-03 limitations of ECtHR capacities, compensating for, 312-15, 319-22 methods of judicial dialogue in, 291n22 national law and, 296-98, 314-15 present day conditions and, 310-12 procedure and, 303-06, 331-35 purposes of judicial dialogue in, 312 relevance and, 310-12 subsidiary role of ECtHR, 289-90, 290n20, 524-25 substantive law and, 300 Corrective judicial dialogue, 404–05 Cory, Peter, 146-47 Cosmopolitanism overview, 435-36, 464-66 authority and, 457-60 autonomy and, 457-60 challenges facing constitutional democracies and, 436 Charter of Fundamental Rights and, 447 CIEU and, 454n48 Cold War, effect of end of, 475–76 continuity and, 458-59 cultural unity and, 481 defined, 444-46 detachment and, 458-59 domestic courts and, 452-55, 465-66 doubts regarding, 479-81 ECHR and, 447 ECtHR and, 454n48, 461, 463-64 eschatology and, 473-74, 473n20 extent of judicial dialogue and, 455-57 freedom of religion and, 439n4 global integration and, 473-76 globalisation and, 440-44 headscarves and, 461-62, 464n82 hospitality and, 445-46 imperfection of constitutional democracies and, 436-40 Internet and, 474



More Information

562

INDEX

Cosmopolitanism (cont.) Internet regulation and, 456-57, 459 - 60"liberal project," judicial dialogue as, 476-79 metaphor of dialogue in, 470-73 methods of judicial dialogue and, 455-57 misrepresentation and, 449-51, 460-64 non-cosmopolitan interpretation of judicial dialogue (See Non-cosmopolitan interpretation of judicial dialogue) norms in, 446-49 notion of, 444-46 pluralism and, 475, 481-82 public international law and, 446–49 purposes of judicial dialogue and, 460-64 religious symbols and, 463-64 role of courts in, 436-40 role of judicial dialogue, 451-52 same-sex marriage and, 439n4 in transitional states, 452-53 transparency and, 464 Cotonou Agreement, 441n13 Council of Europe overview, 266, 299, 512 amicus curiae briefs, judicial dialogue and, 343, 357, 361 Bioethics Committee, 417 Committee for the Prevention of Torture, 417, 418 complementary protection and, 193-94 Consultative Council of European Judges, 417 Council of Ministers, 416, 418 European Commission against Racism and Intolerance, 417, 418 European Commissioner for Human Rights, 417, 421

Parliamentary Assembly (PACE), 416, 418 same-sex marriage and, 238-39, 241, 244-45 Statute of 1949, 410 Venice Commission, 88n70, 417, 418 Court of Justice of the European Union (CJEU) overview, 511 amicus curiae briefs, judicial dialogue and, 355, 368, 374-75 Canada, judicial dialogue with, 116 Charter of Fundamental Rights and, 227, 235 complementary protection and, 181-83, 201, 210-11, 213-14 cosmopolitanism and, 454n48 Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation and, 227, 230-32 Eastern Europe, judicial dialogue with, 508-10, 517 ECHR and, 228-29, 229n50, 232-34, 235, 236 - 37ECtHR, judicial dialogue with, 228-29, 235-37 effects of judicial dialogue in, 517 employment discrimination, preliminary rulings on, 228-32 European Union staff, rulings pertaining to, 232-37 Germany, judicial dialogue with, 259-63, 514-15, 517 human rights and, 519 Internet regulation and, 456-57 Italy, judicial dialogue with, 270-71, 275-76, 278, 279, 517 Poland, judicial dialogue with, 30, 39-41, 45-46, 51, 52, 508-10 re-entry and, 488-89 rejection of judicial reasoning, 518 same-sex marriage and, 217, 218, 227-37, 247-49 Staff Regulations of Officials of the European Communities and the Conditions of Employment of other Servants of the European

globalisation and, 442

human rights and, 506

membership of Eastern European

non-involved parties, judicial dia-

logue and, 412-13, 417-18

countries, 30, 30n14



More Information

INDEX 563

Communities and, 227-28, 232-33, 234-36, 234n77 TFEU and, 232-34, 233n72 Ukraine, judicial dialogue with, 52-53 United Kingdom, judicial dialogue with, 253-54, 517 Crimes against humanity in South America, judicial dialogue and, 83-84 Criteria for judicial dialogue, 425-26 Cultural unity, 481 Czapliński, W., 28n7 Czech Republic Constitutional Court, 57 Constitution of 1992, 34n25, 57 judicial dialogue in amicus curiae briefs and, 363 difficult cases, resolving, 57 extent of, 33-34 Lithuania, with, 57 Netherlands, with, 57 Poland, with, 57 Slovakia, with, 57 Death penalty Canada, judicial dialogue in, 142, 146-47, 519 Russian Federation, judicial dialogue in, 333-35Defamation Poland, judicial dialogue in, 59-61, Russian Federation, judicial dialogue

Poland, with, 57
Poland, with, 57
Slovakia, with, 57
Slovakia, with, 57

Death penalty
Canada, judicial dialogue in, 142,
146–47, 519
Russian Federation, judicial dialogue in, 333–35
Defamation
Poland, judicial dialogue in, 59–61,
59n121
Russian Federation, judicial dialogue in, 302
Definition of judicial dialogue, 12–15
Denmark
asylum laws in, 188n64
Canada, judicial dialogue
compared, 204
Registered Partnership Act (1989),
219, 220–21
same-sex marriage in, 219–21
Denning, Lord, 254, 254n3
De Schutter, Olivier, 370n143
Detachment, judicial dialogue
and, 458–59
De Vergottini, Giuseppe, 90

Dickson, Brian, 117n12, 133n70, 138

Direct judicial dialogue, 12n63 Discovery of cases inside material, 422 of non-involved parties, 255-57 outside material, 423 relevance and, 422-23 in United Kingdom, 255-57 Discrepancy, judicial dialogue and, 405-06 Domestic courts "cooperative system" with ECtHR. (See "Cooperative system" between ECtHR and domestic courts) cosmopolitanism and, 452-55, 465-66 effects of judicial dialogue in, 517-19 extent of judicial dialogue in, 504-10 methods of judicial dialogue in, 511-12purposes of judicial dialogue in, 513-16 "Transnational Judicial Dialogue: Concept, Method, Extent and Effects" (conference), questions in, 529-34 Domestic particularities in Canada, 130-31 "cooperative system" between ECtHR and domestic courts and, 298-99, 315 in Germany, 298-99 in Russian Federation, 299, 321-22 Domestic relations law. See Family law du Bois de Gaudusson, Jean, 365n128 Due process, extent of judicial dialogue and, 509 Dzehtsiarou, Kanstantsin, 346n32, 347, 370

Eastern Europe. See also specific country
Council of Europe, membership in,
30, 30n14
European Union, membership in, 30
judicial dialogue in
overview, 27–31, 65–66
amicus curiae briefs and, 363
CJEU, with, 508–10, 517



More Information

Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index

564

Eastern Europe (cont.) Egede, E., 172n73 Electoral law differences from domestic Greece, judicial dialogue in, solutions, defending, 516 ECHR and, 30n14 429 - 30Italy, judicial dialogue in, 406-07 ECtHR, with, 508-10, 517 Russian Federation, judicial diaeffects of, 47 logue in, 297-98, 299, 303, extent of, 505, 506-07, 508-10 333-35, 336-37 harmonisation of law in, 519 human rights and, 506, Elster, John, 439-40 514-15, 526-27 Ely, John Hart, 458, 458n63 Empirical research on judicial purposes of, 47 under socialism, 28 dialogue, 5-7 Engagement, 13, 13n66, 114n3 transition in, 452-53 ECHR. See European Convention on Engels, Friedrich, 476n42 Human Rights (ECHR) Equivalent protection, 488-89 Eschatology, 473-74, 473n20 Eco, Umberto, 471, 471n13 Eskridge, William N., 220n17, 223, ECtHR. See European Court of Human Rights (ECtHR) 223n33 Ecuador European Central Bank, 263 Chile, judicial dialogue with, 81–82 European Collaborative Research Colombia, judicial dialogue with, 86 Projects in the Social Sciences Education, judicial dialogue and, 16n82 (ECRP), 10-11, 529, 535 Effects of judicial dialogue European Commission against Racism overview, 19-21 and Intolerance, 417, 418 amicus curiae briefs and, 371-78 European Commissioner for Human in Canada, 144-48 Rights, 417, 421, 423 in CJEU, 517 European Commission for Democracy complementary protection and, 194-95 through Law. See Venice in "cooperative system" between Commission ECtHR and domestic European Commission of Human courts, 318-19 Rights, 228-29, 411, 522 in domestic courts, 517-19 European Committee for the in Eastern Europe, 47 Prevention of Torture, 423 on ECHR, 20 European Committee on Social Rights, in ECtHR, 20, 430-31, 517, 524-25 423, 425 fragmentation of law, 518-19 "European consensus" harmonisation of law, 518-19 amicus curiae briefs and, 372 human rights and, 519 "cooperative system" between ECtHR in IACtHR, 517 and domestic courts and, 318, judicial reasoning, on, 518 318n140 level of court, impact of, 517 extent of judicial dialogue and, 521 on national law, 517 family law and, 306 non-cosmopolitan interpretation Germany, judicial dialogue in, 335 and, 503 purposes of judicial dialogue and, in Poland, 47 428, 429, 523-24 in Russian Federation, 517 Russian Federation, judicial dialogue same-sex marriage and, 242-47 in, 333-35, 336

INDEX

in South America, 94-97, 110, 517

same-sex marriage and, 247-49



More Information

INDEX 565

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 179n22, 417 European Convention on Human Rights (ECHR). See also European Court of Human Rights (ECtHR) overview, 11-12 Canada, judicial dialogue in, 121-22, 146, 147n119 Chile, judicial dialogue in, 81 CJEU, judicial dialogue in, 228-29, 229n50, 232-34, 235, 236-37 complementary protection and, 210-11 "cooperative system" with domestic courts (See "Cooperative system" between ECtHR and domestic courts) cosmopolitanism and, 447 effects of judicial dialogue on, 20 Germany, judicial dialogue in, 263-64Hungary, judicial dialogue in, 55 Italy, judicial dialogue in, 270, 272–75, 276-78, 279 Lithuania, judicial dialogue in, 64-65 Malaysia, judicial dialogue in, 167–68 Nigeria, judicial dialogue in, 167–68 Poland, judicial dialogue in, 30, 35, 40, 50, 59-61 purposes of judicial dialogue, 18-19 ratification by Eastern European countries, 30n14 Russian Federation, judicial dialogue in, 62-64 same-sex marriage and, 228-29, 229n50, 232-34, 235, 236-38, 239-40, 242-45, 246-47 shari'ah courts, judicial dialogue in, 161, 167-68, 169-71 Ukraine, judicial dialogue in, 45 United Kingdom, judicial dialogue in, 254-55 European Court of Human Rights (ECtHR). See also European Convention on Human

overview, 10-12, 14n72, 16, 22-23, 511, 519-20 African Commission on Human and Peoples' Rights and, 424 American Court of Human Rights and, 431 amicus curiae briefs and (See Amicus curiae briefs) Australia, judicial dialogue with, 521 Canada, judicial dialogue with, 116, 124-26, 135, 138, 146-47, 146n116, 147n119, 507-08, 515, 521 Chile, judicial dialogue with, 81–82 CJEU, judicial dialogue with, 228-29, 235-37 Committee against Torture and, 424-25 Committee on Economic, Social and Cultural Rights and, 423 Committee on the Elimination of All Forms of Discrimination against Women and, 423 complementary protection and, 184-85, 201, 210-11 confirmative judicial dialogue, 402-04 Convention against Racial Discrimination and, 426-27 "cooperative system" with domestic courts (See "Cooperative system" between ECtHR and domestic courts) corrective judicial dialogue, 404-05 cosmopolitanism and, 454n48, 461, 463-64 discrepancy and, 405-06 Eastern Europe, judicial dialogue with, 508-10, 517 effects of judicial dialogue in, 20, 430-31, 517, 524-25 European Committee on Social Rights and, 423, 425 extent of judicial dialogue in, 520-21 Germany, judicial dialogue with, 263-64, 403-04, 514-15, 517 Hague Child Abduction Convention and, 427-28

Rights (ECHR)



More Information

566 INDEX

European Court of Human Rights (ECtHR) (cont.) harmonisation of jurisprudence, 523-24, 525 Human Rights Committee and, 424-25, 426 Hungary, judicial dialogue with, 55-56 IACtHR, judicial dialogue with, 423-24 ICJ and, 426-27 ICTY and, 431 ILO and, 423, 425, 427 Italy, judicial dialogue with, 270, 272-78, 279, 406-07, 517 Lithuania, judicial dialogue with, 64–65 Malaysia, judicial dialogue with, 167-68, 515 methods of judicial dialogue in, 522 Myanmar, judicial dialogue with, 431 New Zealand, judicial dialogue with, 521 Nigeria, judicial dialogue with, 167-68, 515 non-cosmopolitan interpretation of judicial dialogue in, 496-97 non-involved parties, judicial dialogue with (See Non-involved parties) Office of the Jurisconsult, 411 perspectives of judges in, 23 Poland, judicial dialogue with, 30, 35-38, 45-46, 48-49, 50, 51, 52, 53-55, 56-57, 59-61, 508-10, 514 proposed judicial dialogue, 408-09 purposes of judicial dialogue in, 18-19, 522-24 re-entry and, 488 Registry, 346, 346n31, 369, 422 rejection of judicial reasoning, 518 Research Division, 346, 370, 411, 522 res interpretata in, 401-02 Rules of the Court, 346n30 Russian Federation, judicial dialogue with, 50-52, 62-64, 517 same-sex marriage and, 217, 218, 237-49 settled case law, 275n19 sharī'ah courts, judicial dialogue with, 161, 167-68, 169-71, 515

significant rectification of case law by, 407-08 slight rectification of case law by, 406-07 South Africa, judicial dialogue with, 521 Spain, judicial dialogue with, 403, 408-09 strategic purposes of judicial dialogue in, 522-23 "Transnational Judicial Dialogue: Concept, Method, Extent and Effects" (conference), questions in, 535-41 types of judicial dialogue in, 401-02 Ukraine, judicial dialogue with, 43n66, 45 United Kingdom, judicial dialogue with, 253-55, 283n45, 404-05, 406-08, 517 United States, judicial dialogue with, 521 Venice Commission and, 423 World Health Organization and, 423 European Court of Justice (ECJ). See Court of Justice of the European Union (CJEU) European Forum of Commercial Judges, 46 European Parliament, 238–39 **European Science Foundation** (ESF), 10-11European Union Air Quality Directive, 256 Charter of Fundamental Rights (See Charter of Fundamental Rights) Civil Service Tribunal, 232, 234–36 complementary protection and, 174n5, 175, 177-78, 180-84, 187,200-02crises in, 480 Data Retention Directive, 456–57, 457n58 Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation, 227, 230-32, 238-39, 243 Dublin Regulation, 201-02



More Information

INDEX 567

General Court, 232, 235-36 membership of Eastern European countries, 30 Qualification Directive, 177-78, 180-84, 187, 200-01, 203, 204,209-12Refugee Convention and, 177-78 same-sex marriage, CJEU rulings pertaining to EU staff, 232-37 Staff Regulations of Officials of the European Communities and the Conditions of Employment of other Servants of the European Communities, 227-28, 232-33, 234-36, 234n77 Evidence in "cooperative system" between ECtHR and domestic courts, 293-96, 313-14, 319-20, 524 Germany, judicial dialogue in, 319 - 20Russian Federation, judicial dialogue in, 295, 296, 313-14, 320 United Kingdom, judicial dialogue in, 407-08Evolutive interpretation of ECHR overview, 524 "cooperative system" between ECtHR and domestic courts and, 317-18, 335-37, 524 Germany, judicial dialogue in, 317-18, 335-36 Russian Federation, judicial dialogue in, 336-37 Expression, freedom of. See Freedom of expression Extent of judicial dialogue overview, 15-17 amicus curiae briefs and, 367-70, 378 in Australia, 507 in Canada, 123-24, 505, 506-09

in domestic courts, 504-10 due process and, 509 in Eastern Europe, 505, 506-07, 508-10 in ECtHR, 520-21 "European consensus" and, 521 in Germany, 505, 506-07 human rights, correlation with, 505-06 ideological barriers and, 510 in Italy, 505, 506-07 language, impact of, 507-08 in Malaysia, 505, 510 most cited jurisdictions, 85-86, 110-12, 507-08 in Nigeria, 505, 510 non-judicial dialogue and, 510 in Poland, 31, 43-45, 505, 508-10 Refugee Convention and, 508-09 regional organizations and, 509-10 same-sex marriage and, 242, 510 in *sharī'ah* courts, 505, 506, 510 in South America, 76, 504-05, 506-10 specific rights, 508-09 in Ukraine, 33-34, 43n66 in United Kingdom, 254-55, 505, 506-07 in United States, 506-08

Facts

in "cooperative system" between ECtHR and domestic courts, 293–96, 313–14, 319–20, 524 Germany, judicial dialogue in, 295, 319–20

Russian Federation, judicial dialogue in, 295, 296, 313–14, 320

Family law

in "cooperative system" between ECtHR and domestic courts, 304n79

"European consensus" and, 306 Germany, judicial dialogue in, 304–05, 308, 319–20, 331–32, 332n209, 335–36

Russian Federation, judicial dialogue in, 299, 305–06, 311–12, 316 same-sex marriage and, 240 shariah courts, limitation of jurisdiction to, 161, 162n37

complementary protection, 179,

in "cooperative system" between

ECtHR and domestic

cosmopolitanism and, 455-57

in Czech Republic, 33-34

506, 509

courts, 293



More Information

568 INDEX

Ferreres, Victor, 462n78 Ferrer MacGregor, Eduardo, 190 Finland Constitution, 454 judicial dialogue in Germany, with, 184 Sweden, with, 184 United Kingdom, with, 184 same-sex marriage in, 219 Supreme Administrative Court, 184 Supreme Court, 454 Fischer-Lescano, Andreas, 480, 484, 491 Flanagan, Brian, 9, 348n40, 364, 364n119 Flauss, Jean-François, 358-59, 358n93 Fontana, David, 365-66 Forced disappearances in South America, judicial dialogue and, 83-84, 83n56 France Commission des Recours des Réfugiés, 204 Conseil Constitutionnel, 102, 223 Constitution, 102 Cour de Cassation, 255-56 judicial dialogue in Argentina, with, 99 Brazil, with, 98 Canada, with, 126 Canada compared, 138 Chile, with, 102 Poland, with, 41-42 South America, with, 86 United Kingdom, with, 203, 212, 255-56 Mariage pour Tous, 249 National Asylum Court, 190-91 Pacte Civil de Solidarité, 222-23 Parliament, 222-23, 246-47 same-sex marriage in, 222-23, 225, 246-47, 249 Supreme Court, 222 Franco, Francisco, 225 Fraser, Nancy, 439n5, 442, 443 Freedom of expression Germany, judicial dialogue in, 298-99, 301-02, 310-11 South America, judicial dialogue in, 83-84

Freedom of religion, cosmopolitanism and, 439n4 "Friend of the court" briefs. See Amicus curiae briefs Gallo, Daniele, 527 Gay rights. See LGTBI rights; Same-sex marriage Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 211n173 Gerber, D., 367n136 Germany Act on Protracted Court Proceedings and Criminal Investigations (2011), 326n180 Basic Law, 310-11, 317-18, 324-25, 324n171, 335-36 Bavarian Administrative Court, 230-32 Civil Code, 331-32, 335-36 Constitution, 224, 259-60, 260n7, 324-25, 324n169, 335-36, 491 Criminal Code, 315–16, 324–25, 335 Federal Administrative Court, 208–09, 210, 212, 256 Federal Constitutional Court confirmative dialogue in, 404 evolutive interpretation by, 317–18 family law and, 102, 319-20, 331-32, 335-36 freedom of expression and, 310-11 human rights and, 454n47, 514-15 Internet and, 456-57 judicial dialogue in, 258-66 judicial reasoning in, 255 judicial review in, 101n126 national law, application of, 297 non-involved parties and, 412 preventive detention and, 315-16, 316n130, 324-26 re-entry in, 488, 489 same-sex marriage and, 224, 232 translations of decisions, 135-36 Federal Court of Justice, 255, 326,

336n234, 404



INDEX 569

Federal Labour Court, 297, 310-11 Internet regulation in, 456-57 judicial dialogue in Brazil, with, 98 Canada, with, 135-36, 210 Charter of Fundamental Rights and, 261-62 Chile, with, 102 CJEU, with, 259-63, 514-15, 517 "cooperative system" between ECtHR and domestic courts (See "Cooperative system" between ECtHR and domestic courts) differences from domestic solutions, defending, 516 domestic particularities and, 298-99 ECHR and, 263-64 ECtHR, with, 263-64, 403-04, 514-15, 517 "European consensus" and, 335 evidence and, 295, 319-20 evolutive interpretation of ECHR in, 317-18, 335-36 exceptions to ECtHR jurisprudence, 325n172, 325n174 extent of, 505, 506-07 facts and, 295, 319-20 family law and, 304-05, 308, 319-20, 331-32, 332n209, 333 Finland, with, 184 foreign courts, with, 265 freedom of expression and, 298-99, 301-02, 310-11 Hungary, with, 56 ICJ, with, 264 implementation of ECHR rights, encouraging, 315-16 international legal bodies, with, 264-65 Italy, with, 281-82 judicial reasoning and, 307, 308 jurisprudence of ECtHR and, 301-02 LGTBI rights and, 333 national law and, 297 non-involved parties, with, 412, 414

Poland, with, 41-42, 54 present day conditions and, 310-11 pretrial detention and, 301-02, 311, 315-16, 324-26 procedure and, 304-05, 306, 331-32 relevance and, 310-11 South America, with, 86 TEU and, 259, 262 United Kingdom, with, 203, 208-09, 210, 212, 255, 256 Uruguay, with, 97 judicial review in, 324-26 Labour Code, 297 Life Partnership Act (2001), 224 male circumcision in, 491–93 Penal Code, 491 same-sex marriage in, 224, 225 Social Security Code, 230–32 Glensy, Rex, 364 Global integration, 473–76 Globalisation, 440–44 Globalising constitutionalism, 445n18 Greece Constitutional Court, 283 Court of Cassation, 281 Helsinki Monitor, 362 judicial dialogue in electoral law and, 429-30 Italy, with, 281-82 Grove, Tara Leigh, 156-57 Habermas, Jürgen, 468, 472 Hague Child Abduction Convention, 427-28 Hanafi school, 158 Hanbalī school, 158 Hathaway, James, 183n37, 193-94 Headscarves, judicial dialogue and, 461-62, 464n82 Held, David, 445 Heteronymous states, 442 Hierarchy of decisions, impact on judicial dialogue, 420 High Commissioner for Refugees (UNHCR), 174, 181-83, 182n32, 193-94, 208n147, 209-10, 421

Hirji, Zulfikar, 158



More Information

570 INDEX

Hirschl, Ran, 87 Hogg, Peter, 122n38 Homosexual rights. See LGTBI rights; Same-sex marriage Honduras, judicial dialogue with Chile, 81–82 Hong Kong asylum in, 175n6 non-involved parties, judicial dialogue and, 414 Horizontal judicial dialogue overview, 13-14 complementary protection and, 179-91, 212-14 in South America, 107-09 Hospitality, 445-46 Hugo, Victor, 477n45 Human rights. See also specific topic overview, 1-3 ACHR. (See American Convention on Human Rights (ACHR)) Canada, judicial dialogue in, 514-15, 526-27 CJEU, judicial dialogue in, 519 Council of Europe and, 506 Eastern Europe, judicial dialogue in, 506, 514-15, 526-27 ECHR. (See European Convention on Human Rights (ECHR)) ECtHR and (See European Court of Human Rights (ECtHR)) effects of judicial dialogue regarding, 519 extent of judicial dialogue, correlation with, 505-06 IACHR. (See Inter-American Commission on Human Rights (IACHR)) IACtHR and. (See Inter-American Court of Human Rights (IACtHR)) ICJ, judicial dialogue in, 526–27 Italy, judicial dialogue in, 526-27 judicial dialogue as enhancing, 525-27 Poland, judicial dialogue in, 514-15, 526-27 purposes of judicial dialogue and, 428-30, 514-15, 523

Russian Federation, judicial dialogue in, 322 South America, judicial dialogue in, 506, 514-15, 526-27 Human Rights Centre of Ghent University (NGO), 374–75 Human Rights Committee. See also International Covenant on Civil and Political Rights (ICCPR) amicus curiae briefs and, 343n17, 354-55, 368 complementary protection and, 184-85 ECtHR and, 424-25, 426 Poland, judicial dialogue with, 36 Russian Federation, judicial dialogue with, 322 shari'ah courts and, 170-71, 171n68 Hungary Constitution, 56 Constitutional Court, 55-56 Criminal Code, 55, 56 Fundamental Law, 34n26 judicial dialogue in Canada compared, 130 difficult cases, resolving, 55-56 ECHR and, 55 ECtHR, with, 55-56 extent of, 33-34 Germany, with, 56 Italy, with, 56 Latvia, with, 56 Lithuania, with, 56 Poland, with, 56 Romania, with, 56 Slovakia, with, 56 Ukraine and, 56 Supreme Court, 56 Husain, Raza, 188n61

IACHR. See Inter-American Commission on Human Rights (IACHR) IACtHR. See Inter-American Court of Human Rights (IACtHR) Ibero-American Conference on Constitutional Justice, 88–89, 89n76 ICCPR. See International Covenant on

Civil and Political Rights (ICCPR)



More Information

INDEX 571

Iceland, same-sex marriage in, 219 ILGA-Europe (NGO), 238 Illegitimacy, shari'ah courts and, 167-68 Inconsistency of judicial dialogue, 8-9 India Canada, judicial dialogue compared, 121-22 Chile, judicial dialogue with, 81-82 Indirect judicial dialogue, 12n63 Inevitability of judicial dialogue, 499-500 Inter-American Commission on Human Rights (IACHR) overview, 16 petitions, 75n28 South America, judicial dialogue in, 75, 85 Venezuela, judicial dialogue in, 76-77,510 Inter-American Convention on the Forced Disappearance of Persons, 83n56 Inter-American Convention to Prevent and Punish Torture, 179n22 Inter-American Court of Human Rights (IACtHR) overview, 16 amicus curiae briefs, judicial dialogue and, 355, 356-57, 368, 376 Canada, judicial dialogue with, 116, 147, 147n120 complementary protection, judicial dialogue and, 184-85 ECtHR, judicial dialogue with, 423-24 effects of judicial dialogue, 517 petitions, 75n28 South America, judicial dialogue with, 75, 84–85, 508–10 Venezuela, judicial dialogue with,

International Convention on the Elimination of All Forms of Racial Discrimination. 179n22, 426-27 International Court of Justice (ICJ) amicus curiae briefs, judicial dialogue and, 354, 368 ECtHR, judicial dialogue with, 426-27 Germany, judicial dialogue with, 264 human rights, judicial dialogue and, 526-27 Italy, judicial dialogue with, 275, 279-84, 514-15, 519 non-cosmopolitan interpretation of judicial dialogue and, 496-97 International Covenant on Civil and Political Rights (ICCPR). See also Human Rights Committee overview, 424 amicus curiae briefs, judicial dialogue and, 354 Canada, judicial dialogue and, 135n73 Chile, judicial dialogue and, 102 Colombia, judicial dialogue and, 103-04 New Zealand, judicial dialogue and, 177 Poland, judicial dialogue and, 30, 35, 36, 37 Russian Federation, judicial dialogue and, 322 shari'ah courts, judicial dialogue and, 170-71 South America, judicial dialogue and, 84-85 International Covenant on Economic, Social and Cultural Rights (ICESCR), 135n73 International Criminal Court (ICC), amicus curiae briefs and, 354 International Criminal Tribunal for Rwanda (ICTR), amicus curiae briefs and, 354 International Criminal Tribunal for the Former Yugoslavia (ICTY) amicus curiae briefs, judicial dialogue and, 354

complementary protection, judicial

dialogue and, 213-14

76–77, 510 Interights (NGO), 366–67

International armed conflict, 211n173 International Association of Refugee

Law Judges, 193-94, 204,

Administrative Jurisdictions,

International Association of Supreme

204n132, 211-12

46-47, 46n80



More Information

572 INDEX

International Humanist and Ethical Union (NGO), 492-93 International Labour Organisation (ILO) Bolivia, judicial dialogue with, 102-03, 103n139 ECtHR, judicial dialogue with, 423, 425, 427 Expert Committee, 423 "International Law through the National Prism: the Impact of Judicial Dialogue" (conference), 10-12, 529, 535 International rule of law, 4–5 Internet cosmopolitanism and, 474 regulation of, 456-57, 459-60 Internet Governance Forum, 459–60 Ireland Canada, judicial dialogue compared, 121-22 non-involved parties, judicial dialogue and, 414, Islamic legal thought. See also Shari'ah courts Hanafi school, 158 Hanbalī school, 158 judicial dialogue and, 158–62 Mālikī school, 158 Shāfi'ī school, 158 Shi'ī school, 158 Sunnī schools, 158 Israel Canada, judicial dialogue compared, 138 non-involved parties, judicial dialogue with, 414 Poland, judicial dialogue with, 54 Issue-based perspectives, 22 Civil Registry Office, 243-44 Code of Civil Procedure, 268n3, 268n4 Constitution, 240, 244, 268n4, 269-75, 270n8, 272n12, 276-77, 282-83, 514-15

counter-limitations, 271n11 equivalent protection, 488n88 judicial dialogue in, 269-75 Jurisdictional Immunities of the State case, 282-84, 514-15 non-involved parties and, 412 pretrial detention and, 311 role of, 267-68, 269 same-sex marriage and, 240-42, 248-49 Finance Act (2006), 276n22 judicial dialogue in overview, 267 Agrati-Scattolon cases, 275-79 Charter of Fundamental Rights and, 274n17 CJEU and, 270-71, 275-76, 278, 279, 517 counter-limitations, 271n11 differences from domestic solutions, defending, 516 ECHR and, 270, 272-75, 276-78, 279 ECtHR, with, 270, 272–78, 279, 406-07,517electoral law and, 406-07 extent of, 505, 506-07 Germany, with, 281–82 Greece, with, 281–82 human rights and, 526-27 Hungary, with, 56 ICJ, with, 275, 279-84, 514-15, 519 Jurisdictional Immunities of the State case, 279-84, 514-15 legislation, effect of, 267-69 non-involved parties, with, 412 same-sex marriage and, 240-45, 248-49 South America, with, 86 TEU and, 274n15 Uruguay, with, 97 vertical judicial dialogue, 283 Supreme Court of Cassation, 242, 243-44, 248-49, 267-69, 276-77, 280-81 Tribunal of Florence, 282 Venice Tribunal, 278

Constitutional Court

Agrati-Scattooon cases, 275-79



More Information

INDEX 573

La Forest, Gérard, 128 Jackson, Vicki, 10n57, 13, 19n98, 73, 129, 370 Lambert, Hélène, 188, 188n61, 190-91, Jinkaku, 460n68, 460n70 200n115 Joint Council for the Welfare of Lamer, Antonio, 117n12 Immigrants (NGO), 379n190 la Rue, Frank, 459n66 Laskin, Bora, 117n12 Judges, perspectives of overview, 11, 22 Latin America. See South America in ECtHR, 23 Latvia, judicial dialogue with Judicial internationalisation, 114n3 Hungary, 56 Judicial reasoning Law, David S., 456, 456n54, 467n1 "Law and society" approach, 441n9 Canada, rejection in, 518 in "cooperative system" between League of Arab States, 159n20 ECtHR and domestic courts, LeBel, Louis, 128, 147n120 306-09, 331-35 Lee, M.Y.K., 220n17 effects of judicial dialogue on, 518 Legitimacy of judicial dialogue, 9 Legrand, Pierre, 147n121 Germany, judicial dialogue in, 308 Level of court, impact on judicial Malaysia, rejection in, 518 Nigeria, rejection in, 518 dialogue, 517 Russian Federation, judicial dialogue Levi-Strauss, Claude, 498 Levit, Koven, 491 in, 307-09 shariah courts, rejection in, 518 LGTBI rights Germany, judicial dialogue in, 335-36 United States, rejection in, 518 **Judicial** review methods of judicial dialogue and, 512 in "cooperative system" between non-judicial dialogue and, 510 ECtHR and domestic Russian Federation, judicial dialogue courts, 323-31 in, 321-22, 329n195 Germany, judicial dialogue same-sex marriage. (See Same-sex in, 324-26marriage) Russian Federation, judicial dialogue L'Heureux-Dubé, Claire, 128, 133n70, in, 326-31 135n71, 148n122 Justice (NGO), 352-53, 374, 374n161 "Liberal project," judicial dialogue as, 476-79 Kaczyński, Lech, 59n121 Liberty (NGO), 353, 366, 372, 374, Kant, Immanuel, 445-46, 448, 467-68, 379n190 473-74, 475-76 Likosky, M., 440n8 Karl, Beatrix, 492 Lithuania Kennedy, Anthony, 370n142 Constitutional Court, 64-65 Kennedy, David, 481-82, 501 Constitution of 1992, 34n27 Kilias, Martin, 492 judicial dialogue in Kleinfeld, R., 441n11 Czech Republic, with, 57 ECHR and, 64-65 Klug, Heinz, 444-45, 445n18, 453n44, 462 Koh, H.H., 68n7 ECtHR, with, 64-65 extent of, 33-34 Koskenniemi, Martti, 473–74, 476, 479, 480 Hungary, with, 56 Kovler, Anatoly, 50n88 particular domestic solutions, Krenc, Frédéric, 347, 370 justifying, 64–65 "Living instrument" doctrine, 49n87, Krotoszynski, Ronald, 9, 19n98 Kumm, Mattias, 460, 460n69 50n88



574

Local conditions. See Domestic McLachlin, Beverley, 117n12, particularities 130n61, 374 López Guerra, Luis, 23, 419, 431 Mercosur Luhmann, Niklas, 482-83, 485-86, Cooperation Agreement for the 489, 497 Exchange of Information Lukashevich, Vasily, 346n32, 347, 370 and Publications through Luxembourg Court. See Court of Justice the Mercosur Jurisprudence of the European Union (CJEU) Database, 88n75 judicial dialogue and, 93n98 Malawi Permanent Forum of Supreme Canada, judicial dialogue compared, Courts, 88 Meron, Theodor, 431 137 - 38Constitution, 137n77 Metaphor of judicial dialogue, 470-73 Malaysia Meta-political democracy, 442 Administration of Islamic Law Methods of judicial dialogue (Federal Territories) Act (1993), overview, 17 162-64, 169 amicus curiae briefs and, 345-48, Administration of Muslim Law 370-71, 378, 512 Enactment (1952) (Selangor in Canada, 138-39 State), 163 complementary protection Arab Charter on Human Rights and, 192-94 and, 160-61 in "cooperative system" between Constitution of 1957, 162–63 ECtHR and domestic courts, judicial dialogue in 291n22 ECHR and, 167-68 cosmopolitanism and, 455-57 ECtHR, with, 167-68, 515 in domestic courts, 511-12 extent of, 505, 510 in ECtHR, 522 overcoming barriers to, LGTBI rights and, 512 169, 171-72 non-cosmopolitan interpretation rejection of judicial reasoning, 518 and, 502-03 Muftis, 163-64, 169 personal contacts of judges, 512 non-shari'ah courts in, 153n2 in Poland, 45-47 personal law, limitation of jurisdiction regional or international networks, to, 161 46-47, 511-12 Shāfi'ī school, 158 research by judges, 139-40, 511 shari'ah courts in, 155n5, 162-64. same-sex marriage and, 242 (See also Shari'ah courts) in South America, 86-91 Male circumcision in Germany, 491–93 Mexico Mālikī school, 158 Australia, judicial dialogue with, 190 Manfredi, C.P., 132n66 Canada, judicial dialogue with, 190 Marx, Karl, 476, 476n42 Chile, judicial dialogue with, 81–82 Colombia, judicial dialogue Mauritius with, 97-98 non-involved parties, judicial dialogue and, 414 complementary protection, judicial United Kingdom, judicial dialogue dialogue and, 175, 189-90 Law on Refugees, Complementary with, 255-56 Protection and Political McAdam, Jane, 191n75 Asylum, 189-90 McCrudden, Christopher, 345, 364

INDEX



More Information

INDEX 575

New Zealand, judicial dialogue with, 190 Refugee Convention, judicial dialogue and, 189-90 Migrants. See Complementary protection Misrepresentation, 449-51, 460-64 Mixed vertical-horizontal judicial dialogue, 13-14 Møse, Erik, 23, 419, 420, 422, 429 "MultiRights," 529, 535 Murray, John L., 459, 461 Muslim legal thought. See Islamic legal thought Mutual observation, 484-86 Myanmar ECtHR, judicial dialogue with, 431 Human Rights Commission, 431 Namibia, judicial dialogue with noninvolved parties, 414 National law consistent interpretation of, judicial dialogue ensuring, 49-53 "cooperative system" between ECtHR and domestic courts and, 296-98, 314-15 effects of judicial dialogue on, 517 Germany, judicial dialogue in, 297 international law versus, 420-21 Russian Federation, judicial dialogue in, 297-98, 314-15, 320-21 Nergelius, Joakim, 453n45 Netherlands Council of State, 190 Criminal Code, 81 judicial dialogue in Chile, with, 81 Czech Republic, with, 57 non-involved parties, with, 412 United Kingdom, with, 209, 212 same-sex marriage in, 221-22 Network of the Presidents of the Supreme Judicial Courts of the European Union, 46 Neves, Marcello, 90 New Zealand Court of Appeal, 208-10

Immigration Act (2009), 177 Immigration and Protection Tribunal, 185, 190, 197-98, 203, 206 judicial dialogue in Australia, with, 204, 206 Canada, with, 124-26, 131-32, 196, 208 Canada compared, 121-22 complementary protection and, 175, 177, 185, 196, 197-98, 203, 206, 208 Convention against Torture and, 177 ECtHR, with, 521 ICCPR and, 177 Mexico, with, 190 non-involved parties, with, 414, 415 Refugee Convention and, 177 United Kingdom, with, 196, 203,208-10Supreme Court, 196, 208 Nicolaidis, K., 441n11 Nigeria Constitution of 1999, 164–65 Courts of Appeal, 164–67, 168–69 judicial dialogue in Arab Charter on Human Rights and, 160-61 ECHR and, 167-68 ECtHR, with, 167-68, 515 extent of, 505, 510 overcoming barriers to, 168-69, 171-72 rejection of judicial reasoning, 518 jurisdiction, 164-65 Mālikī school, 158 non-shari'ah courts in, 153n2 personal law, limitation of jurisdiction to, 161 shari'ah courts in, 155n5, 164-67. (See also Sharī'ah courts) Non-cosmopolitan interpretation of judicial dialogue overview, 467-70, 479-84, 500-03 bricolage and, 498, 501, 502 constructive misunderstanding and, 486-90



More Information

576

INDEX

Non-cosmopolitan interpretation of judicial dialogue (cont.) contingency and, 499-500 cultural unity and, 481 ECtHR and, 496-97 effects of judicial dialogue and, 503 external dimension versus internal dimension, 494-98 ICJ and, 496-97 inevitability and, 499-500 methods of judicial dialogue and, 502-03 mutual observation and, 484-86 NGOs and, 492-93 non-judicial dialogue, importance of, 490-94 pluralism and, 481-82 re-entry and, 486-90 Non-governmental organizations (NGOs) amicus curiae briefs, judicial dialogue and. (See Amicus curiae briefs) defined, 341n9 non-cosmopolitan interpretation of judicial dialogue and, 492–93 Non-involved parties overview, 410, 417-18 Bioethics Committee and, 417 Committee for the Prevention of Torture and, 417, 418 Consultative Council of European Judges and, 417 Council of Ministers and, 416, 418 European Commission against Racism and Intolerance and, 417, 418 European Commissioner for Human Rights and, 417 judicial dialogue with Australia, with, 414, 415 Belgium, with, 412 Canada, with, 413-14, 415 discovery of cases, 255-57 Germany, with, 412, 414 Hong Kong, with, 414 Ireland, with, 414,

Mauritius, with, 414 member states of Council of Europe, with, 412–13, 417–18 Namibia, with, 414 Netherlands, with, 412 New Zealand, with, 414, 415 non-member states of Council of Europe, with, 413-16 Scotland, with, 414 South Africa, with, 414, 415 Spain, with, 412 United States, with, 413-14, 415 Parliamentary Assembly (PACE) and, 416, 418 Venice Commission and, 88n70, 417, 418 Non-judicial dialogue, 490–94, 510 Non-refoulement, 186n51, 207-08 Nordic Council, 219-20, 221, 509-10, 512 Normative apprisals of judicial dialogue, 23-24 Norway, same-sex marriage in, 219 Norwegian Centre of Excellence, 529, 535 Nuremberg Tribunal, amicus curiae briefs and, 354 Nußberger, Angelika, 23

Organisation of Islamic Cooperation, 159–61, 159n19 Organization of American States, membership of Canada in, 116, 116n11 Originalism, 84n60, 129, 249, 455n51 Örücü, Esin, 4n20, 91, 348n41 Ost, François, 470 Outline of study, 21–24 Owens, Julie, 173n2

Pakistan, *shari'ah* courts in, 158
Paraguay
Appeal Tribunal of Itapúa, 96n101
Civil Procedural Code, 96n101
judicial dialogue in
Argentina, with, 86, 96n101
Chile, with, 81–82
freedom of expression and, 83

Israel, with, 414

Italy, with, 412



Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index More Information

INDEX 577

Pasquet, Luca, 527	competencies of domestic courts,
Paulus, Andreas, 22, 507	widening, 57–59
Pax Americana, 478	consistent interpretation of
Perpetual Peace (Kant), 445–46	national law, ensuring, 49–53
Persuasive authority, 116n10	Czech Republic, with, 57
Peru	difficult cases, resolving,
Bolivia, judicial dialogue with, 102–03	53–57, 513
Chile, judicial dialogue with, 81–82	ECHR and, 30, 35–38, 40,
Pinto de Albuquerque, Paulo, 375	49–50, 59–61
Pluralism, 475, 481–82	
'PluriCourts," 529, 535	ECtHR, with, 30, 35–38, 45–46,
Poland	48–50, 51, 52, 53–55, 56–57,
Constitutional Court	59-61, 508-10, 514
	effects of, 47
CJEU and, 39–40	extent of, 31, 43–45, 505,
creation of, 29	508, 509–10
defamation and, 59–61, 59n121	foreign domestic courts,
ECtHR and, 35–38, 316n134	with, 41–43
foreign domestic courts and, 41–43	France, with, 41–42
freedom of expression and, 56	Germany, with, 41–42, 54
human rights and, 51	human rights and, 514–15, 526–27
international law and, 32, 33	Human Rights Committee and, 36
interpretive rulings, 57–59	Hungary, with, 56
judicial dialogue in, 44	ICCPR and, 30, 35, 36, 37
national law, application of, 50,	Israel, with, 54
61n128	judicial independence, protection
privacy and, 48n84	of, 516
purposes of judicial dialogue in,	language, impact of, 38, 41–42
125, 513, 516	legal context of, 31-34
regional and international	methods of, 45-47
networks and, 46–47	particular domestic solutions,
Road Traffic Act and, 56-57	justifying, 59–61
terrorism and, 53-55	privacy and, 48n84
transition process, legitimisation	purposes of, 47
of, 47–49	under socialism, 28
Constitution of 1952, 28, 48	TEU and, 39-41
Constitution of 1997, 31–33, 32n20,	transition process, legitimisation
33n24, 35-36, 37, 61n128	of, 47–49
Electronic System of Legal	treaties and, 28n8, 29n11, 37n38
Information, 38, 45–46	United Kingdom, with, 54
international law, position of, 31–34	United States, with, 41-42, 54
judicial dialogue in	Ministry of Justice, 38
overview, 27–31, 65–66	Penal Code, 59n121
amicus curiae briefs and, 363, 512	Road Traffic Act, 56-57
Austria, with, 41–42	Small Constitution of 1992, 48
Charter of Fundamental Rights	Supreme Administrative Court, 38,
and, 39–41, 39n51	40, 42–43, 46–47
CJEU, with, 30, 39–41, 45–46, 51,	Supreme Court, 35, 37–38, 42–43,
52, 508–10	44, 46–47, 48–49, 50, 57–59, 514
- /=====	,,,,,,



More Information

578 INDEX

Polibus, 452 Portugal Brazil, judicial dialogue with, 98 same-sex marriage, judicial dialogue and, 237-38 Posner, E.A., 101n130, 448-49, 462n76 Posner, R.A., 455n51 Present day conditions "cooperative system" between ECtHR and domestic courts and, 310-12 defined, 1-2 Germany, judicial dialogue in, 310-11 Russian Federation, judicial dialogue in, 311-12 Pretrial detention Germany, judicial dialogue in, 301-02, 311, 315-16, 324-26 Russian Federation, judicial dialogue in, 298, 302-03, 308-09, 314-15, 316, 330-31, 333 Privacy, judicial dialogue in Poland and, 48n84 Procedure in "cooperative system" between ECtHR and domestic courts, 303-06, 331-35 Germany, judicial dialogue in, 304–05,

306,331-32Russian Federation, judicial dialogue

in, 305-06, 333-35 Proposed judicial dialogue, 408-09

Prost, Mario, 479

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 211n173

Protocol Relating to the Status of Refugees (1967). See Refugee Convention

Public international law, cosmopolitanism and, 446-49

Purposes of judicial dialogue overview, 17-19 amicus curiae briefs and, 348-50, 524 in Canada, 142-44 complementary protection and, 194-95

in "cooperative system" between ECtHR and domestic courts, 312 cosmopolitanism and, 460-64 differences from domestic solutions, defending, 526-27 difficult cases, resolving, 53-57, 513, 523 in domestic courts, 513-16 in Eastern Europe, 47 in ECtHR, 18-19, 522-24 "European consensus" and, 428, 429, 523-24 harmonisation of ECtHR jurisprudence, 523-24, 525 human rights and, 428-30, 514-15, 523 judicial independence, protection of, 93-94, 516 parallel proceedings, reconciling, 426-27 in Poland, 47 questions of general relevance, resolving, 428 in South America, 91-94 specific treaties, interpreting, 427–28 strategic purposes, 522–23 in United Kingdom, 257

Quasi-judicial bodies, 419n1

Random nature of judicial dialogue, 525-27 Reasoning. See Judicial reasoning Reception judicial dialogue contrasted, 14,68-69 in South America, 68-69 Redress Trust (NGO), 369n140, 376 Re-entry, 486-90 Refugee Convention overview, 22, 173, 180 Australia, judicial dialogue in, 178–79 Canada, judicial dialogue in, 141, 176-77 European Union, judicial dialogue in, 177-78 extent of judicial dialogue and, 508–09



INDEX 579

grounds for relief, 173n2 interaction with complementary protection, 204-05 Mexico, judicial dialogue in, 189-90 New Zealand, judicial dialogue in, 177 non-refoulement, 207 United Kingdom, judicial dialogue in, 209-10 Refugee-like persons. See Complementary protection Regional organizations, extent of judicial dialogue and, 509-10 Regional perspectives, 21-22 Rehnquist, William, 135n71 Relevance in "cooperative system" between ECtHR and domestic courts, 310-12 discovery of cases, 422-23 fact-finding and, 421-22 Germany, judicial dialogue in, 310-11inside material, 422 outside material, 423 Russian Federation, judicial dialogue in, 311-12selection of material, 423–25 Religious freedom, cosmopolitanism and, 439n4 Religious symbols, judicial dialogue and, 463-64 Repetto, G., 225n42 Research methodology overview, 21 amicus curiae briefs, judicial dialogue and, 341-44, 359-67 South America, judicial dialogue in, 70-73Research on judicial dialogue, 5-7 Res interpretata, 401-02 Roberts, John, 145n109 Romania amicus curiae briefs, judicial dialogue and, 363 Hungary, judicial dialogue with, 56 Romano, Cesare, 344n21 Rozakis, Christos, 354, 358

Rubenfeld, Jed, 466 Rule of law, judicial dialogue and, 4-5 Russian Federation Code of Civil Procedure, 337n240 Code of Criminal Procedure, 51–52, 302-03, 326-28, 330-31 Constitutional Court death penalty and, 333-35 domestic particularities and, 321-22 electoral law and, 297-98, 333-35, 336-37 family law and, 62-64, 62n129, 299, 311-12, 312n120 human rights and, 51-52 LGTBI rights and, 329n195 national law, application of, 314-15, 326-31 pretrial detention and, 302-03 Constitution of 1993, 34n28, 51-52, 62-64, 62n129 growth of wealth and power in, 480 judicial dialogue in acceptance of ECtHR jurisprudence, 329n199 consistent interpretation of national law, ensuring, 50–52 "cooperative system" between ECtHR and domestic courts. (See "Cooperative system" between ECtHR and domestic courts) death penalty and, 333-35 defamation and, 302 domestic particularities and, 299, 321-22 ECHR and, 62-64 ECtHR, with, 50-52, 62-64, 517 effects of, 517 electoral law and, 297-98, 299, 303, 333–35, 336–37 "European consensus" and, 333-35, 336 evidence and, 295, 296, 313-14, 320 evolutive interpretation of ECHR in, 336-37 extent of, 33-34



580

More Information

INDEX

Russian Federation (cont.) Directive 2000/78/EC Establishing a facts and, 295, 296, 313-14, 320 family law and, 299, 305-06, 311-12, 316 human rights and, 322 Human Rights Committee and, 322 ICCPR and, 322 implementation of ECHR rights, encouraging, 316 judicial reasoning and, 307-09 judicial review in, 326-31 jurisprudence of ECtHR and, 302-03 LGTBI rights and, 321-22, 329n195 national law and, 297-98, 314-15, 320-21 particular domestic solutions, justifying, 62-64 present day conditions and, 311-12 pretrial detention and, 298, 302-03, 308-09, 314-15, 316, 330 - 31,333procedure and, 304, 305-06, 333-35 relevance and, 311-12 same-sex marriage and, 244-45 Supreme Court, 50-51, 320-22, 326-31, 333-35, 336-37 Tatarstan Supreme Court, 316 Ryngaert, Cedric, 500 Sabato, Raffaele, 22 Sadurski, Wojciech, 337, 363 Same-sex marriage overview, 216-18, 247-49 in Austria, 225 judicial dialogue and, 238-40, 245-46, 248 in Belgium, 221-22

Charter of Fundamental Rights and,

CJEU, judicial dialogue in, 217, 218,

227-37, 247-49

241, 244-45 countries recognising, 216n3

in Denmark, 219-21

cosmopolitanism and, 439n4 Council of Europe and, 238-39,

227, 227n46, 235, 241, 242-43

General Framework for Equal Treatment in Employment and Occupation and, 227, 230-32, 238-39, 243 ECHR and, 228-29, 229n50, 232-34, 235, 236-38, 239-40, 242-45, 246-47 ECtHR, judicial dialogue in, 217, 218, 237-49 effects of judicial dialogue and, 242-47 employment discrimination, preliminary rulings of CJEU on, 228-32 equal treatment and, 238-39 European Commission of Human Rights and, 228–29 "European consensus" and, 247-49 European Parliament and, 238–39 European Union staff, CJEU rulings pertaining to, 232-37 extent of judicial dialogue and, 242,510 family law and, 240 in Finland, 219 in France, 222-23, 225, 246-47, 249 in Germany, 224, 225 harmonisation of law and, 519 in Iceland, 219 Italy, judicial dialogue in, 240-45, 248-49 methods of judicial dialogue and, 242 national legislatures, dialogue between, 218-26, 247 in Netherlands, 221-22 non-discrimination and, 237-38 in Norway, 219 piecemeal regulation versus, 217n5 in Portugal, 237–38 registration versus, 216n4 right to marry and, 239-42 Russian Federation, judicial dialogue in, 244-45 in Spain, 224-25 Staff Regulations of Officials of the European Communities and the Conditions of Employment of



More Information

Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index

INDEX 581

other Servants of the European Communities and, 227-28, 232-33, 234-36, 234n77 supranational and national courts, judicial dialogue between, 226-27, 247-49 in Sweden, 219 in Switzerland, 225 TFEU and, 232-34, 233n72 Turkey, judicial dialogue in, 244-45 in United States, 241 Sánchez Gil, Rubén, 190 Sankey, Lord, 129n56 Scalia, Antonin, 129, 249, 455n51 Scherpe, Jens M., 219 Scotland, judicial dialogue with non-involved parties, 414, Senden, Hanneke, 343, 348-49, 350-51, 361 Shāfi'ī school, 158 Shari'ah courts different Islamic jurisdictions, 162, 168-69 family law, limitation of jurisdiction to, 161, 162n37 illegitimacy and, 167-68 international instruments regarding, 159-60 Islamic legal thought and, 158-62 judicial dialogue in overview, 153-55, 172 concept of, 155-57 ECHR and, 161-62, 167-68, 169-71 ECtHR, with, 161-62, 167-68, 169-71, 515 extent of, 505, 506, 510 external thought, incompatibility with, 160-61 Human Rights Committee and, 170-71, 171n68 ICCPR and, 170-71 ideological barriers to, 158-62, 510 impossibility of explicit dialogue, 154 non-shari'ah courts and, 169-72 rejection of judicial reasoning, 518

in Malaysia, 155n5, 162-64 in Nigeria, 155n5, 164-67 in Pakistan, 158 personal law, limitation of jurisdiction to, 161, 162n37 Shi'ī school, 158 Significant rectification of case law, 407-08 Slaughter, Anne-Marie, 7-8, 27-28, 69n9, 93n97, 149n125, 155, 193n87, 194-95, 197, 455n52, 468-69, 472, 473, 474, 475-76, 475n35, 477-78, 478n55, 479-80, 481, 484-85, 495, 499, 501, 502 Slight rectification of case law, 406-07 Slovakia Czech Republic, judicial dialogue with, 57 Hungary, judicial dialogue with, 56 Smith, Jackie, 365 South Africa Constitution, 137n77 Constitutional Court, 452–53 judicial dialogue in Canada, with, 126 Canada compared, 121–22, 130, 137 - 38Chile, with, 81–82 ECtHR, with, 521 non-involved parties and, 414, 415 transition in, 452-53 South America. See also specific country abstract nature of human rights law, 95-96 "constitutional bloc" doctrine, 519 constitutional evolution in, 73-75 direct incorporation of international human rights law, 74-75 harmonisation of law in, 519 horizontal judicial dialogue in, 107-09 judicial dialogue in overview, 67-73, 107-09 ACHR and, 74, 84-85 American influence on, 73-74 Argentina, with, 86 cases considered, 109-10 Colombia, with, 86



More Information

Cambridge University Press 978-1-107-17358-3 — Judicial Dialogue and Human Rights Edited by Amrei Müller , In collaboration with Hege Elisabeth Kjos Index

582 INDEX

South America (cont.) synchronizing rights colonial period, during, 68n8 evolution, 98-101 unavoidable dialogue, 104-07, constitutional mandate, expansion of, 94 107n157 United Kingdom, with, 86 correlation with specific United States, with, 86 rights, 82-85 where no clear answers in domestic crimes against humanity and, 83-84 law, 97-98 difficult cases, resolving, 513 significance of international jurisprudence in human rights effects of, 94-97, 110, 517 evolution of, 78-80 law, 95 Southern African Development extent of, 76, 504-05, 506-08, 509-10 Community Tribunal, 431 forced disappearances and, 83-84, Soviet Union, Constitution of 1977, 28n4 83n56 Spain Catalan issue, 466n84 France, with, 86 Civil Code, 224 freedom of expression and, 83 frequency of, 76-77, 86n65 Constitution, 441n13 Germany, with, 86 Constitutional Court, 403, 441n13, 456-57, 466n84, 507 human rights and, 506, 514-15, 526-27 Criminal Procedure Act (1988), 403 human rights treaties, compliance Internet regulation in, 456-57 with, 101-04 judicial dialogue in IACHR and, 75, 85 Brazil, with, 98 IACtHR, with, 75, 84-85, 508-10 ECtHR, with, 403, 408-09 ICCPR and, 84-85 non-involved parties, with, 412 international community, South America, with, 86, 507 membership in, 93 United Kingdom, with, 203 interpretation, aid in, 92-93 Popular Party, 225 same-sex marriage in, 224-25 Italy, with, 86 judicial independence, protection Supreme Court, 403, 408-09, 409n38 of, 93-94, 516 Spedale, Darren R., 220n17, 223, lack of judicial objection to, 96 223n33 majority versus minority Speech, freedom of. See Freedom of opinions, 80-82 expression methods of, 86-91 Spielmann, Dean, 315n129, 370 Stefan, Paul, 157 most cited jurisdictions, 85-86, 110-12 Stonewall (NGO), 238 personal contacts of judges, 512 Strasbourg Court. See European Court Portuguese influence on, 73-74 of Human Rights (ECtHR) purposes of, 91-94 Subsidiary role of ECtHR, 289-90, reception contrasted, 68-69 290n20, 524-25 Substantive law, "cooperative system" regional or international networks in, 511-12 between ECtHR and domestic research by judges, 511 courts and, 300 Sunnī schools, 158 research methodology in, 70-73 Sunstein, C.R., 101n130 Spain, with, 86, 507 Spanish influence on, 73-74 Sweden



More Information

INDEX 583

Canada, judicial dialogue compared, 204 Finland, judicial dialogue with, 184 same-sex marriage in, 219 United Kingdom, judicial dialogue with, 203, 212 Switzerland Austria, judicial dialogue with, 245-46 Registered Partnership Act, 245-46 same-sex marriage in, 225 United Kingdom, judicial dialogue with, 192-93, 203 Taiwan Constitutional Court, 453n42, 456n54 judicial dialogue in, 18n94 Taubes, Jacob, 473, 477 Terrorism, judicial dialogue in Poland and, 53-55 Tesauro, Giuseppe, 282n41 Teubner, Gunther, 478, 480, 482–83, 484-85, 491 Theoretical apprisals of judicial dialogue, 23-24 Theoretical discussion of judicial dialogue, 7-10 Torbisco, Neus, 461, 464n82 "Transnational Judicial Dialogue: Concept, Method, Extent and Effects" (conference) domestic court judges, questions to, 529-34 ECtHR judges, questions to, 535-41 Transparency in judicial dialogue, 464 Treaty of Lisbon (2009), 227, 274, 274n15 Treaty of the European Union (TEU) Germany and, 259, 262 Italy and, 274n15 Poland and, 39-41 Treaty on Functioning of European Union (TFEU) CJEU and, 232-34, 233n72 same-sex marriage and, 232-34, 233n72

Tulkens, Françoise, 347, 370 Turkey, same-sex marriage in, 244-45 Tzanakopoulos, A., 488n89 Ubuntu, 460n68, 460n70 Ukraine Chernobyl disaster, 53n101 Constitutional Court, 45 crisis in, 480 judicial dialogue in CJEU, with, 52-53 consistent interpretation of national law, ensuring, 52-53 ECHR and, 45 ECtHR, with, 43n66, 45 extent of, 33-34, 43n66 Hungary, with, 56 UNHCR. See High Commissioner for Refugees (UNHCR) United Kingdom Appellate Committee, 253 Asylum and Immigration Tribunal, 194, 212 Court of Appeal, 213 High Court of England and Wales, 209-10, 377-78 Immigration and Asylum Chamber, 187, 192-93, 203 Immigration Appeal Tribunal, 209, 210 Judicial Committee of Privy Council, 253, 253n1 judicial dialogue in amicus curiae briefs and, 363, 372-74, 377-78, 512 Argentina, with, 99 Australia, with, 192-93, 206, 208-09, 254, 255 Belgium, with, 203 Brazil, with, 98 Canada, with, 124-26, 131-32, 206, 208-09, 254, 255 Canada compared, 121-22, 138 CJEU, with, 253-54, 517 complementary protection and, 185, 187, 192–93, 194, 196, 203, 208-10, 212, 213

criticism of, 12n62

Tripathi, P., 364n122



More Information

584 INDEX

United Kingdom (cont.) Human Rights Committee. (See differences from domestic solutions, Human Rights Committee) Refugee Convention. (See Refugee defending, 516 Convention) difficult cases, resolving, 513 Security Council, 488 discovery of cases, 255-57 United States ECHR and, 254-55 ECtHR, with, 253-55, 283n45, Bill of Rights, 114–15, 121–22, 132–34, 145-46, 148-49 404-05, 406-08, 517 evidence and, 407-08 California Superior Court, 377-78 extent of, 254-55, 505, 506-07 Code of Federal Regulations, 188-89 Constitution, 68 Finland, with, 184 Eighth Amendment, 133 France, with, 203, 212, 255-56 Fifth Amendment, 133 Germany, with, 203, 208-09, 210, 212, 255, 256 First Amendment, 133, 145n112 Fourteenth Amendment, 133 Mauritius, with, 255-56 Fourth Amendment, 133 Netherlands, with, 209, 212 judicial dialogue in New Zealand, with, 196, 203, 208-10 overview, 258 personal contacts of judges, 512 Poland, with, 54 amicus curiae briefs and, 358-59, 358n93, 364-66, 368, 377-78 purposes of, 257 Refugee Convention and, 209-10 Argentina, with, 68, 99 Brazil, with, 98 research by judges, 511 South America, with, 86 Canada, with, 124–26, 132–35, Spain, with, 203 132n66, 145-46, 145n110, Sweden, with, 203, 212 507-08, 519 Chile, with, 81-82 Switzerland, with, 192-93, 203 United States, with, 209 Colombia, with, 97–98, 103–04 Special Immigration Appeals complementary protection and, Commission, 372-74 175, 188-89 Supreme Court, 190, 208-09, ECtHR, with, 521 extent of, 506-08 253-57, 283, 283n45, 407-08, 408n33, 507-08, 511, 513 non-involved parties, with, United Nations 413-14, 415 Charter, 282-83 Poland, with, 41-42, 54 Committee on the Elimination of rejection of judicial reasoning, 518 Racial Discrimination, 181 reluctance regarding, 156-57 South America, with, 86 Committee on the Rights of the Child, 181 United Kingdom, with, 209 Convention against Torture. (See negative attitudes toward, 480n63 Convention against Torture) same-sex marriage in, 241 Convention on the Prevention and Sixth Amendment, 133 Punishment of the Crime of Supremacy Clause, 121–22 Genocide, 183n37 Supreme Court, 123n42, Educational, Scientific and Cultural 134-35, 506-07 Organisation, 486 Universal Declaration of Human Rights High Commissioner for Refugees. (UDHR), 103-04 Uruguay (See High Commissioner for Refugees (UNHCR)) amnesty laws in, 105-06



More Information

INDEX 585

Appellate Family Tribunal, 97 Constitution, 105–06 Expiration Law, 105-06 judicial dialogue in ACHR and, 97, 105-06 Argentina, with, 79, 86, 105-06 Brazil, with, 106-07 Chile, with, 81-82 Colombia, with, 97–98 crimes against humanity and, 83-84 evolution of, 79 Germany, with, 97 Italy, with, 97 unavoidable dialogue, 105-06 where no clear answers in domestic law, 97 Supreme Court, 79, 97, 106n153

Van Drooghenbroeck, Sébastien, 347, 361n106, 370
Vaypan, Grigory, 327
Venezuela
Constitution, 76–77
judicial dialogue in
ACHR and, 510
Colombia, with, 86
freedom of expression and, 83
frequency of, 76–77

IACHR and, 76–77, 510
IACtHR and, 76–77, 510
Venice Commission, 88n70, 417, 418, 423
Vertical judicial dialogue, 13–14, 79,
179, 213–14, 283, 508–10
Vienna Convention on Consular
Relations, 264
Vienna Convention on the Law of
Treaties (VCLT), 10n56,
180n25, 353n65, 419–20
Villiger, Mark, 422
Voeten, Erik, 345–46, 350n53, 354

Waldron, Jeremy, 450n37
Wałęsa, Lech, 59n121
Warren, Earl, 135n71
Wiest, Dawn, 365
Wilson, Bertha, 135, 144–45
Winkler, Matteo, 527
World Conference on Constitutional
Justice, 46, 46n75, 87–88,
88n70, 89
World Health Organization, 423
World Trade Organisation, 442

Zapatero, José Luis, 224 Zorkin, Valeri, 63 Zupančič, Boštjan, 422

Waaldijk, Kees, 217