Judicial Creativity The Law Explained Volume 8

Selected by Choice magazine as an Outstanding Academic Title In The Politics of Jurisprudence, Roger Cotterrell offers a concise introduction to and commentary on Anglo-American jurisprudence, and a contribution to the study of the development of American and English general conceptions of law since the establishment of modern legal professions in the U.S. and Britain.

The Ninth Amendment holds that every right not explicitly granted to the federal government by the Constitution belongs to the states or to the individual. Further, those rights held by the government should not be construed to deny or disparage other rights held by the people. As in other areas of contention between federal power and states' rights, the Ninth Amendment has become subject to activist Supreme Court interpretation whereby the traditional model of federalism, in which states had meaningful public policy prerogatives, has given way to a model in which states become mere extensions of the U. S. government. In this volume, Marshall DeRosa provides a thorough analysis of Supreme Court unenumerated rights policy and offers suggestions toward reestablishing American federalism as envisioned by the framers of the Constitution. The book opens with a review and analysis of current debates over Ninth Amendment rights and then utilizes the privileges and immunities clauses as demonstrative of the traditional relationship between the states' police powers and

unenumerated fundamental rights. DeRosa then considers the critical role of academia in shifting public policy away from popular control and toward the judiciary. Later chapters include national and state case studies as instances of judicial creativity, an examination of the effects of Ninth Amendment jurisprudence on the Second Amendment as it bears on the gun control debate, and a comparative analysis of contrasting theories on the status of unenumerated rights. In his conclusion DeRosa offers some prescriptive thoughts on how to restore the original constitutional concept of popular consent as a remedy to an increasingly unaccountable federal judiciary. By restoring the Ninth Amendment to the context of American federalism, this volume constitutes a major contribution to contemporary scholarship, challenging a corpus of commentary that either ignores, misunderstands, or misrepresents the relevance of popular control in the articulation of unenumerated rights. The Ninth Amendment and the Politics of Creative Jurisprudence will be of interest to political scientists, historians, legal theorists, and political practitioners.

Islamic law influences the lives of Muslims today as aspects of the law are applied as part of State law in different forms in many areas of the world. This volume provides a much needed collection of articles that explore the complexities involved in the application of Islamic law within the contemporary legal systems of different countries today, with particular reference to Saudi Arabia, Morocco, Indonesia, Nigeria, Turkey, Malaysia and Pakistan. The articles identify the relevant areas of difficulties and also

propose possible ways of realising a more effective and equitable application of Islamic law in the contemporary world. The volume features an introductory overview of the subject as well as a comprehensive bibliography to aid further research.

In this groundbreaking book, Scalia and Garner systematically explain all the most important principles of constitutional, statutory, and contractual interpretation in an engaging and informative style with hundreds of illustrations from actual cases. Is a burrito a sandwich? Is a corporation entitled to personal privacy? If you trade a gun for drugs, are you using a gun in a drug transaction? The authors grapple with these and dozens of equally curious questions while explaining the most principled, lucid, and reliable techniques for deriving meaning from authoritative texts. Meanwhile, the book takes up some of the most controversial issues in modern jurisprudence. What, exactly, is "textualism?" Why is "strict construction" a bad thing? What is the true doctrine of "originalism?" And which is more important: the spirit of the law, or the letter? The authors write with a well-argued point of view that is definitive yet nuanced, straightforward yet sophisticated.

This book argues that the Constitution has a dual nature. The first aspect, on which legal scholars have focused, is the degree to which the Constitution acts as a binding set of rules that can be neutrally interpreted and externally enforced by the courts against government actors. This is the process of constitutional interpretation. But according to Keith Whittington, the Constitution also permeates politics itself, to guide

and constrain political actors in the very process of making public policy. In so doing, it is also dependent on political actors, both to formulate authoritative constitutional requirements and to enforce those fundamental settlements in the future. Whittington characterizes this process, by which constitutional meaning is shaped within politics at the same time that politics is shaped by the Constitution, as one of construction as opposed to interpretation. Whittington goes on to argue that ambiguities in the constitutional text and changes in the political situation push political actors to construct their own constitutional understanding. The construction of constitutional meaning is a necessary part of the political process and a regular part of our nation's history, how a democracy lives with a written constitution. The Constitution both binds and empowers government officials. Whittington develops his argument through intensive analysis of four important cases: the impeachments of Justice Samuel Chase and President Andrew Johnson, the nullification crisis, and reforms of presidential-congressional relations during the Nixon presidency.

The rules of treaty interpretation codified in the 'Vienna Convention on the Law of Treaties' now apply to virtually all treaties, in an international context as well as within national legal systems, where treaties have an impact on a large and growing range of matters. The rules of treaty interpretation differ somewhat from typical rules for interpreting legal instruments and legislation within national legal systems. Lawyers, administrators, diplomats, and officials at international organisations are increasingly

likely to encounter issues of treaty interpretation which require not only knowledge of the relevant rules of interpretation, but also how these rules have been, and are to be, applied in practice. Since the codified rules of treaty interpretation came into decree, there is a considerable body of case-law on their application. This case-law, combined with the history and analysis of the rules of treaty interpretation, provides a basis for understanding this most important task in the application of treaties internationally and within national systems of law. Any lawyer who ever has to consider international matters, and increasingly any lawyer whose work involves domestic legislation with any international connection, is at risk nowadays of encountering a treaty provision which requires interpretation, whether the treaty provision is explicitly in issue or is the source of the relevant domestic legislation. This fully updated new edition features case law from a broader range of jurisdictions, and an account of the work of the International Law Commission in its relation to interpretative declarations. This book provides a guide to interpreting treaties properly in accordance with the modern rules.

A distinguished and experienced appellate court judge, Posner offers in this new book a unique and, to orthodox legal thinkers, a startling perspective on how judges and justices decide cases.

In this famous treatise, a Supreme Court Justice describes the conscious and unconscious processes by which a judge decides a case. He discusses the sources of information to which he appeals for guidance and analyzes the contribution that considerations of precedent, logical

consistency, custom, social welfare, and standards of justice and morals have in shaping his decisions.

Expert analysis of the impact of international and national courts on the development of international law applying to armed conflicts.

This book is an edited collection of 44 U.S. Supreme Court opinions that include the word "creativity." All Supreme Court cases are important cases in American law and these are no exception. These cases provide perspective from the highest jurists about the meaning of creativity in American law. The "feeling of creativity" is amongst the goals of American democracy but also a judicial slur. Copyright protects artistic creativity for publishers and innovators but judicial creativity is to be restrained. Creativity "is fostered by a rule of law." Creativity may be most creative in the ways it restrains itself. For advanced English language readers interested in law or creativity. Reading case law can improve your ability to read law.

We are all familiar with the image of the immensely clever judge who discerns the best rule of common law for the case at hand. According to U.S. Supreme Court Justice Antonin Scalia, a judge like this can maneuver through earlier cases to achieve the desired aim—"distinguishing one prior case on his left, straight-arming another one on his right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law." But is this common-law mindset, which is appropriate in its place, suitable also in statutory and constitutional interpretation? In a witty and trenchant essay, Justice Scalia answers this question with a resounding negative. In exploring the neglected art of statutory interpretation, Scalia urges that judges resist the temptation to use legislative intention and legislative history. In his view, it is incompatible with democratic government to allow the

meaning of a statute to be determined by what the judges think the lawgivers meant rather than by what the legislature actually promulgated. Eschewing the judicial lawmaking that is the essence of common law, judges should interpret statutes and regulations by focusing on the text itself. Scalia then extends this principle to constitutional law. He proposes that we abandon the notion of an everchanging Constitution and pay attention to the Constitution's original meaning. Although not subscribing to the “strict constructionism” that would prevent applying the Constitution to modern circumstances, Scalia emphatically rejects the idea that judges can properly “smuggle” in new rights or deny old rights by using the Due Process Clause, for instance. In fact, such judicial discretion might lead to the destruction of the Bill of Rights if a majority of the judges ever wished to reach that most undesirable of goals. This essay is followed by four commentaries by Professors Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin, who engage Justice Scalia’s ideas about judicial interpretation from varying standpoints. In the spirit of debate, Justice Scalia responds to these critics. Featuring a new foreword that discusses Scalia’s impact, jurisprudence, and legacy, this witty and trenchant exchange illuminates the brilliance of one of the most influential legal minds of our time.

As the work of the International Criminal Tribunals for the Former Yogoslavia and Rwanda draws to a close, this edited collection appraises their impact. It particularly focuses on the position of judges as lawmakers within these tribunals, shedding light on the profound changes in international criminal law which these judges have instigated.

Authors from 13 countries come together in this edited volume, Common Law and Civil Law Today: Convergence and Divergence, to present different aspects of the relationship and

intersections between common and civil law. Approaching the relationship between common and civil law from different perspectives and from different fields of law, this book offers an intriguing insight into the similarities, differences and connections between these two major legal traditions. This volume is divided into 3 parts and consists of 22 articles. The first part discusses the common law/civil law dichotomy in the international legal systems and theory. The second focuses on case-law and arbitration, while the third part analyses elements of common and civil law in various legal systems. By offering such a variety of approaches and voices, this book allows the reader to gain an invaluable insight into the historical, comparative and theoretical contexts of this legal dichotomy. From its carefully selected authors to its comprehensive collection of articles, this edited volume is an essential resource for students, researchers and practitioners working or studying within both legal systems.

Hilaire Barnett’s Constitutional and Administrative Law has consistently provided students with reliable, accessible and comprehensive coverage of the Public Law syllabus. Mapped to the common course outline, the Fourteenth edition equips students with a thorough understanding of the UK constitution’s past, present and future by analysing and illustrating the political and socio-historical contexts that have shaped the major rules and principles of constitutional and administrative law, as well as ongoing constitutional reform. This edition has been fully updated and includes discussion of the consequences of the United Kingdom's withdrawal from the European Union, including the impact on the legislative supremacy of Parliament and the relationship between EU and domestic law after departure. It also features discussion of the 2020 Coronavirus Act, with its implications for state power, and ahead of the forthcoming new SQE qualification, revised multiple choice questions on the Companion Website. Ideal for

students studying constitutional and administrative law for the first time, this is an indispensable guide to the challenging concepts and legal rules in public law.

The book offers contributions to a philosophical and realistic approach to the place of adjudication in contemporary constitutional democracies. Bringing together scholars from different legal and philosophical backgrounds, the book purports to cast light on the role(s) of judges and the function of judicial interpretation inside of constitutional states, from the standpoint of legal realism as a revisited and sophisticated jurisprudential outlook. In so doing, the book also copes with a few major jurisprudential issues, like, e.g., determining the ideas that make up the core of legal realism, exploring the relation between legal realism and legal positivism, identifying the boundaries of judicial interpretation as they appear from a realist standpoint, as well as considering some skeptical outlooks on the very claims of contemporary legal realism.

As Kent Greenwalt's second volume on aspects of legal interpretation, this book analyzes statutory and common law interpretation and compares the two. In respect to statutory interpretation, it first asks whether judges are "faithful agents" of the legislature or "independent cooperative partners." It concludes that the obvious answer is that neither simple categorization really fits-that the function of judges involves a combination of roles. The next issue addressed is whether the

intent of those in authority matters for interpreting the kinds of instructions contained in statutes. At the general level, the answer is "yes." This answer follows even if one thinks interpretation should concentrate on the understanding of readers, because readers themselves would treat intentions as part of the relevant context of the language of statutes. It would take some special reasons, such as constitutional structure or unreliability, to discount actual intents of legislators and use of legislative history. The book argues that none of these special reasons are convincing. On the question whether judges should focus on the language of specific provision or overall purpose, both are relevant, and purpose should become more important as time passes. In an analysis of various other features of statutory interpretation, the book claims that presidential signing statements should not have weight, that subsequent legislative actions short of new statutes should only occasionally carry importance, that "canons of interpretation," such as the rule of lenity, can provide some, limited, guidance, and that there are special reasons for courts to adhere to precedents in statutory cases, but these should not yield any absolute rule. A chapter on administrative interpretation of statutes claims that the standards agencies apply should differ to a degree from those of courts and that judicial deference to those interpretations is ordinarily warranted. The book's second part, on common law interpretation,

considers the force of precedents, resisting any simple dichotomy between holding and dictum. It also defends the use of reasoning by analogy, not only in the initial stages thinking about a problem, but also in respect to some final justifications for decisions. An examination of the place of rules, principles, and policies argues that all three are relevant in common law interpretation; and shows that common law interpretation is not reducible to any formula. A final chapter compares statutory and common law interpretation, similarities and differences, how each can affect the other, and the significance of having a legal system in which they both play prominent roles.

In Judges and the Making of International Criminal Law Joseph Powderly explores the role of judicial creativity in the progressive development of international criminal law. This wide-ranging work unpacks the nature and contours of the international criminal judicial function.

This is the English version of Jerzy Wroblewski's major work in Polish, S~dowe Stosowania Prawa (translated in his own preferred terms as 'The Judicial Application of Law'). The present translation arose out of a visit by the author to Scotland in 1989. In that year, the Carnegie Trust for the Universities of Scotland made it possible for Jerzy Wroblewski to spend six months as a Carnegie Fellow in the Centre for Criminology and the Social and Philosophical Study of Law at

the University of Edinburgh. During that time he took a notably active part in the intellectual life of the Centre and the Faculty of Law. He gave freely of his time in teaching and advising students and also produced a series of original articles on topics connected with legal reasoning and law and computers. His major task while he was here, however, was to prepare a translation of S~dowe Stosowania Prawa, and this he accomplished to the extent of completing a preliminary draft. Zenon Bankowski and Neil MacCormick were to help him in improving this linguistically and preparing the final text for publication. Wroblewski warned us, having finished his draft with great labour, that the greater labour would be in the polishing of it. For we would have, as he joked, 'to translate my English into English'. And certainly, we found it extremely time-consuming, so as to defy completion during his stay in Edinburgh.

A novel and incisive investigation of the role of judicial precedents and customs in Russian law, this book examines the trends in the development of judge-made law in Russian civil law since the demise of the Soviet Union. Exploring the interrelated propositions that a certain creative element is intrinsic to the judicial function in modern legal systems, which are normally shaped by both legislators and judges and that the Russian legal system is not an exception to this rule, the author argues that the rejection or acceptance of judge-made law can no longer

be sufficient grounds for distinguishing between common law and civil law systems for the purposes of comparative analysis. Divided into six chapters, it covers: the principles applied by judges when interpreting legal acts; analyzing a number of academic writings on this subject the boundaries of the realm of judge-made law and the problem of 'hard cases' and the factors, which make them 'hard' a taxonomy of forms in which Russian courts effectuate their law-creation functions current policies of courts in legal and socio-political matters joint-stock societies and arbitrazh courts. Estimating the degree of creativity within different branches of the Russian judiciary and explaining the difference in the approaches of various courts as well as setting-out proposals as to how the discrepancies in judicial practice can be avoided, Judicial Law-Making in Post-Soviet Russia is invaluable reading for all students of international law, comparative law, legal skills, method and systems and jurisprudence and philosophy of law.

In this revised and updated edition of a classic text, one of America's leading constitutional theorists presents a brief but well-balanced history of judicial review and summarizes the arguments both for and against judicial activism within the context of American democracy. Christopher Wolfe demonstrates how modern courts have used their power to create new "rights" with fateful political consequences and he challenges popular opinions held by many contemporary

legal scholars. This is important reading for anyone interested in the role of the judiciary within American politics. Praise for the first edition of Judicial Activism: "This is a splendid contribution to the literature, integrating for the first time between two covers an extensive debate, honestly and dispassionately presented, on the role of courts in American policy. --Stanley C. Brubaker, Colgate University

Copyright law regulates creativity. It affects the way people create works of authorship ex-ante and affects the status of works of authorship significantly ex-post. But does copyright law really understand creativity? Should legal theories alone inform our regulation of the creative process? This book views copyright law as a law of creativity. It asks whether copyright law understands authorship as other creativity studies fields do. It considers whether copyright law should incorporate non-legal theories, and if so, how it should be adjusted in their light. For this purpose, the book focuses on one of the many rights that copyright law regulates – the right to make a derivative work. A work is considered derivative when it is based on one or more preexisting works. Today, the owner of a work of authorship has the exclusive right to make derivative works based on her original work or to allow others to do so. The book suggests a new way to think about both the right, the tension, and copyright law at large. It proposes relying on non-

legal fields like cognitive psychology and genre theories, and offers new legal-theoretical justifications for the right to make derivative works. As the first book to consider the intersection between copyright law, creativity and derivative works, this will be a valuable resource for students, scholars, and practitioners interested in intellectual property and copyright law.

This book critically examines the evolving global trend of judicial activism with particular reference to Bangladesh. It constructs judicial activism as a golden-mean adjudicative technology, standing between excessive judicial assertion and unacceptable judicial passivity that may leave injustices un-redressed. It argues that judicial balancing between over-activism and meek administration of justice should essentially be predicated upon domestic conditions, and the needs and fundamental public values of the judges' respective society. Providing cross-jurisdictional empirical evidence, the study demonstrates that judicial activism, steered towards improving justice and grounded in one's societal specificities, can be exercised in a morally and legally legitimate form and without rupturing the balance of powers among the state organs. This study has sought to displace the myth of judicial activism as constitutional transgression by "unelected" judges, arguing that judicial activism is quite different from excessivism. It is argued and shown that a particular judge or judiciary turns out to be activist when other public functionaries avoid or breach their constitutional responsibilities and thus generate injustice and inequality. The study treats judicial

activism as the conscientious exposition of constitutional norms and enforcement of public duties of those in positions of power. The study assesses whether Bangladeshi judges have been striking the correct balance between over-activism and injudicious passivity. Broadly, the present book reveals judicial under-activism in Bangladesh and offers insights into causes for this. It is argued that the existing milieu of socio-political injustices and over-balance of constitutional powers in Bangladesh calls for increased judicial intervention and guidance, of course in a balanced and pragmatic manner, which is critical for good governance and social justice. “Writing about judicial activism easily gets shackled by fussy and pedestrian debates about what judges may or may not do as unelected agents of governance. The book . . . goes much beyond such reductionist pedestrianisation of law, for it courageously lifts the debate into the skies of global legal realism. The analysis perceptively addresses bottlenecks of justice, identifying shackles and mental blocks in our own minds against activising concerns for justice for the common citizen.” —Prof Werner Menski (Foreword)

This book looks at how the legal provisions of the European Convention on Human Rights emerged into a vast body of European human rights law. It presents a creative and thorough analysis of the case law of the European Court of Human Rights and shows how the Court manages to bring and hold together judges coming from a great number of diverse legal and cultural traditions. The analysis of key issues - such as creativity, binding force of precedence, and interpretation - illustrate the complexity of

the case-by-case international protection of human rights. This analysis will give both scholars and practitioners insight into a prudent and innovative construct of opinions on the Court's jurisprudence. The book is a valuable contribution to emerging European human rights law.

This book comprehensively analyses the foundations of judicial review.

This book engages in an analytical and realistic enquiry into legal interpretation and a selection of related matters including legal gaps, judicial fictions, judicial precedent, legal defeasibility, and legislation. Chapter 1 provides an outline of the central theoretical and methodological tenets of analytical realism. Chapter 2 presents a conceptual apparatus concerning the phenomenon of legal interpretation, which it subsequently applies to investigate the truth-in-legal-interpretation issue. Chapters 3 to 6 argue for a theory of legal interpretation - pragmatic realism - by outlining a theory of interpretive games, revisiting the debate between literalism and contextualism in contemporary philosophy of language, and underscoring the many shortcomings of the container-retrieval view and pragmatic formalism. In turn, Chapter 7, focusing on comparative legal theory, advocates an interpretation-sensitive theory of legal gaps, as opposed to purely normativist ones. Chapter 8 explores the connection between judicial reasoning and judicial fictions, casting light on the structure and purpose of fictional reasoning. Chapter 9 provides an analytical enquiry into judicial precedent, examining a variety of ideal-typical systems in terms of their normative or de iure relevance. Chapter

10 addresses defeasibility and legal indeterminacy. In closing, Chapter 11 highlights the central tenets of a realistic theory of legislation.

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All these titles are available in Kindle formatSally Russell has an LLB (Hons) from the University of London, and a Postgraduate Certificate in Education. She was formerly Head of Law at Sussex Downs College and a Senior Examiner with AQA. She has also written various study and teaching materials for the National Extension College and Hodder education. For more information visit www.drsr.org

Contrary to traditional theories of statutory interpretation, which ground statutes in the original legislative text or intent, legal scholar William Eskridge argues that statutory interpretation changes in response to new political alignments, new interpreters, and new ideologies. It does so, first of all, because it involves richer authoritative texts than does either common law or constitutional interpretation: statutes are often complex and have a detailed legislative history. Second, Congress can, and often does, rewrite statutes when it disagrees with their interpretations; and agencies and courts attend to current as well as historical congressional preferences when they interpret statutes. Third, since statutory interpretation is as much agency-centered as judgecentered and since agency executives see their creativity as more legitimate than judges see theirs, statutory interpretation in the modern regulatory state is particularly dynamic. Eskridge also considers how different normative theories of jurisprudence--liberal, legal process, and antiliberal--inform debates about statutory interpretation. He explores what theory of statutory interpretation--if any--is required by the rule of law or by democratic theory. Finally, he provides an analytical and jurisprudential history of important debates on

statutory interpretation.

The interpretive process in International Criminal Law (›ICL‹) is characterised by a conflict between the requirements for stability and change. On the one hand, ICL provides for the ›criminal‹ responsibility of individuals. Thus, there is an enhanced requirement for legal certainty: According to the principle of legality, the addressee of the law must be able to identify the prohibited conduct in advance in order to be able to avoid criminal sanctions. On the other hand, however, ICL forms part of ›international‹ law. Hence, it derives to some extent from international treaties. Whereas the forms of criminal conduct are continuously evolving, treaties are rather static instruments – they cannot be adapted to a changing environment within a short period of time. Thus, reality is developing at a pace that the law cannot always match. In consequence, there is a certain need to account for evolving circumstances within the framework of interpretation. The aim of this book is to review the consequences of this conflict for the interpretation of ICL. How can the conflicting requirements be brought into balance? Can substantive rules of ICL be interpreted in a ›dynamic‹ fashion to the detriment of the accused without violating the principle of legality? How do international criminal courts and tribunals deal with this issue?

In the past twenty years, international criminal law has become one of the main areas of international legal scholarship and practice. Most textbooks in the field describe the evolution of international criminal tribunals, the elements of the core international

crimes, the applicable modes of liability and defences, and the role of states in prosecuting international crimes. The Oxford Handbook of International Criminal Law, however, takes a theoretically informed and refreshingly critical look at the most controversial issues in international criminal law, challenging prevailing practices, orthodoxies, and received wisdoms. Some of the contributions to the Handbook come from scholars within the field, but many come from outside of international criminal law, or indeed from outside law itself. The chapters are grounded in history, geography, philosophy, and international relations. The result is a Handbook that expands the discipline and should fundamentally alter how international criminal law is understood. This impressive and unique collection of essays covers important aspects of the legal regime of the International Criminal Court (ICC). The volume begins with an analysis of the historical development of the ICC, the progressive development of international humanitarian and international criminal law by the ad hoc Tribunals and the work of mixed national/international jurisdictions. The legal and institutional basis of the ICC is then dealt with in detail, including the organs of the ICC, war crimes, crimes against humanity and crimes of aggression, modes of liability before the ICC and defences before the ICC. Part III focuses on the court at work, including its procedural rules, criminal proceedings at the ICC, penalties and appeal and revision procedures. Part IV deals with the relationship of the ICC with states and international organizations. The contributors are established scholars in the field of international criminal and

humanitarian law, many of whom are practitioners in the various tribunals.
The present generation lives in a time of transition. The isolated national legal order, the supreme idea of 19th Century legal science, begins to be superseded by the evolution of a wider international and transnational net work of legal rules and conceptions. With the recognition of a fundamental guarantee of human rights as a binding ingredient of the framework of inter national law, the strict separation of the internal system of the states from the international community is transcended. To this extent, the rules of international law now exercise a direct influence upon the national legal order. In some conventional arrangements safeguarding human rights, the individual is given direct access to international protection against his own state. The piercing of national borders by transnational norms finds its strongest expression in the formation of regional communities of states which seek to develop a common fund of legal rules, concepts and principles among their members. The leading role in this direction lies with European organizations. In the Community formed by the signatories of the European Convention on Human Rights, the members accept for themselves a stan dard of legal guarantees for fundamental rights of the individual laid down in the Convention. The organs of the Convention, including the Court and foremost the Commission, fulfill their tasks by measuring the national laws of the member states against the basic requirements embodied in the Euro pean Convention.