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Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared

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Abstract

This chapter examines the relationship between the methods that the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) use to decide disputes that involve 'human' or 'fundamental' rights claims, and the substantive outcomes that result from the use of these particular methods. It has a limited aim: in attempting to understand the interrelationship between human rights methodology and human rights outcomes, it considers primarily the use of 'comparative reasoning' in 'human' and 'fundamental' rights claims by these courts. It is not primarily concerned with examining the extent to which the use of comparative reasoning is based on an appropriate methodology or whether there is a persuasive normative theory underpinning the use of comparative reasoning. The issues considered in this chapter do some of the groundwork, however, that is necessary in order to address these methodological and normative questions.

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I. CONCEPTS AND PRINCIPLES

A. Use of Comparative Reasoning

IN AN ARTICLE published in the *Oxford Journal of Legal Studies* in 2000,[1] I argued that it was then commonplace in several jurisdictions for judges to refer to the decisions of the courts of foreign jurisdictions when interpreting domestic human rights guarantees, but that there had also been a persistent undercurrent of scepticism about this trend and the emergence of a growing debate about its appropriateness. Since then, the phenomenon of judicial borrowing has continued apace and the use by Justices of the US Supreme Court of foreign jurisprudence in several high-profile cases has further intensified the debate (particularly in the US).[2]

We now have a lot more information about the global use of comparisons in the human and constitutional rights context than was available at the end of the last century.[3] This is particularly true in the case of both European courts. There is now a very significant number of scholarly studies of the use of comparative reasoning by the ECtHR[4] and the CJEU,[5] in the latter

[1] C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) *OJLS* 499.

[2] See generally J Waldron, *'Partly Laws Common to All Mankind': Foreign Law in American Courts* (New Haven, Yale University Press, 2012) for an account of the practice and discussion of the controversy in the US.

[3] See, eg, T Groppi and M-C Ponthoreau, *The Use of Foreign Precedents by Constitutional Court Judges* (Oxford, Hart Publishing, 2013).

[4] See, eg, P Mahoney, 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law' in G Canivet, M Andenas and D Fairgrieve (eds), *Comparative Law before the Courts* (London, British Institute of International and Comparative Law, 2004) 135; R Bernhardt, 'Comparative Law in the Interpretation and Application of the European Convention on Human Rights' in S Busuttil (ed), *Mainly Human Rights: Studies in Honour of JJ Cremona* (Valetta, Fondation Internationale Malte, 1999) 33; K Dzehtsiarou and V Lukashevich, 'Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court' (2012) 30(3) *Netherlands Quarterly of Human Rights* 272; M Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law' (2009) 2(3) *Erasmus Law Review* 353; PG Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights' (1997–98) 73 *Notre Dame Law Review* 1217.

[5] See, eg, C Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?' (2003) 38 *Texas International Law Journal* 505; P Herzog, 'United States Supreme Court Cases in the Court of Justice of the European Communities' (1997–98) 21 *Hastings International and Comparative Law Review* 903; K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *ICLQ* 873; MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) *European Journal of Legal Studies*; CN Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities' (1994) 6 *Pace International Law Review* 267; M Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities' in A de Mestral et al (eds), *La Limitation des Droits de L'Homme en Droit Constitutionnel Compare* (Quebec, Les Editions Yvon Blais Inc, 1986); BB Wasenstriner, 'Common Tradition of All Member States: The Courts Method of Defining the EU Human Rights Standards' in T Gries and R Alleweldt (eds), *Human Rights within the European Union* (Berlin, BWV, 2004) 27; N Colneric, 'Die Rolle der Rechtsvergleichung in der Praxis des EuGH' in T Gries and R Alleweldt (eds), *Human Rights within the European Union* (Berlin, BWV, 2004) 316. When this article was in proof, Gráinne de

case concentrating particularly on the practice of the Advocates General.[6] Sometimes these studies examine the respective court alone and sometimes the studies compare the approaches taken by both courts.[7] The use of such sources remains controversial.[8]

B. Internal versus External Sources

Two sets of critical distinctions emerge from this scholarship. The first is between comparative materials drawn on by the courts that derive from 'internal' sources and those that derive from 'external' sources.[9]

Internal sources are those that relate to those jurisdictions to which the relevant court has direct relevance and those jurisdictions that are considered part of the same legal system. For the ECtHR, this would include the 47 countries that are parties to the European Convention on Human Rights (ECHR). For the CJEU, this would include the 28 countries that are members of the EU. When the ECtHR draws on the legal practices of some or all of the 47 in order to determine whether there is a 'consensus' for the purpose of deciding what margin of appreciation to accord, it uses 'internal' sources.[10] So too, when the CJEU draws on the constitutional practice of some or all of the 28 to identify a constitutional tradition 'common' to the Member States for the purpose of deciding whether a fundamental right exists in EU law.[11] In contrast, external sources are those that do not relate to those jurisdictions to which the respective courts have direct relevance

Búrca drew my attention to the article, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168.

[6] LF Peoples, 'The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities' (2007–08) 35 *Syracuse Journal of International Law and Commerce* 219; LF Peoples, 'The Influence of Foreign Law Cited in the Opinions of Advocates General on Community Law' (2009) 28 *Yearbook of European Law* 458.

[7] H Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Cambridge, Intersentia, 2011), ch 6, 'Comparative Interpretation'; S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*' (2006) 43 *CML Rev* 629; FG Jacobs, 'Between Luxembourg and Strasbourg: Dialogue between the European Court of Human Rights and the European Court of Justice' in A Epiney, M Haag and A Heinemann (eds), *Challenging Boundaries: Essays in Honour of Roland Bieber* (Baden-Baden, Nomos und Dike, 2007) 205.

[8] See, eg, S Robin-Olivier, 'European Legal Method from a French Perspective. The Magic of Combinations: Uses and Abuses of the Globalisation of Sources by European Courts' in U Neergaard, R Nielsen and L Roseberry (eds), *European Legal Method: Paradoxes and Revitalisation* (Copenhagen, DJØF Publishing, 2011); K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] *Public Law* 534.

[9] See, eg, Maduro (n 4), who distinguishes between 'external' and 'internal' pluralism. See also Senden (n 7) 115.

[10] Dzehtsiarou (n 8) 549.

[11] Case 4/73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491 [13].

or those jurisdictions that are not considered part of the same legal system. Examples are when the ECtHR identifies sources from the US, or Namibia, or Mauritius (to take only some recent examples) as relevant for the interpretation of a particular provision of the ECHR,[12] or where the CJEU's Advocates General identify sources from the US, or Canada, or Israel, or South Africa as relevant for the interpretation of a particular provision of one of the EU treaties or directives.[13]

C. International versus Domestic Sources

The second critical distinction is between materials drawn on by the courts that derive from 'international' sources and those that derive from 'domestic' sources. This is not the same distinction as that between 'internal' and 'external sources'. International sources are those that derive from both 'hard' law sources, such as international treaties, and 'soft' law sources, such as resolutions of international organisations, recommendations from human rights bodies established by regional organisations, and decisions by other regional or international courts and adjudicatory bodies. So, when the ECtHR or judges in separate opinions refer to decisions of the International Court of Justice[14] or the Inter-American Court of Human Rights,[15] recommendations by the Venice Commission[16] or interpretations

[12] A few examples must suffice: in *Vinter and others v UK* App Nos 66069/09 and 130/10 and 3896/10 (ECtHR, 9 July 2013) [73]–[75], the Court referred to cases from the Canadian Supreme Court, the South African Constitutional Court, the United States Supreme Court, the Judicial Committee of the Privy Council, the Supreme Court of Mauritius, the Namibian Supreme Court and the Hong Kong Court of Final Appeal. In *Hirst v UK (No 2)* App No 74025/01 (ECtHR, 6 October 2005) (2006) 42 EHRR 41 [35]–[39], the Grand Chamber referred to cases from Canada and South Africa, while in *Othman (Abu Qatada) v UK* App No 8139/09 (ECtHR, 17 January 2012) (2012) 55 EHRR 1, the Court referred to Canadian cases at [152]–[154].

[13] Case C-415/05 P *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, Opinion of AG Maduro [34] (US) and [45] (Israel).

[14] In *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001) (2002) 35 EHRR 30, the ECtHR relied on the ICJ's Advisory Opinion on Namibia (1971) ICJ Reports 16.

[15] In *Mamatkulov and Askarov v Turkey* App Nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) (2005) 41 EHRR 25 [46]–[53], the Grand Chamber referred to the case law of the ICJ and the Inter-American Court of Human Rights. See also *Research Division, European Court of Human Rights, Research Report: References to the Inter-American Court of Human Rights in the Case-law of the European Court of Human Rights* (Council of Europe, 2012), which describes a survey of references in any part of the Court's judgments (facts and law), including separate opinions of judges, identifying a total of 25 cases.

[16] *Russian Conservative Party of Entrepreneurs and others v Russia* App Nos 55066/00 and 55638/00 (ECtHR, 11 January 2007) (2008) 46 EHRR 39 [70]–[73]; *Parti Nationaliste Basque—Organisation Regionale d'Iparralde v France* App No 71251/01 (ECtHR, 7 June 2007) (2008) 47 EHRR 47 [45]–[52]; *Çiloğlu and Others v Turkey* App No 73333/01 (ECtHR, 6 March 2007) [17].

by the United Nations Human Rights Committee,[17] these are references to 'international' sources.[18] Contrast this with references by the ECtHR or the CJEU to decisions of the UK Supreme Court,[19] the Canadian Supreme Court, the German *Bundesverfassungsgericht* or the Italian Constitutional Court,[20] which involve 'domestic' sources, in the sense of judicial decisions of courts that are central to the legal systems of states rather than of international organisations.

We can see by combining these two sets of distinctions that any particular source used by the ECtHR or the CJEU may fit into one of four categories: internal/domestic (eg, the UK Supreme Court); internal/international (the ECHR for the ECtHR and vice versa); external/international (the UN Convention on the Rights of the Child); and external/domestic (eg, the US Supreme Court).[21] However, these categories are neither clear-cut nor stable. So, for example, until the ECHR was formally recognised by the Maastricht Treaty as directly relevant for the purpose of deriving EU fundamental rights in 1992,[22] we might think of the use by the CJEU of the ECHR for this purpose as a reference to an 'external/international' source, but since 1992 and certainly once the EU formally adheres to the ECHR,[23] this source has effectively become 'internal/international'.

[17] *Kurt v Turkey* App No 24276/94 (ECtHR, 25 May 1998) (1999) 27 EHRR 373 [65]; *Frette v France* App No 36515/97 (ECtHR, 26 February 2002) (2004) 38 EHRR 21 (joint partly dissenting Opinion of Judges Bratza, Fuhrmann and Tulkens, note 54); *Py v France* App No 66289/01 (ECtHR, 6 June 2005) (2006) 42 EHRR 26 [63]; *Issa v Turkey* App No 31821/96 (ECtHR, 16 November 2004) (2005) 41 EHRR 27 [71]; *Mamatkulov and Askarov v Turkey* App Nos 46827/99 and 46951/99 (ECtHR, 4 February 2005) (2005) 41 EHRR 25 [40]; *Öcalan v Turkey* App No 46221/99 (ECtHR, 12 May 2005) (2005) 41 EHRR 45 [60]; *Riener v Bulgaria* App No 46343/99 (ECtHR, 23 May 2006) (2007) 45 EHRR 32 [84]–[85]; *Saadi v UK* App No 13229/03 (ECtHR, 29 January 2008) (2008) 47 EHRR 17 [31]. See generally M Andenas and D Fairgrieve, '"There is a World Elsewhere"—Lord Bingham and Comparative Law' in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford, Oxford University Press, 2011).

[18] See also European Court of Human Rights, Press Unit, 'Factsheet: Use of International Conventions by the European Court of Human Rights', November 2012.

[19] Case C-396/11 *Ministerul Public—Parchetul de pe lângă Curtea de Apel Constanţa v Ciprian Vasile Radu* [2013] All ER (EC) 410, Opinion of AG Sharpston, 18 October 2012, at note 55; *Demir and Baykara v Turkey* App No 34503/97 (ECtHR, 12 November 2008) (2009) 48 EHRR 54 [73].

[20] *Vinter and others v UK* (n 12) [69]–[71] (BVerfGE), [73] (Supreme Court of Canada) and [72] (Italian Constitutional Court).

[21] The external/international and the external/domestic are closely related to the distinction between semi-horizontal and vertical developed in A Rosas, 'With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts' (2005) 5(1) *The Global Community: Yearbook of International Law & Jurisprudence* 203, 205.

[22] Article 6(2) of the Treaty Establishing the European Union (the Maastricht Treaty).

[23] Under EU law, the Lisbon Treaty (art 6(2) TEU) provides that the EU shall accede to the ECHR. Under ECHR law, Protocol No 14 ECHR provides the legal basis for the possibility of EU accession to the Convention. A draft accession agreement was concluded on 5 April 2013 and is available at: www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf.

II. CROSS-POLLINATION BETWEEN THE ECTHR AND THE CJEU

The scholarly studies of the use of comparative reasoning by these courts are also remarkably consistent in demonstrating that, in all but one respect, the pattern of use by both courts of these different sources is relatively similar. The most dramatic development has been the extent to which both the ECtHR and the CJEU have now become, after lengthy periods of initial distance and suspicion,[24] extraordinarily comfortable in their use of each other's case law.[25]

A. The ECtHR's Use of CJEU Case Law

A good example is provided in *DH v Czech Republic*,[26] in which the ECtHR drew heavily on CJEU case law in order to establish firmly for the first time the idea of 'indirect discrimination' as one dimension of Article 14 ECHR. After an elaborate and extensive discussion of the CJEU's jurisprudence on indirect discrimination,[27] the Court drew explicitly on that case law in order to address the question whether a presumption of indirect discrimination arose in the case before it: 'The recent case-law of the Court of Justice of the European Communities … shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant.'[28] The Court did not rely solely on this source, noting also 'the information furnished by the third-party interveners' that 'the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims' task of adducing prima facie evidence', but the CJEU jurisprudence was clearly a particularly influential source.

[24] Douglas-Scott (n 7).

[25] S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) *Human Rights Law Review* 645, 657 (on the ECtHR's citation of the CJEU); Douglas-Scott (n 7) 644 (on the CJEU's citation of the ECtHR).

[26] *DH v Czech Republic* App No 57325/00 (ECtHR, 13 November 2007) (2008) 47 EHRR 3.

[27] The Court discussed the following cases: Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607; Case C-167/97 *R v Secretary of State for Employment ex parte Seymour-Smith* [1999] ECR I-623; Case C-256/01 *Allonby v Accrington & Rossendale College* [2004] ECR I-873; Case C-147/03 *Commission of the European Communities v Austria* [2005] ECR I-5969.

[28] *DH v Czech Republic* (n 26) [187].

B. The CJEU's Use of ECtHR Case Law

A good example of the reverse flow of usage can be found in the Opinion of Advocate General Kokott in *Solvay SA v European Commission*,[29] which concerned the scope under EU law of the right to have a matter adjudicated upon within a reasonable time. Earlier CJEU case law had held that this constituted a fundamental right in EU law in the case of both administrative proceedings before the Commission and judicial proceedings before the EU courts, and it is now to be found in Article 41(1) and the second paragraph of Article 47 of the Charter of Fundamental Rights. Solvay, a company, claimed that there had been an infringement of this right in competition proceedings. The issue in *Solvay* concerned the continued validity of previous consistent case law of the CJEU that a Commission decision may be annulled on account of excessively long proceedings only where it is established that the undue delay has adversely affected the ability of the undertakings concerned to defend themselves. Solvay argued that this approach was outdated and asked the CJEU to reconsider it in the light of the binding force of the Charter of Fundamental Rights following the entry into force of the Lisbon Treaty.

The Advocate General agreed that Article 52(3) of the Charter's homogeneity clause (to the effect that fundamental rights contained in the Charter which correspond to rights guaranteed by the ECHR (in this case Article 6(1) ECHR) are to have the same meaning and scope as those laid down by the ECHR) meant that the ECtHR's jurisprudence was particularly important. The Advocate General considered, however, after an extensive examination of the ECtHR case law, that Article 6(1) of the ECHR as currently interpreted by the ECtHR did not require that a decision imposing a fine in antitrust proceedings must be annulled and the administrative procedure discontinued on the sole ground of a failure to adjudicate within a reasonable time. The ECHR generally allowed its Contracting States a certain margin of discretion with respect to the ways and means of eliminating any infringements of fundamental rights. The case law of the ECtHR relating to Article 6(1) of the ECHR also showed that the annulment of all penalties under criminal law and the discontinuance of the criminal proceedings concerned represented only one possible means of redress within the meaning of Article 41 ECHR for infringement of a fundamental right through the excessive length of the proceedings. Drawing on decisions of the ECtHR and on studies by the Venice Commission, the Advocate General noted the diversity of approaches adopted in national law, concluding that there

[29] Case C-109/10 P *Solvay SA v European Commission* [2012] 4 CMLR 1. The CJEU did not adopt the conclusions of the Advocate General.

'is no question in that case-law of there being any *obligation* on the part of the national authorities to annul penalties and discontinue proceedings'.[30] The requirement of homogeneity 'does not necessarily oblige the EU Courts, in the context of European competition law, to deal with an infringement of the fundamental right to have a matter adjudicated upon within a reasonable time by annulling the contested decision'.[31]

C. Methodological Congruence in Cross-pollination

Such cross-pollination, perhaps encouraged by the joint dialogue sessions that take place regularly between the two courts,[32] is now so common that the participants in the respective systems now seldom problematise the practice. Considerable efforts have been made for some years to harmonise the case law,[33] even to the extent of the CJEU reversing previously held positions in light of subsequent ECtHR jurisprudence.[34] This congruence has been strengthened by the EU's Charter of Fundamental Rights, which the CJEU has applied more frequently since it became binding as a result of the Lisbon Treaty.[35] Article 52(3) states that, to the extent that rights in the Charter are adopted from the ECHR, they are to be given the same meaning and content as they have in the ECHR, and although this does not refer to the ECtHR's case law,[36] the CJEU has held that in doing so, the Court should follow the clear and consistent jurisprudence of the ECtHR.[37]

That is not to say that the respective case law of the 'other' court is simply accepted uncritically; it is not in either case.[38] There are also differences

[30] Ibid, AG's Opinion [255].

[31] Ibid [257].

[32] Eg, a delegation from the CJEU, headed by its President, Vassilios Skouris, paid a working visit to the ECtHR on 3 October 2011.

[33] Douglas-Scott (n 7) 657 is hesitant to term it 'harmonization', preferring 'parallel development'.

[34] In Case C-94/00 *Roquette Frères* [2002] ECR I-9011 [29], the ECJ reversed its position, following ECtHR decisions that had rejected the approach adopted in Cases 46/87 and 222/98 *Hoechst* [1989] ECR 2859 [18].

[35] Joint Communication from Presidents Costa and Skouris [2007] OJ C303/17.

[36] Although the Explanations to the Charter, and its Preamble, do refer to the case law of the ECtHR.

[37] Case C-400/10 PPU *McB v E* [2011] 3 WLR 699 [53].

[38] For a striking example, see *Radu* (n 19) Opinion of AG Sharpston [82], in which the Advocate General recommended that EU protections should exceed those established by the ECtHR regarding extradition. There are also, for example, significant substantive differences between the courts in the areas of sex discrimination (see SD Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and Some Case Law of the EU and the ECHR' (2013) 9(1) *Utrecht Law Review* 80) and the right to strike (see A Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR' (2013) 9(1) *Utrecht Law Review* 104).

at the margins in the use to which the comparative methods are put.[39] Whatever the differences, however, the two courts appear to treat each other as, effectively, 'internal', irrespective of the formal position. In that sense, we see a (largely) judicially led change in the 'rule of recognition' or *Grundnorm* of both systems,[40] one which the Lisbon Treaty is formalising. So, the CJEU and the ECtHR are remarkably similar in the ways in which their respective 'internal/domestic' sources are used in determining whether a 'consensus' has emerged (ECtHR) or a 'common constitutional tradition' is present (CJEU). That is not to say that the use of these comparative materials is unproblematic or that it has not been subject to extensive criticism;[41] it is only to say that the pattern of use by the two courts is relatively similar.

The similarity in the methods that the courts use to produce the material on which to construct the comparative analysis is also quite striking. In their early days, both courts often relied on individual judges' own knowledge or information supplied by one of the parties.[42] Each of these methods of gaining comparative research continues to be important, but, in addition, the ECtHR has recently[43] introduced a significantly enhanced research function (the CJEU has had a Research and Documentation service for many years), so that both courts now have research sections within their court whose task it is to produce the relevant material on which the comparative assessment can be made.[44] With that change in the working methods of the

[39] For the use of the comparative method in determining the 'margin of appreciation' in the ECtHR, see A Stone Sweet and TL Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO', draft of 6 August 2012, at 27, available on SSRN. The 'margin of appreciation' has no exact equivalent in the CJEU, which accords a less prominent role to any such 'margin'; see J-P Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 *European Constitutional Law Review* 173, 180.

[40] *Cf* Case C-84/95 *Bosphorus v Minister of Transport, Ireland* [1996] ECR I-3953, Opinion of AG Jacobs [53]: 'for practical purposes the Convention can be regarded as part of Community law'.

[41] For a relatively rare example of judicial criticism, see the dissenting opinion of Judge Borrego Borrego in *DH v Czech Republic* (n 26) [5], in which he notes, impliedly in a critical way, the extensive nature of the materials the Court drew on, including '"other sources" (three pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court)'. See Dzehtsiarou (n 8) on academic criticism that the method of determining whether a European consensus exists was ad hoc, inconsistent and unsystematic; see also Ambrus (n 4) 354: 'The comparative law method applied by the ECtHR has invited severe criticism. It has been argued, inter alia, that in the case law of the Court the comparison is carried out randomly, that it is superficial and that it is interpreted arbitrarily.'

[42] Above, nn 4 and 5.

[43] As recently as 2004, Paul Mahoney, the then Deputy Registrar of the ECtHR, observed that: 'On the most basic level, the Registry of the Court simply does not have—or, does rather, not yet have—the resources to staff a proper research unit or to provide adequate library facilities with comparative materials': Mahoney (n 4) 148.

[44] European Court of Human Rights, *Annual Report 2012* (Registry of the European Court of Human Rights, 2013) para 3.2: 'The Research Division is attached to the Jurisconsult's Office and its principal task is to provide research reports to assist the Grand Chamber and

ECtHR, there are relatively few significant differences in the way in which comparative material is generated. In particular, both courts are in similar positions of being able to access with extraordinary ease the wide range of foreign materials, via the internet, that previously would have been inaccessible or accessible only with a significant expenditure of resources.

III. USE OF EXTERNAL/DOMESTIC SOURCES

All that said, this high degree of similarity in the use and production of 'internal' materials (with 'internal' now expanded to include each other) does not carry through to the use of 'external' sources, whether external/domestic or external/international. In particular, the use of 'external/domestic' sources differs markedly between the two courts, and it is this difference that I shall focus on initially. The ECtHR increasingly embraces the use of such sources, whilst the CJEU largely ignores them.

A. The ECtHR's Use of External/Domestic Sources

The ECtHR's use of these external/domestic sources is prominently on display in some of the most significant, and controversial, cases.

i. Right to Vote

In *Hirst v UK (No 2)*,[45] the Grand Chamber was asked to consider whether prisoners had a right to vote under the ECHR. The Court's assessment of the relevant external domestic case law was detailed, sustained and engaged. It considered cases from Canada,[46] in particular the 1992 decision of the Canadian Supreme Court in *Sauvé v Canada (No 1)*,[47] in which the Supreme Court unanimously struck down a legislative provision barring all prisoners from voting, and a later decision by the same court (by five votes to four) striking down a subsequent ban on prisoners serving a sentence of two years or more, in *Sauvé v Attorney General of Canada (No 2)*.[48] Detailed consideration was given, over several paragraphs, to the majority opinion by McLachlin CJ and the minority opinion of Gonthier J. The Grand Chamber

Sections in the examination of pending cases.' On the ECtHR, see further Dzehtsiarou and Lukashevich (n 4) 295. On the CJEU, see Lenaerts (n 4) 875; and P Singer and J-C Engel, 'L'importance de la recherché comparative pour la justice communautaire' (2007) 134(2) *Journal du Droit International* 497.

[45] *Hirst v UK (No 2)* (n 12).
[46] Ibid [35].
[47] *Sauvé v Canada (No 1)* [1993] 2 SCR 438.
[48] *Sauvé v Attorney General of Canada (No 2)* [2002] 3 SCR 519.

also considered, in detail, the 1999 decision of the Constitutional Court of South Africa in *August and another v Electoral Commission and others*,[49] in which the Court concluded that the Electoral Commission was under an obligation to make reasonable arrangements for prisoners to vote. The British government sought to distinguish these cases on several grounds: the Canadian precedent, *Sauvé (No 2)*, was decided by a narrow majority of five votes to four; it concerned a law which was different in text and structure from the Convention right; the interpretation relied on was one reached by domestic courts to which the doctrine of the margin of appreciation did not apply; and there was a strong dissent which was more in accordance with the jurisprudence of the ECtHR. The South African case (*August and another*) was not relevant as it concerned practical obstacles to voting, not a statutory prohibition.

The Grand Chamber held that a blanket deprivation of all convicted prisoners from voting breached the ECHR 'even if no common European approach to the problem can be discerned', since 'this cannot in itself be determinative of the issue'.[50] In giving such a prominent place to the Canadian and South African cases, the implication was clear: that the approach taken by these courts should be given weight. That, at least, appears to be the conclusion drawn by a powerful group of dissenting judges,[51] who appeared to criticise the Court's approach. Whilst accepting that 'an "evolutive" or "dynamic" interpretation' was a legitimate interpretative approach to adopt, this 'should have a sufficient basis in changing conditions in the societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case'.[52] The dissenting opinion notes, somewhat caustically perhaps, that the 'judgment of the Grand Chamber—which refers in detail to two recent judgments of the Canadian Supreme Court and the Constitutional Court of South Africa—unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States', a deficiency that the dissenting opinion then sought to redress, concluding that:

> [T]he legislation *in Europe* shows that there is little consensus about whether or not prisoners should have the right to vote. In fact, the majority of Member States know such restrictions, although some have blanket and some limited restrictions. Thus, the legislation in the United Kingdom cannot be claimed to be in disharmony with a common *European* standard.[53]

[49] *August and another v Electoral Commission and others* (CCT8/99) 1999 (3) SA 1.
[50] *Hirst v UK (No 2)* (n 12) [81].
[51] Joint dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens.
[52] *Hirst v UK (No 2)* (n 12) [6].
[53] Ibid, emphasis added.

ii. Extradition of Alleged Terrorists

In *Othman (Abu Qatada) v UK*,[54] the ECtHR was asked to consider the compatibility of arrangements for extradition from the UK of an alleged terrorist to stand trial in a third country, in which it was alleged that evidence obtained by torture would be used. The applicant complained that he would be at real risk of being subjected to torture or ill-treatment if deported to Jordan, contrary to the prohibition on torture in Article 3 ECHR. The British government argued that assurances negotiated with Jordan were sufficient to ensure that he would not be tortured and that the extradition should proceed. Under Article 6 ECHR, the applicant further complained that he would be at real risk of a flagrant denial of justice if he were to be retried in Jordan for either of the offences for which he had been convicted *in absentia*, because evidence obtained by torture of third persons would be admitted at the applicant's retrial. The Court was therefore required to decide whether the use at trial of evidence obtained from a third party by torture would amount to a flagrant denial of justice. The Court considered that it would. As a result, a principal issue was the standard of proof required of the applicant: should the standard required of the applicant consist of having to demonstrate that there was a real risk of the admission of torture evidence, or was a higher standard of proof required of the applicant?

The Court first considered comparative and international decisions on torture and the use of evidence obtained by torture, in particular the case law and reports of the United Nations Committee Against Torture (UNCAT) interpreting the UN Convention Against Torture, and related domestic interpretations of the ECHR by the French Cour d'appel de Pau, the Düsseldorf Court of Appeal (*Oberlandesgericht*), the Cologne Administrative Court (*Verwaltungsgericht*) and the Hamburg Court of Appeal Criminal Division (*Oberlandesgericht*). Subsequently, however, the Court analysed the decisions of the British courts and of the British Columbia Supreme Court in *India v Singh*.[55] A wide range of international sources were considered, including materials from the UN High Commissioner for Human Rights, the Council of Europe Commissioner for Human Rights, and Human Rights Watch. Complaints before other international human rights institutions were considered, including complaints before the UN Human Rights Committee.

The UK government particularly relied on the domestic cases on the issue of the standard of proof required of the applicant. It accepted that the admission of evidence obtained by torture of the defendant would render

[54] *Othman (Abu Qatada) v UK* (n 12).
[55] *India v Singh* (1996) 108 CCC (3d) 274.

that defendant's trial unfair. However, it submitted that a real risk that the evidence had been obtained by torture or other ill-treatment did not suffice. Instead, a flagrant denial of justice could not arise unless it was established on a balance of probabilities or beyond reasonable doubt that evidence had been obtained by torture. This standard of proof was consistent with the standard applied by the Court in 'domestic' Article 3 and Article 6 cases, and with the foreign domestic case law, including the German and Canadian case law.

The Court disagreed, holding that 'even accepting that there is still only a real risk that the evidence against the applicant was obtained by torture … the Court considers it would be unfair to impose any higher burden of proof on him'.[56] In particular, it considered in some detail whether the German and Canadian cases supported the government's position, concluding that 'the Court does not consider that the Canadian and German case-law, which has been submitted by the Government … provides any support for their position'.[57] It held, unanimously, that the applicant's deportation to Jordan would be in violation of Article 6 ECHR 'on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons'.[58]

iii. Assisted Suicide

In *Pretty v UK*,[59] the applicant, who was paralysed and suffering from a degenerative and incurable illness, alleged that the refusal of the Director of Public Prosecutions to grant an immunity from prosecution to her husband if he assisted her in committing suicide, and the prohibition in domestic law on assisting suicide, infringed her rights under Articles 2, 3, 8, 9 and 14 ECHR. The case had been extensively litigated in the UK domestic courts and had led to a decision of the House of Lords rejecting her claim. In the course of Lord Bingham's leading judgment, there was extensive discussion of the judgments of the Supreme Court of Canada in *Rodriguez v Attorney General of Canada*,[60] which the applicants heavily relied on and which Lord Bingham described as the 'most detailed and erudite discussion known to me of the issues'. Nevertheless, he distinguished the case, based on the Canadian Charter, as insufficiently close to the provisions of the ECHR and therefore as not in point.

When the case came before the ECtHR, the Canadian case was again argued by the applicants to be highly relevant. The Court had to decide,

[56] *Othman (Abu Qatada) v UK* (n 12) [273].
[57] Ibid [275].
[58] Ibid [291].
[59] *Pretty v UK* App No 2346/02 (ECtHR, 29 April 2002) (2002) 35 EHRR 1.
[60] *Rodriguez v Attorney General of Canada* [1994] 2 LRC 136.

first, whether Ms Pretty's claim was capable of constituting an interference with her Article 8 right before deciding the limits to Article 8. Unlike the House of Lords, the Court considered that the Canadian Supreme Court's decision was indeed relevant:

> In *Rodriguez v the Attorney General of Canada* … which concerned a not dissimilar situation to the present, the majority opinion of the Supreme Court considered that the prohibition on the appellant in that case receiving assistance in suicide contributed to her distress and prevented her from managing her death. This deprived her of autonomy and required justification under principles of fundamental justice. Although the Canadian court was considering a provision of the Canadian Charter framed in different terms from those of Article 8 of the Convention, comparable concerns arose regarding the principle of personal autonomy in the sense of the right to make choices about one's own body.[61]

Immediately following this, the Court held that the applicant in this case:

> [I]s prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention.[62]

As regards the limits on Article 8 set out in Article 8(2), the Court also drew on the *Rodriguez* case:

> [T]he Court finds, in agreement with the House of Lords and the majority of the Canadian Supreme Court in *Rodriguez*, that States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals.[63]

iv. Freedom of Expression and Assembly

In *Appleby v UK*,[64] the applicants alleged that they had been prevented from meeting in the town centre, a privately owned shopping centre, to impart information and ideas about proposed local development plans, contrary to Articles 10, 11 and 13 ECHR. They submitted that the state was directly responsible for the interference with their freedom of expression and assembly as the shopping centre had been built by a public entity on public land. The state owed a positive obligation to secure the exercise of their rights within the shopping centre. They referred to freedom of expression case law

[61] *Pretty v UK* (n 59) [66].
[62] Ibid [67].
[63] Ibid [74].
[64] *Appleby v UK* App No 44306/98 (ECtHR, 6 May 2003) (2003) 37 EHRR 38.

from other jurisdictions (in particular the US[65] and Canada[66]) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed in the context of shopping malls, which gave an indication of how the state could approach any perceived problems. In particular, the applicants argued that the shopping centre must be regarded as a 'quasi-public' space in which individuals can claim the right to exercise freedom of expression in a reasonable manner. The government argued that the cases from the US and Canada referred to by the applicants were not relevant 'as they dealt with different legal provisions and different factual situations and, in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land'.[67]

The Court appears to have taken the US case law seriously, devoting several paragraphs to considering its implications. After assessing the cases, it observed that:

> [A]lthough the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall.

As regards the cases from the individual states, the Court concluded that they 'show a variety of approaches to the public- and private-law issues that have arisen in widely differing factual situations'. It concluded that it 'cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Article 10 of the Convention'.[68]

v. Legal Recognition of Transsexuals

In *Goodwin v UK*,[69] however, the Court did find an emerging consensus based, partly, on comparative foreign domestic materials in relation to the legal recognition of transsexuals. In an extensive intervention by Liberty, the British non-governmental human rights organisation, information from outside Europe purported to demonstrate a significant trend in states giving

[65] The US cases referred to comprised both federal cases and state courts. The main federal cases were: *Hague v Committee for Industrial Organisation* 307 US 496 (1939); *Marsh v Alabama* 326 US 501 (1946); *Hudgens v NLRB* 424 US 507 (1976); *Lloyd Corp v Tanner* 47 US 551 (1972); *Pruneyard Shopping Center v Robbins* 447 US 74 (1980).

[66] *Harrison v Carswell* 62 DLR 3d 68 (1975); *R v Layton* 38 CCC 3d 550 (1986) (Provincial Court, Judicial District of York, Ontario); *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139.

[67] *Appleby v UK* (n 64) [38].

[68] Ibid [46]. It is noteworthy that when an equivalent approach to foreign case law is not adopted by the Court, some dissenting opinions consider it important to fill the vacuum; see *Mouvement Raëlien Suisse v Switzerland* App No 16354/06 (ECtHR, 13 July 2012) (2013) 56 EHRR 14, joint dissenting Opinion of Judges Sajó, Lazarova Trajkovska and Vucinic, Appendix.

[69] *Goodwin v UK* App No 28957/95 (ECtHR, 11 July 2002) (2002) 35 EHRR 18.

full legal recognition to gender re-assignment. For example, 'there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America'.[70] Liberty cited, in particular, the cases of *Attorney General v Otahuhu Family Court*[71] and *Re Kevin*,[72] 'where in New Zealand and Australia transsexual persons' assigned sex was recognised for the purposes of validating their marriages'.[73] The government, however, 'maintained that there was no generally accepted approach among the Contracting States in respect of transsexuality'.[74]

In a highly significant if controversial discussion, the Court relied on the Liberty survey, finding that it 'shows a continuing international trend towards legal recognition'.[75] It also noted how in Australia and New Zealand:

> [I]t appears that the courts are moving away from the biological birth view of sex … and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.[76]

The Court accepted that 'a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection' was still lacking, but considered that 'the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising'.[77] But it distinguished this absence of consensus on how to deal with the repercussions from the importance of the worldwide trend:

> The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.[78]

[70] Ibid [56].
[71] *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 60.
[72] *Re Kevin* [2001] FamCA 1074.
[73] *Goodwin v UK* (n 69) [56].
[74] Ibid [64].
[75] Ibid [84].
[76] Ibid.
[77] Ibid [85].
[78] Ibid. In *Schalk and Kopf v Austria* App No 30141/04 (ECtHR, 24 June 2010) (2011) 53 EHRR 20, on the other hand, the Court did not consider that judgments from the Constitutional Court of South Africa, the Courts of Appeal of Ontario and British Columbia in Canada, and the Supreme Courts of California, Connecticut, Iowa and Massachusetts in the US, which had found that denying same-sex couples access to civil marriage was discriminatory, outweighed the fact that (at [58]): 'there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage'.

vi. Life Sentences

In *Vinter v UK*,[79] the issue was the compatibility of life sentences without parole, so-called 'irreducible' life sentences. The applicants argued that since the abolition of the death penalty, a 'whole life' order was 'the only sentence which permanently excluded a prisoner from society and ran counter to the principle of reintegration which was predominant in European penal policy'.[80] There was a 'European consensus against the imposition of such sentences', as shown by judgments of the Italian[81] and German Constitutional Courts,[82] 'and the views expressed by Supreme Court and Constitutional Courts around the world'.[83] Against this, the government argued that there 'was a lack of consensus amongst the Contracting States in respect of life sentences, as shown, for instance, by the non-mandatory language of Article 5(2) of the Framework Decision of the Council on the European arrest warrant'.[84] There was extensive material provided regarding comparative judicial decisions on the compatibility of particular sentencing regimes with domestic constitutional requirements in Canada,[85] South Africa,[86] the US[87] and several other (mostly Commonwealth) jurisdictions.[88] The Court appears to have been particularly influenced by the comparative and international materials placed before it. It considered that the comparative and international law materials before it 'show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter'.[89] Where domestic law 'does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention'.[90]

[79] *Vinter and others v UK* (n 12).
[80] Ibid [99].
[81] Judgment of 27 June 1974 (204/1974); Judgment of 7 November 1974 (264/1974); Judgment of 21 September 1983 (274/1983); Judgment of 24 June 1997 (161/1997).
[82] *Life Imprisonment* case of 21 June 1977, 45 BVerfGE 187; *War Criminal* case 72 BVerfGE 105 (1986); Decision of 16 January 2010, BVerfG, 2 BvR 2299/09.
[83] *Vinter and others v UK* (n 12) [99].
[84] Ibid [92].
[85] *R v Smith (Edward Dewey)* [1987] 1 SCR 1045; *R v Luxton* [1990] 2 SCR 711; *R v Latimer* [2001] 1 SCR 3.
[86] *Dodo v The State* (CCT 1/01) [2001] ZACC 16; *Niemand v The State* (CCT 28/00) [2001] ZACC 11.
[87] *Graham v Florida* 130 S Ct 2011 (2010).
[88] Judicial Committee of the Privy Council: *De Boucherville v The State of Mauritius* [2008] UKPC 70; Supreme Court of Mauritius: *State v Philibert* [2007] SCJ 274; Namibian Supreme Court: *State v Tcoeib* [1997] 1 LRC 90; High Court of Namibia: *State v Vries* 1997 4 LRC 1 and *State v Likuwa* [2000] 1 LRC 600; Hong Kong Court of Final Appeal: *Lau Cheong v Hong Kong Special Administrative Region* [2002] HKCFA 18.
[89] *Vinter and others v UK* (n 12) [120].
[90] Ibid [121].

vii. Common Features of These Cases

There are several different features of this use in these cases that should be noted. The use of foreign sources in these cases contributes directly to the decision in the case, in that it is part of the reasoning that the Court sets out as the basis for its decision. In some cases, it not only contributes to the reasoning but is also one of the primary reasons identified by the Court. The Court appears to use comparative materials for a variety of differing reasons, in some cases using the external materials to point to an emerging global trend, perhaps particularly when it seeks to justify a change of direction in its jurisprudence, or the reversal of a previous line of case law. In other cases, the Court appears to be influenced more by the quality of the argument that the external materials provide. Although, in the past, the Court mostly drew on a relatively small group of external/domestic sources, such as Canada and South Africa (that is, countries that are Anglophone and/or based to some extent on the common law, with the US being a relatively unpopular outlier in comparison), the external/domestic sources on which the Court now draws consists of an ever-increasing group of jurisdictions. The ECtHR's warm embrace of these sources also appears to be given increasing prominence, at least by the Grand Chamber, where a section of the Court's judgment is frequently devoted to analysis of this comparative material.[91] This seems to have coincided with the increased 'professionalisation' of the comparative law research function in the Court and the increased use of comparative law arguments by the parties and interveners, not least interveners from jurisdictions whose judicial decisions are then brought to the attention of the Court.

B. The CJEU's Use of External/Domestic Sources

Contrast these cases with the approach adopted in relation to the determination of the meaning and scope of fundamental rights by the CJEU (and here I include the Advocates General within the institution of the CJEU). To illustrate the contrasting approaches, consider two cases that involved one of the critical issues in the relationship between human rights standards and EU law, viz how far human rights norms should trump economic interests. Two of the most famous cases establishing the basic approach were the *Schmidberger* and *Omega* cases, and they illustrate the point well.[92]

[91] Dzehtsiarou (n 8) 549.

[92] In other respects, the cases illustrate a degree of 'parallelism'. See Jacobs (n 7) 212–13, who notes that in both cases the CJEU 'speaks, it may be thought, like a human rights court'.

i. Human Rights and Economic Interests

In the *Schmidberger* case,[93] the issue concerned the extent of a Member State's duty to keep major transit routes open in order to ensure the free movement of goods within the Community, and in particular whether a Member State must, if necessary to achieve that purpose, prohibit a political demonstration whose organisers assert their fundamental right to freedom of expression and assembly. Advocate General Jacobs' Opinion stressed the importance of the case as being 'the first case in which a Member State has invoked the necessity to protect fundamental rights to justify a restriction of one of the fundamental freedoms of the Treaty'. With the exception of a reference to one decision of the House of Lords[94] and some cursory references to the ECHR (but not to the ECtHR), no other non-EU sources were cited.

In the *Omega* case,[95] the Court of Justice was asked to clarify the extent to which national authorities were entitled to rely on human rights values embedded in their national constitutional law to justify measures that help to safeguard public policy in the Member State concerned, but at the same time adversely affect fundamental economic freedoms. The case involved an order made by a police authority prohibiting simulated killing in the course of a game. The ground invoked to justify that ban was the jeopardising of public order, with human dignity being one of the principles thereby safeguarded. The effect of the ban was to prevent the import of the game from the UK into Germany, thus limiting the free movement of goods. Again, Advocate General Stix-Hackl identified a centrally difficult issue of some legal complexity in the human rights field: the meaning of human dignity. 'There is hardly any legal principle more difficult to fathom in law', she wrote, 'than that of human dignity.'[96] Yet, in attempting 'at least to give an outline of this concept', apart from a passing reference to the ECtHR judgment in *Pretty*[97] and a description of a decision of the UN Human Rights Committee,[98] no other external case law sources are mentioned,[99] and certainly none that could be described as external/domestic.

[93] Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.
[94] *R v Chief Constable of Sussex ex parte International Traders Ferry Ltd* [1999] 2 AC 418.
[95] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* [2004] ECR I-9609.
[96] Ibid, AG's Opinion [74].
[97] *Pretty v UK* (n 59).
[98] Communication No 854/1999: France 26/7/2002 CCPR/C/75/D/854/1999 (the famous dwarf-throwing case).
[99] Instead, there is extensive reference to (mostly French and German) legal commentary.

ii. European Arrest Warrants

In the recent *Radu* case,[100] Advocate General Sharpston considered the proper interpretation of Framework Decision 2002/584 on the European arrest warrant in light of the Charter of Fundamental Rights. The critical question was whether the Framework Decision, properly construed, permitted an executing Member State to refuse to execute such a warrant where to do so would infringe, or would risk infringing, the requested person's rights under Articles 5 and 6 ECHR or Articles 6, 48 and 52 of the Charter. The Advocate General responded that she did not believe that a narrow approach, one which would exclude human rights considerations altogether, was supported by the wording of the Framework Decision, which she considered made it clear that the Decision did not affect the obligation to respect fundamental rights. The issue then became in what circumstances the authorities may then refuse to make an order for surrender and what factors they must take into account in reaching such a decision.

To answer this question, the Advocate General turned to the ECtHR, and previous decisions by the CJEU itself. She concluded, on the basis of her analysis, that 'both Courts accept that fundamental rights may affect the legislative obligation of a Member State to transfer a person to another State'. As regards Article 3 ECHR and the equivalent provisions in Article 4 of the Charter, they consider that the test should be whether there are 'substantial grounds for believing' that there is a 'real risk' that the provision in question will be infringed in the State 'to which the person in question would otherwise fall to be transferred'.[101] She took issue with the ECtHR's approach and did not consider that the test that the breach in question should be 'flagrant' should be accepted:[102] 'Such a concept appears to me to be too nebulous to be interpreted consistently throughout the Union.'[103] The ECtHR's test that the breach must be so fundamental as to amount to a complete denial or nullification of the right to a fair trial was 'unduly stringent'.[104] It was 'not right, in my view, to require that a potential breach be established "beyond reasonable doubt"'.[105] She suggested instead 'that the appropriate test is that the requested person must persuade the decision-maker that his objections to the transfer are substantially well founded'.[106] What is noteworthy is that, in contrast with the approach adopted in relation to the equivalent issue in the ECtHR and examined earlier, the

[100] *Radu* (n 19).
[101] Ibid [77].
[102] Ibid [82].
[103] Ibid.
[104] Ibid [83].
[105] Ibid [84].
[106] Ibid [85].

Advocate General arrived at these conclusions without any need to refer to any external (non-EU) legal sources.

iii. Common Features of These Cases and Some Caveats

There is an important structural difference between the CJEU and the ECtHR that makes a comparison between the two systems difficult. Many, if not most, of the examples of where I have identified 'the CJEU' as having used external sources occur in the opinions of the Advocates General, an institution unknown in the ECHR system. Where a research note has been prepared by the research and documentary services incorporating references to external sources, this is likely only to surface in public through the opinion of the AG in the case. Even if such a research note has been prepared, whether the AG refers to these external sources in his or her opinion depends on the preferences of the individual AG; it appears to be a matter of the AG's personal interest and legal training as to whether to refer to external sources or not, particularly if the parties to the case have not referred to such sources. Notwithstanding the strict differentiation between the CJEU and the AG, I have referred to both as 'the Court', unless otherwise stated.

That difficulty of comparison aside, some common features emerge with regard to the CJEU's approach. The use of foreign sources by the CJEU seldom, if ever, contributes directly to the decision in the case and is never the primary reason identified by the Court to justify its decision. The jurisdictions from which the Court draws these external/domestic sources consist of a significantly smaller group of jurisdictions, primarily the US.[107] There is some indication that the use of these sources is increasing, perhaps because of the increased 'professionalisation' of the comparative law research function in the Court, but to nothing like the same extent or depth as in the ECtHR.

There are several caveats that must be entered to this argument of significant difference. First, we need to take account of the fact that the absence of explicit reference to comparative materials in a judgment by the Court (as opposed to the opinion of the AG) may be due in part to the continuing influence of the French judicial style on the CJEU, which tends towards the minimalist and mostly eschews reference to foreign sources.[107a] Second, the relative absence of references to external/domestic sources relates to the 'fundamental rights' jurisprudence of the CJEU, not necessarily to jurisprudence

[107] See, eg, the Opinion of AG Maduro in Case C-438/05 *Viking Line* [2007] ECR I-10779 [39], note 38, giving examples of domestic case law in which national courts construed horizontal effect in this manner 'of which I shall name only a random few'. The 'random few' are all courts of EU Member States, except for 'two classic examples from the United States': *Shelley v Kraemer* 334 US 1 (1948) and *New York Times Co v Sullivan* 376 US 254 (1964).

[107a] Cp, de Búrca, note 5, 176.

arising from the 'internal market' aspects of the Court's jurisdiction. In the 'internal market' context, the use of the jurisprudence of the US Supreme Court is by no means absent[108] and continues to have an important role to play.[109] Third, the major exception to the lack of reference to external/domestic sources in the context of rights claims is the use by the CJEU of US jurisprudence in the interpretation of the anti-discrimination provisions of the treaties and in the interpretation of the anti-discrimination directives.[110] It is noteworthy in considering the reasons for the use of US sources in this context that EU anti-discrimination law is seen, at least to some extent, as deriving from US practice, not least by those lawyers practising in this area before the CJEU who have used US sources prominently in their advocacy before the Court in these cases.[111] It is also noteworthy that EU anti-discrimination was not initially seen as engaging 'fundamental rights' by the Court (or, indeed, by the EU generally), but rather as part of 'social affairs' and employment, and is to that extent closer to internal market concerns.[112] Fourth, the Court sometimes does refers to such sources in what might be considered key fundamental rights cases, but this is frequently for what might be called 'rhetorical' purposes, where the use of the foreign source is intended to send a subtle message and is primarily expressive (for

[108] Baudenbacher (n 5) 513; Herzog (n 5) 918–19.

[109] LF Peoples, 'The Influence of Foreign Law Cited in the Opinions of Advocates General on Community Law' (n 6) 495: the most influential foreign law subject was intellectual property law; the second most influential foreign law subject was the antitrust law of the US; the next most influential areas were US criminal law, US federal-state relations including the commerce clause, and anti-discrimination law.

[110] In Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143, the Advocate General referred to case law in US courts that both rejected and approved claims that dismissal of transsexuals constituted a discrimination on grounds of sex. In C-450/93 *Kalanke* [1995] ECR I-3051, AG Tesauro referred to the judgments of the US Supreme Court in *Regents of the University of California v Bakke* 483 US 265 (1978), *United Steelworkers of America, AFL-CIO-CLC v Webster* 443 US 193 (1979) and *City of Richmond v Croson* 488 US 469 (1989). In Case C-109/91 *Ten Oever* and *Coloroll* [1993] ECR I-4879, AG Van Gervan relied heavily on *City of Los Angeles Department of Water and Power v Manhart* and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris* 435 US 702 (1978), as did AG Sharpston in C-227/04 P *Lindorfer v Council* [2007] ECR I-6767, AG Jacobs in Case C-227/04P *Lindorfer v Council* [2007] ECR I-06767 [57] and AG Kokott in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and others* [2011] 2 CMLR 38 [70]. See LF Peoples, 'The Influence of Foreign Law Cited in the Opinions of Advocates General on Community Law' (n 6), in which he notes that the AGs' use of US discrimination case law may have declined, except in scrutinising the use of gender-related actuarial calculations.

[111] For example, particularly Lord Lester QC, counsel in Case 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911, which first used US case law (*Griggs v Duke Power Co* 401 US 424 (1971)) to develop the concept of indirect discrimination in the interpretation of art 119 of the EEC Treaty and of art 1 of Council Directive 75/117/EEC of 10 February 1975.

[112] See the discussion of the early development in C Docksey, 'The Principle of Equality Between Women and Men as a Fundamental Right Under Community Law' (1991) 20(4) *Industrial Law Journal* 258.

example, references to the US Supreme Court cases of *Dred Scott*, *Plessy v Ferguson* and *Brown v Board of Education*).[113]

IV. ACCOUNTING FOR THE DIFFERENCES?

A. 'Strategic' Approaches

It is noteworthy, I suggest, that the most thorough legal study yet undertaken of the role of comparative reasoning in both courts identifies 'strategic' reasons as the best explanation for the use of such reasoning.[114] In other words, the primary function of comparative reasoning in both courts is to identify the 'best' approach, meaning the approach that best fits the understanding of rights within the epistemic community[115] that each court finds itself in. This also suggests, more broadly, that the view of rights adopted by both courts is that rights are seen as part of 'political doctrine constructed to play a certain role in … political life'.[116] I shall describe this approach, following Charles Beitz, as 'political'.

Although formulated as an analysis of the CJEU, I believe that Koen Lenaerts' description applies, to some extent,[117] to both courts. He argues that the purpose of the comparative method in the CJEU 'after having carefully "taken the pulse" of the national legal systems, [is] to find the *best solution in the "middle-line" or compromise solution*, which should enjoy credibility and acceptability in the Member States and which will ensure the effectiveness of Community law'.[118] As Neil Walker points out, this is particularly evident in the 'explicit doctrine of reliance on national constitutional

[113] See, in particular: AG Maduro's Opinion in *Al Barakaat International Foundation* (n 13) [34] (citing Justice Murphy's dissent in *Korematsu v United States* 323 US 214 (1944)) and at [45] (citing Justice Aharon Barak of the Supreme Court of Israel in HCJ 769/02 [2006] *The Public Committee Against Torture in Israel et al v The Government of Israel et al*); AG Sharpston's Opinion in Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, [2008] ECR I-7245 [45] (citing *Brown v Board of Education of Topeka* 349 US 294 (1954) and Justice John Marshall Harlan's dissent in *Plessy v Ferguson* 163 US 537 (1896)); Opinion of AG Ruiz-Jarabo Colomer in Case C-228/07 *Petersen v Arbeitsmarktservice Niederösterreich* [2008] ECR I-6989 [30] (citing *Dred Scott v Sandford* (60 US (19 How) 393 (1856) and Justice Cardozo in *Baldwin v GAF Seelig* 294 US 511 (1935)).

[114] Senden (n 7) 363.

[115] For a discussion of 'epistemic communities', see PM Haas, 'Introduction, Epistemic Communities and International Policy Coordination', (1992) 46 *International Organization* 1.

[116] C Beitz, *The Idea of Human Rights* (Oxford, Oxford University Press, 2009) 44.

[117] The caveat is important. There are clear trends in other directions, for example, the ECtHR jurisprudence where the outcome does not appear to be based on a 'middle-line' or compromise, such as in *Goodwin v UK* (n 69) and the early seminal decision in *Marckx v Belgium* (1979–80) 2 EHRR 330.

[118] Lenaerts (n 4) 906 (emphasis added). See also Wasenstriner (n 5) 37: 'the Court chooses the national solution which best fits into the structure in purposes of the Community'.

traditions in developing human rights protection at the European level' which conveyed the message 'that national courts should have no reason to fear' the EU.[119]

B. Differing Functions of Rights in the Respective Systems

We are left, however, with a puzzle. We have seen that the most significant difference between the two courts' use of comparative references lies in the use by the ECtHR of external/domestic sources, which are practically absent from the reasoning of the CJEU. If, as I have argued, both courts share a broadly 'political' understanding of human rights, why is there such a significant difference in their practice of comparative reasoning? My argument is that the courts in question adopt significantly different understandings of the role that rights play in their particular area of European political life. So the differences in the use of comparative reasoning arise from and illustrate the different approaches that the courts adopt to the different functions of human rights in the political and legal systems within which the courts operate, and the different roles of the courts within these systems regarding these rights.

C. Differing Functions of the Two Courts

Sceptical though I am, in general, about the nature of the difference between 'constitutional' and 'human rights', there is nevertheless an important intuition that those enamored of the distinction have identified, namely that 'rights' function differently in different political and legal contexts. Add to this intuition the issue of the different functions that different types of courts play in different political and legal systems, and we have a recipe for quite distinctive methodologies emerging as to how 'the same right' will be interpreted by the ECtHR and the CJEU. The ECtHR is, quite simply, a *court of human rights*. It is primarily interested in the relationship between the individual and the state. Its primary job is not to get the state to work better or more fairly, most justly, more efficiently or even more democratically, except where an individual's rights are engaged. Its function is to try to ensure that a particular individual is not being oppressed by the state. Whilst the ECtHR is, in some respects, a 'constitutional court', it is not a constitutional court in the sense that the US Supreme Court is thought of as a 'constitutional court'.[120]

[119] N Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Idea' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2007) 316, 324.

[120] I realise, of course, that there is considerable scholarly debate on the issue. Contrast A Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human

In contrast, the treaties establishing and maintaining the EU, even with the addition of the Charter of Fundamental Rights, are not primarily about human rights. As Douglas-Scott argues:

> [T]he different contexts of these two courts, with Strasbourg acting as freestanding human rights court, and Luxembourg possessing a much wider jurisdiction, comprising a very large number of (sometimes competing) policies, should not be overlooked as a factor constraining and sometimes shaping human rights interpretations.[121]

The role of the CJEU, therefore, is about creating and maintaining a system of economic and (to some extent) political governance, in which human rights play an important part, but only a part. And the part they play is primarily integrationist in inspiration.[122] Thus, not surprisingly, the CJEU will not want a court decision binding throughout the EU to 'look' too Swedish, British or German, and will thus try to avoid giving the impression through its citation practice that some courts are more important to it than others. As with the US Supreme Court, the role of the CJEU is to interpret the role, the meaning and the scope of human rights in light of the overall structure and functions of the treaties as a whole.[123] The treaties have other things to do as well as protect human rights. So has the CJEU.[124]

Despite sharing a common 'political' theory of human rights, they appear to differ in the function that the respective courts play in the human rights system, with the CJEU adopting a more 'constitutional' role, seeing its role as primarily one of engaging with issues of *European* political and economic governance.[124a] The ECtHR, on the other hand, is more Janus-faced. On the

Rights as a Constitutional Court' (October 2009), available on SSRN, who argues that the ECtHR is a constitutional court, with S Greer, *The European Convention on Human Rights* (Oxford, Oxford University Press, 2006) and L Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161. G Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' 1, available on SSRN, captures the limited point I want to make: 'human rights treaties, unlike a constitution, are not meant to contain all the fundamental principles of a political community; they are not meant to *constitute* a system of political organization for a particular people' (emphasis added).

[121] Douglas-Scott (n 7) 649.

[122] JHH Weiler, 'Eurocracy and Distrust' (1986) 61 *Washington Law Review* 1103, 1108 and 1118.

[123] L Zucca, 'Monism and Fundamental Rights' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012) 337: 'The Court of Justice is in the business of dealing with issues of social economic and political governance. This has a major consequence in terms of fundamental rights: the Court of Justice has to constantly struggle to find the best balance between the preservation of economic freedoms and the protection of other values.'

[124] Compare AG Maduro in Case C-415/05 P *Al Barakaat International Foundation* (n 13) [37]: 'The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community.'

[124a] De Búrca, note 5, 182, of sources that the CJEU 'may have no conception of itself as an International court, or as a court with Responsibilities Flowing from the International influences expected by its Rulings.'

one hand, like the CJEU, it faces inwards, but it also faces outwards, seeing itself as engaging in a 'dialogue' with the wider world on the nature and limits of human rights. Unlike the CJEU, the ECtHR sees itself identifying human rights in dialogue with others, and these 'others' are not only Europeans.[125]

D. Contrasting Approaches to External/International Materials

This is most clearly seen in the cases in which the courts engage extensively with *international* external materials. The ECtHR clearly identifies itself as an international, as well as a European, court of human rights, seeing its role as (at least in part) to secure a degree of coherence between the diffuse parts of the human rights system. This was clear, for example, in *Nada v Switzerland*,[126] in which the Grand Chamber confirmed that where 'a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them'. Prominent members of the Court have said so extrajudicially as well. Françoise Tulkens has favourably quoted the International Law Commission's proposed principle of harmonisation, according to which 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.[127]

The ECtHR wants, and perhaps needs, to participate in this international cultural practice. Perhaps the strongest statement of this need is to be found in the ECtHR's judgment in *Demir and Baykara v Turkey*:

> The Court, in defining the meaning of terms and notions in the text of the Convention, can *and must* take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus

[125] Compare F Tulkens, 'Introduction: Fifty Years of the European Court of Human Rights viewed by its Fellow International Courts', Strasbourg, 30 January 2009: 'we believe that it is necessary for the international bodies concerned to engage in a continuing and permanent dialogue on fundamental rights—a dialogue that should contribute to the development of a true "common law" of human rights. This can be achieved by a process of interaction, as the different international courts learn from and assimilate each other's case law'. See also Mahoney (n 4) 136–37: 'The short point is that the ECHR is above all about "law in society"; and, for the Strasbourg Court when seeking to give meaning to inconclusively worded concepts in particular circumstances, "society" is to be understood as comprising not just the ECHR contracting States taken individually or collectively for the purposes of each case but also, more broadly, the international community in its various components.' See further Ambrus (n 4) 365.

[126] *Nada v Switzerland* App No 10593/08 (ECtHR, 12 September 2012) (2013) 56 EHRR 18 [170].

[127] Tulkens (n 125) 3, quoting para 408 of the Report of the International Law Commission, 58th session 2006, UNGA, Official Records, 61st session, Supplement No 10 (A/61/10) 405. See also HE Judge R Higgins, 'The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights', Strasbourg, 30 January 2009, 8.

> emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.
>
> In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[128]

Contrast this with the CJEU's approach in *Kadi*, particularly the Advocate General's view of the relationship between EU law and international law. For Gráinne de Búrca, the contrasting approaches adopted in both courts leads her to the conclusion that the CJEU 'increasingly adopts … a robustly pluralist approach to international law and governance, emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law', in contrast with the 'constitutionalist approaches' characteristic of the ECtHR, which 'presume the existence of a community of interest amongst states, based on some shared basic values and emphasizing the importance of universality and universalizability'.[129]

This is unlikely to be the whole story, however. As well as a difference in perspective and mentality, there are other more mundane differences. The EU has the capacity to adhere to international treaties and does so quite extensively. For the CJEU, it is perhaps not surprising, therefore, that it emphasises the fundamental difference between conventions binding on the EU (for example, in the human rights context, the UN Disability Convention and, probably in the future, the ECHR) and other conventions that 'only' bind the Member States.[130] The Council of Europe, as an intergovernmental organisation, can adhere to international instruments itself on a much more limited basis and therefore the distinction may seem less important.

E. The Use of External/Domestic Materials Revisited

This may explain the contrasting use of external *international* materials, but what of external *domestic* materials, such as the judgments of the US Supreme Court, the Supreme Court of Israel and the Constitutional Court

[128] *Demir and Baykara v Turkey* (n 19) [85] and [86], emphasis added.

[129] G de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (2010) 51(1) *Harvard International Law Journal* 1. Although MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76(2) *MLR* 191 adopts somewhat different terminology, there are similarities in his distinction between 'freestanding constitutionalism' and 'political constitutionalism'.

[130] See A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2010–11) 34 *Fordham International Law Journal* 1304.

of South Africa? Why would the ECtHR engage with these? The answer appears to be because of the complex nature of the 'cultural practice' of rights production and interpretation that Sally Merry identifies.[131] This is not just an *international* practice, it is (as Beitz more accurately terms it) a 'global' practice,[132] one to which domestic actors significantly contribute. Beitz identifies the extensive nature of the global discursive community on human rights as consisting of 'a heterogeneous group of agents, including the governments of states, international organizations, participants in the processes of international law, economic actors such as business firms, *members of nongovernmental organizations, and participants in domestic and transnational political networks and social movements*'.[133] The domestic constitutional courts that the ECtHR identifies as its primary interlocutors are precisely those that are also active 'in domestic *and transnational* political networks'.[134]

In contrast, the CJEU simply does not (yet) consider itself part of this global discursive community on *human rights*. The nature of the CJEU as an 'internal' rather than an international court is relevant not only in terms of how the ECtHR views it and its jurisprudence, but also in terms of what sources the CJEU sees as appropriate for it to use. If the CJEU compares itself generally with national constitutional and supreme courts in the Member States, it is also likely to see those courts' uses of external materials as reflecting how it should use these sources. With some notable exceptions (such as the UK Supreme Court), national supreme and constitutional courts seem generally unlikely to use external sources, unless these sources consist of Conventions binding on the state in question, and in some cases the explicit use of non-binding external domestic sources appears almost unthinkable. Viewed from this perspective, the approach of the CJEU seems much less exceptional than a comparison with the ECtHR might suggest. In common with the views of many European constitutional and supreme courts regarding the exceptionalism of their constitutional systems, the CJEU appears to view EU law, and its role within that system, as *sui generis*; to look beyond the EU would be verging on the 'unconstitutional' because those foreign sources do not have the same challenges and tasks.

If this is correct, we then have a greater insight into the respective theories of human rights that the courts appear to adopt. Both courts take a broadly 'political' approach to understanding what human rights are and how they should develop. For the ECtHR, it is a discursive understanding of human rights, in which human rights evolve through dialogue and engagement on

[131] SE Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press, 2006) 228–29, quoted in Beitz (n 116) 38.
[132] Beitz (n 116) 8.
[133] Ibid, emphasis added.
[134] Ibid, emphasis added.

a global level aiming towards universality and avoiding fragmentation, but this evolution is partly mediated via the Court itself.[135] In this, the Court is acting consistently with (at least part) of its more general interpretative method, in which it has the ambition to detect whether a majority (or at least a strong minority) of the Contracting States agree on a common approach or interpretation.

For the CJEU, dialogue and engagement are also important, but this approach is modified in three critical respects: first, human rights are only a part of a system of European governance that must be protected and furthered; second, human rights emerge from a primarily *European* discourse (in which the Member States and the ECtHR are the principal actors) that serves primarily European interests; and, third, striving for universality and the avoidance of fragmentation is not the role of the CJEU's fundamental rights jurisprudence. The CJEU appears more willing to impose its own interpretation of EU law and does not seek (to the degree that the ECtHR does, at least) to identify a European consensus, despite talk of 'common constitutional traditions'. It is hardly surprising, therefore, that it does not consider the need to identify any consensus or trend *beyond* Europe. The courts play differing but complementary roles, and the different uses of comparative reasoning are an important indicator of these differing roles.

V. SOME IMPLICATIONS FOR THE FUTURE

In the past, the differences of method and theory that the courts adopted were relatively easy to handle and have not led to significant differences in outcome between the courts largely because they have seldom operated in the same areas. However, these differences in method, and the underlying theoretical differences indicated by differing methodological approaches, mean that bringing the courts into a closer relationship with each other, through the adoption of the EU Charter of Fundamental Rights and the EU's accession to the ECHR, may well lead to increased tensions between them over human rights. What are the implications of this analysis for the future use of comparative analysis based on external sources? Here are some thoughts, by no means systematically thought through or fully considered.

[135] See M Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford, Oxford University Press, 2010) 377, who notes the selectivity of the Court in using or not using international law in interpreting the ECHR. She argues that the Commission and the Court both adopted a 'functional approach' in which their 'underlying motivation … in referring to international law was the need to reinforce the ECHR system and the protection of human rights at the European level'.

A. A Short-Term Decline in Comparative Citation by the CJEU

Gráinne de Búrca has shown convincingly that 'the Frequency of citations of the [CJEU] to the European Convention on Human Rights has declined'.[135a] If the analysis advanced up to this point is correct, this decline is to be expected. Indeed, in the short term at least, there is likely to be a continuing a decline in comparative citation generally by the CJEU. The availability of the Charter, and its use by the CJEU as a primary point of reference in fundamental rights protection, may lead to fewer references to external sources both domestic and international, because the Court may consider that references to the Charter alone should suffice to provide a source of legitimate authority in such cases. Another factor leading to a short-term decline in comparative citation also relates to the effect of the Charter: the CJEU is likely to be principally concerned with the 'constitutional' dimensions of the relationship between the Charter, the ECHR, the ECtHR, national fundamental rights standards and the existing EU acquis. These issues are unlikely to be thought to be particularly illuminated by reference to external sources, whether domestic or international.

A second reason for the decline in the use of comparative materials in human rights cases has been identified by de Búrca as operating independently of the Charter.[135b] The opinions of the Advocates General are more likely than the judgments of the CJEU to contain references to comparative material. These opinions not only are an important source of comparative material for the Court, they are also an important indication to external audiences (such as the ECtHR) that the EU's judicial system takes external sources into account (if somewhat haphazardly). De Búrca has shown, however, that since the CJEU has been able to dispense with the Advocate General's opinion, a significant proportion of human rights cases do not have the benefit of such an opinion, with the consequential effect that the citation to comparative material, taking the EU judicial system as a whole, has declined.

B. A Longer-Term Issue for Relations between the ECtHR and the CJEU

External sources are likely to be seen as of more possible relevance when the substantive meaning of the various rights, and their application to particular facts, comes to be examined in detail. In this context, the different role rights play may ultimately pose a dilemma for the CJEU. On the one hand, we have seen that the CJEU does not want to weaken the autonomy of EU fundamental rights law as a system of European law, and this leads the Court significantly to eschew reliance on non-European judicial sources. On the other hand, the Court has always been adept at heading

[135a] See de Búrca, note 5, 174–176.
[135b] De Búrca, note 5, 180.

off challenges to its own authority as the dominant interpreter of EU law. Douglas-Scott is the latest of a long line of academic observers of the Court who consider that the 'avowal of a strong protection of human rights has been a means for the Luxembourg Court to maintain and increase its authority and the primacy and constitutional autonomy of EU law'[136] and it has done this in significant part by anticipating what other courts may regard as weaknesses of the CJEU's role and modifying its practice to address those weaknesses.

The approach that the CJEU appears to be adopting to possible challenges posed by the ECtHR is to substantially incorporate ECHR approaches into its jurisprudence and vice versa; the two courts are running on parallel lines, travelling in roughly the same direction. And this has led initially to the ECtHR adopting a *Solange*-type approach to reviewing EU law on human rights grounds in *Bosphorus*, and to the particularly favourable role that the CJEU will enjoy in the ECHR system if the recently agreed terms of engagement set out in the accession agreement come into force.[137] The significant differences between the methodological approaches to interpretation may pose a challenge in the future, however, because unless the CJEU modifies its practice regarding the use of external materials, it may not be dealing with the same range of materials with which the ECtHR engages, and this may lead to strong arguments that the CJEU has not considered the full range of human rights arguments and principles, potentially pushing the ECtHR into a more interventionist stance.

C. Implications for Treatment of Interveners before the CJEU

There is nothing inherent in the procedures of the CJEU that would make a change in the practice of the Court regarding the use of external domestic materials impossible, regardless of the ideological problems it may pose. The Court could, for example, dispense with Advocates General less frequently. That issue aside, however, there is a further procedural issue that may need to be addressed. I said earlier that there are relatively few significant differences in the way in which comparative material is generated by the two courts.[138] The one significant difference arises from differences in the extent to which interveners generate such material. Since the early 1980s,[139] interveners are now a frequent presence in cases before the ECtHR,[140] and

[136] Douglas-Scott, 'The EU and Human Rights after the Treaty of Lisbon' (n 25) 681.
[137] Draft accession agreement (n 23).
[138] Above, text at nn 43 and 44.
[139] For an account of this development, see D Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *American Journal of International Law* 611, 630–38.
[140] Article 44 of the Rules of Court provide for third parties to apply to the President of a Chamber to intervene in a case before the Court and permission is frequently granted in

such third-party interveners frequently supply comparative material.[141] Indeed, in some cases, the role of non-governmental organisations (NGOs) in supplying comparative material has been critical, such as the reliance by the Court in *Chahal*[142] on comparative information from intervener human rights organisations on the position in Canada regarding the use of special advocates,[143] with the advantages and disadvantages that such reliance occasions.[144] Third-party interventions before the CJEU, however:

> [A]re much less common than those before the European Court of Human Rights, somewhat due to the less frequent engagement of NGOs with EU law but mostly because of the extremely restrictive approach the Court itself takes toward interventions in the public interest.[145]

This restrictive approach has been criticised as reducing the institutional capacity of the CJEU in this respect.[146]

It is also likely to lead to a degree of bias as to what information is supplied to the CJEU. This is because of the two routes to intervening in a case before the Court, applying to the Court directly for leave[147] or being granted leave by the referring national court, it is the latter which has tended to be the dominant route in human rights cases, in the relatively few cases in which interventions have taken place to date.[148] This means that, unless direct access is made more open, whether an organisation is granted permission will depend significantly on the national procedural rules, some of which (for example, in the UK) appear to be considerably more open than others to permitting such interventions. Not surprisingly, therefore,

appropriate cases; see further L van den Eynde, 'Short Overview of the Litigation Practices of Non-Governmental Organizations before the European Court of Human Rights' (2011) *European Yearbook of Human Rights* 539.

[141] Dzehtsiarou (n 8) 548–49.

[142] *Chahal v UK* App No 22414/93 (15 November 1996) (1997) 23 EHRR 413.

[143] D Jenkins, 'There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology' (2011) 42 *Columbia Human Rights Law Review* 279.

[144] In its Intervention Submission in *A v UK* App No 3455/05 (ECtHR, 19 February 2009) (2009) 49 EHRR 29, JUSTICE noted, at [13], that 'it appears that our fellow NGO interveners in *Chahal* may have inadvertently misapprehended the position in Canada in 1996'.

[145] JUSTICE, *To Assist the Court: Third Party Interventions in the UK: A JUSTICE Report* (London, JUSTICE, 2009) para 47.

[146] S Carrera and B Petkova, 'The Role and Potential of Civil Society and Human Rights Organizations through Third Party Interventions before the European Courts: The Case of the EU Area of Freedom, Security and Justice' in B de Witte et al (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Cheltenham, Edward Elgar Publishing, 2012). See also de Búrca, note 5, 177–8.

[147] Article 40(2) of the Statute of the Court of Justice.

[148] See, eg, Case C-648/11 *The Queen (on the Application of MA, BT, and DA) v Secretary of State for the Home Department* (ECJ, 6 June 2013), in which the AIRE Centre intervened; and Case C-411/10 *NS v Secretary of State for the Home Department* [2012] 2 CMLR 9, in which Amnesty International, the AIRE Centre, the United Nations High Commissioner for Refugees and the Equality and Human Rights Commission intervened. Such interventions may be increasing. For example, the AIRE Centre has significantly increased the number of its interventions in recent years. See: www.airecentre.org/pages/human-rights-litigation.html.

organisations based in the UK have come to represent a significantly higher proportion of interveners in human rights cases than organisations for other countries, affecting the type of comparative analysis provided to the Court.

The role of interveners has been a source of some controversy in the negotiations on accession by the EU to the ECHR. The draft Accession Agreement foresees[149] a prior intervention by the CJEU in some cases before the ECtHR where there has been no reference by the national court to the CJEU and where there is therefore a risk that the ECtHR would rule on the matter before it without having the views of the CJEU. In this CJEU procedure, it appears that NGOs may not be allowed to intervene as third parties.[150] If, as seems highly likely, NGOs continue to intervene in the ECtHR cases, but cannot do so before the CJEU in these cases, there is some risk that the goal of prior intervention by the CJEU risks may be frustrated if there is no congruity of material before both courts. Lawyers for the European Commission representing the EU before the ECtHR are likely to want to have the CJEU's views on any external sources that the ECtHR is likely to find persuasive. The EU judge on the ECtHR is likely to be confronted with these external sources and this may filter back into the practices of the CJEU. What effect all this may have on the CJEU's use of external sources is uncertain, but it would not be unreasonable to suppose that the CJEU may come in time to see significant advantages in being seen to broaden its sources of material, including external/domestic sources.

VI. CONCLUSION

In conclusion, a critical question is whether the CJEU comes to consider that the function of human rights in the legal and political context of the EU has significantly altered, and with it the function of the Court itself in the interpretation of these rights, to require it to become closer to the ECtHR in terms of the methods it adopts in relation to human rights interpretation. A clear indication that the CJEU considers that its role in human rights interpretation *has* significantly shifted and requires a different method would be if there were to be a change in the approach that the CJEU adopts in human rights adjudication, particularly in any significant change in its use of the comparative method, including any substantially increased use of external—and (perhaps particularly) external *domestic*—sources, and in permitting more extensive direct interventions from human rights organisations that are equipped to provide such sources on a systematic basis.

[149] Article 3(6) of the draft accession agreement (n 23).

[150] See, eg, Amnesty International, International Commission of Jurists and the AIRE Centre, 'NGO Submissions on EU Accession to ECHR', November 2012, para 20. Available at: www.airecentre.org/data/files/NGO_Submissions_on_EU_Accession_to_ECHR_16_Nov_2012.pdf.