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Citation for published version:

Lock, T 2016, 'The influence of EU law on Strasbourg doctrines', *European Law Review*, vol. 41, no. 6, pp. 804-825.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

European Law Review

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The influence of EU law on Strasbourg doctrines

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Abstract

This article identifies four distinct areas of EU law influence on the ECtHR's doctrines: references for informational purposes; references to support an autonomous interpretation; legal transplants; and references in the context of evolutive interpretation. EU law is relevant for both the determination of the scope of Convention rights and for the ECtHR's proportionality analysis. But EU law influence is not confined to the case law of the CJEU. It includes the full spectrum of EU legal materials. While it welcomes the ECtHR's engagement with developments at the European Union level the article expresses a normative critique that is underpinned by a concern that the ECtHR's reasoning is often lacking in clarity and exposition of argument.

Introduction

It is a well-documented phenomenon that decision-making bodies in the field of human rights law draw inspiration from the law and practice of other legal orders be they domestic, regional or international. The main reason for this is that even though there are multiple sources guaranteeing human rights these seem to be underpinned by the recognition of a common core.¹ The European Court of Human Rights (ECtHR or Strasbourg Court) is particularly active in this regard in that many of its decisions feature a section on relevant 'international law' or 'comparative law'. Its approach is epitomised by its use of 'European consensus' as a way of justifying and legitimising evolutive interpretation or a narrow margin of appreciation based on a comparative legal analysis of developments in the legal orders of the parties to the Convention and of international legal developments in general. The ECtHR's comparative method has seen considerable academic attention, mainly with regard to its consensus approach and focused on its treatment of developments in municipal and international law.² The same is true for the incorporation of most Convention rights into European Union law by the Court of Justice of the European Union (CJEU) in developing its own set of fundamental rights as general principles.³ The ECtHR's case law on the

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¹ Sandra Fredman, 'Foreign fads or fashions? The role of comparativism in human rights law' (2015) 64 *International and Comparative Law Quarterly* 631, 633.

² E.g. relatively early on by Laurence R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 *Cornell International Law Journal* 133; and more recently in great detail by Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

³ The CJEU relied heavily on the European Convention on Human Rights (ECHR) – starting with Case 29/69 *Stauder v Stadt Ulm* ECLI:EU:C:1969:57 – and on the case law of the ECtHR – starting with Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170. For academic commentary see e.g. Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307; Gráinne de Búrca, 'The Evolution of EU Human Rights Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 465; Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon' (2015) 22 *Maastricht Journal of European and Comparative Law* 812; Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the

responsibility of EU Member States for violations of the Convention through European Union acts has seen a similar amount of academic coverage.⁴

The influence of European Union law on the ECHR has not, by contrast, been studied in a systematic manner. The studies that exist tend to mention this aspect of EU-ECHR relations only in passing and to – often only briefly – discuss the reception of the CJEU’s *case law* into the Convention system.⁵ This article, by contrast, sets out to show how European Union *law in general* influences the doctrines developed by the ECtHR. It moreover provides a systematisation of the ECtHR’s approach, which is complemented by an in-depth normative critique of its various facets. The most comprehensive of these earlier studies was written by Douglas-Scott in 2006. She remarked back then that ‘the Court of Human Rights does not cite Luxembourg very frequently in its own legal opinions’.⁶ This article suggests that this is changing, and not only in respect of CJEU case law but also as far as EU law in general is concerned. Despite some peaks and troughs, the following graph indicates a pronounced upward trend in the number of references to EU law since the first two references occurred in 1979.⁷ Admittedly, these overall numbers do not account for the overall rise

European Union’ (2000) 6 *Columbia Journal of European Law* 1; Philip Alston (ed), *The EU and Human Rights* (OUP 1999); Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 298 et seq.; Wolfgang Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’ (2011) 7 *European Constitutional Law Review* 64.

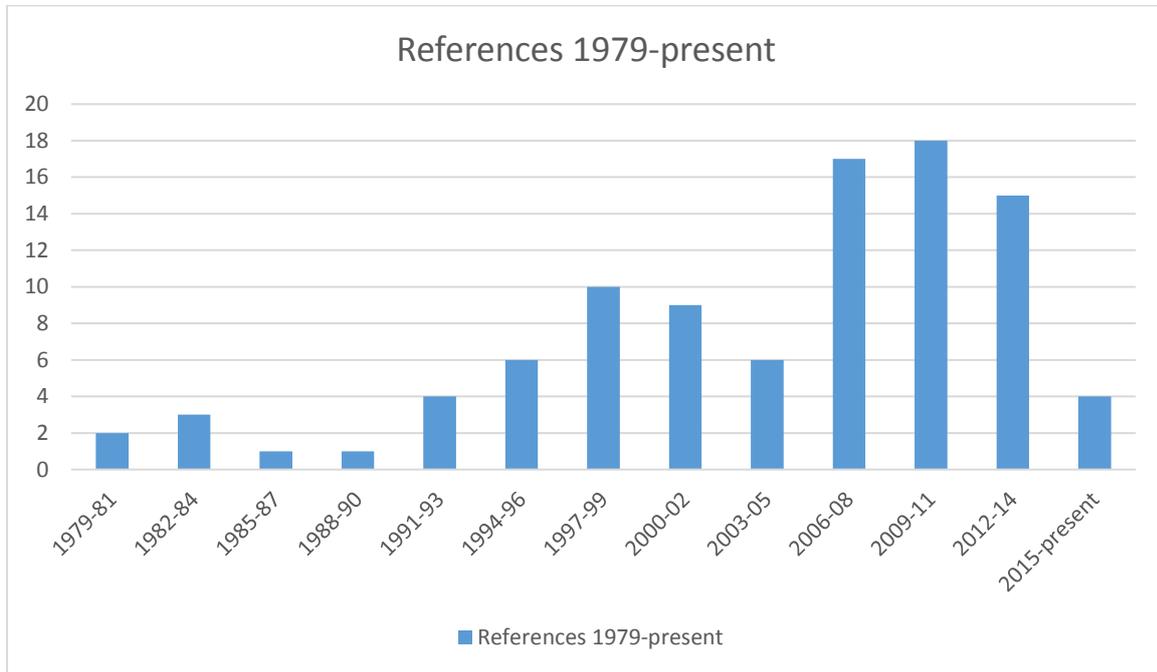
⁴ See e.g. Leonard F. M. Besselink, ‘The European Union and the European Convention on Human Rights: From Sovereign Immunity in *Bosphorus* to Full Scrutiny Under the Reform Treaty?’ in Ineke Boerefijn and Jenny E. Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights, Essays in Honour of Cees Flinterman* (Intersentia, Antwerp 2008) 295; Iris Canor, ‘*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?’ (2000) 25 *European Law Review* 3; Cathryn Costello, ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *Human Rights Law Review* 87; Sionaidh Douglas-Scott, ‘*Bosphorus v Ireland*’ (2006) 43 *Common Market Law Review* 243; Lech Garlicki, ‘Cooperation of courts: The role of supranational jurisdictions in Europe’ (2008) 6 *International Journal of Constitutional Law* 509; Alicia Hinarejos Parga, ‘*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe’ (2006) 31 *European Law Review* 251; Jean-Paul Jacqué, ‘Droit Communautaire et Convention Européenne des droits de l’homme, l’arrêt *Bosphorus*, une jurisprudence ‘Solange II’ de la Cour des droits de l’homme?’ (2005) 41 *Revue Trimestrielle de Droit Européen* 749; Nikolaos Lavranos, ‘Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH’ [2006] *Europarecht* 79; Carl-Otto Lenz, ‘*Matthews v United Kingdom*’ [1999] *Europäische Zeitschrift für Wirtschaftsrecht* 311; Tobias Lock, ‘Beyond *Bosphorus*: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’ (2010) 10 *Human Rights Law Review* 529; Steve Peers, ‘*Bosphorus* – European Court of Human Rights’ (2006) 2 *European Constitutional Law Review* 443; Cedric Ryngaert, ‘Oscillating between Embracing and Avoiding *Bosphorus*: The European Court of Human Rights on Member State Responsibility for Acts of International Organisations and the Case of the European Union’ (2014) 39 *European Law Review* 176; Henry G. Schermers, ‘Case note on *Matthews*’ (1999) 36 *Common Market Law Review* 673.

⁵ See e.g. ; Johan Callewaert, ‘The European Convention on Human Rights and European Union Law: A Long Way to Harmony’ [2009] *European Human Rights Law Review* 768; Francis G. Jacobs, ‘Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice’ (2003) 38 *Texas International Law Journal* 547; Francis G. Jacobs, *The Sovereignty of Law: The European Way* (CUP 2007) 55-56; 59-61; Laurent Scheeck, ‘The Relationship between the European Courts and Integration through Human Rights’ (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 837; Dean Spielmann, ‘Un autre regard: la Cour de Strasbourg et le droit de la Communauté européenne’ in *Libertés, justice, tolerance - Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, vol II (Bruylant 2004) 1447.

⁶ Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis’ (2006) 43 *Common Market Law Review* 629, 640.

⁷ The numbers are based on a HUDOC advanced search in the category ‘International Law and Other Relevant Material’ for ‘European Union’, ‘European Community’; ‘European Communities’ and ‘European Court of

in the number of cases decided by Strasbourg. Furthermore, they do not indicate what importance was accorded to EU law in each of these cases. But even these crude numbers provide justification for deeper academic scrutiny of Strasbourg’s engagement with EU law.



This graph shows a slight increase coinciding with the proclamation of the of the EU Charter of Fundamental Rights (CFR) in late 2000; and a more marked increase since its entry into force in 2009. There are two likely reasons for this. The first – discussed in more detail below – is that there is a discernible pattern in the ECtHR’s case law indicating that the ECtHR treats the CFR as an updated version of the Convention. Many of the civil and political rights contained in the Charter are based on Convention rights, but have in some cases been slightly broadened. For instance, Article 47 CFR guarantees everyone a fair and public hearing, which is largely equivalent to Article 6 ECHR. By contrast to that provision, however, it does not contain a restriction to proceedings concerning the determination of ‘civil rights and obligations’ and criminal charges.

The second reason is that with the entry into force of the Charter the Court of Justice has been placed in a position in which it is confronted with more fundamental rights disputes than before. This rise in the number of fundamental rights cases provides the CJEU with an incentive to develop its own fundamental rights doctrine independently of ECtHR precedents. An early sign of this is the *Google Spain* case where the Court of Justice interpreted Article 7 CFR, which protects the right to private life and mirrors Article 8 ECHR, and Article 8 CFR, which enshrines a right to protection of personal data, to entail a ‘right to be forgotten’, so that the operator of an internet search engine is obliged to erase search results relating to data concerning individuals stemming from events in the past.⁸ It spelled out in particular that Articles 7 and 8 CFR ‘override, *as a rule*, not

Justice’ (conducted on 20 April 2016). Decisions by both the European Commission on Human Rights and by the ECtHR are included. Only English-language results are considered. Duplicate results were eliminated, but multiple hits for different decisions in the same case were retained (e.g. separate admissibility decisions; or appeals to the Grand Chamber).

⁸ Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.

only the economic interests of the operator of the search engine but also the interest of the general public in finding that information.⁹ In deriving the right to be forgotten from the right to private life and in conceiving this right in such a robust manner, the Court of Justice has put itself at the vanguard of data protection in Europe. It is only a matter of time before the ECtHR will be seized of a dispute raising similar questions and it will be difficult for it to ignore the CJEU's advances in this area of law.¹⁰

A survey of the ECtHR's case law conducted in preparation of this article revealed that the ECtHR refers to EU law and practice in three types of scenarios. The first concerns cases in which an EU Member State is held responsible for violations of the Convention related to its obligations under EU law.¹¹ The second scenario covers cases where the ECtHR refers to EU legal material as part of the factual background of the case. For instance, in *A, B and C v Ireland* the ECtHR referred to Protocol no. 17 to the Maastricht Treaty, which provides a guarantee that the strict Irish constitutional prohibition on abortion remains unaffected by EU law.¹² This was used by the ECtHR as confirmation that the restrictions on abortion in Ireland 'were based on profound moral values'.¹³ References to EU law in neither the first nor the second scenario have an influence on the interpretation of ECHR rights. These types of cases will therefore not be discussed further.

This article focuses on the third scenario, in which the ECtHR draws inspiration from EU law when interpreting Convention rights. It identifies four distinct areas of EU law influence on the ECtHR's doctrines. These are references for informational purposes; references made to support an autonomous interpretation; legal transplants; and references in the context of evolutive interpretation. EU law is relevant not only in the determination of the scope of Convention rights, but it is also invoked in the ECtHR's proportionality analysis. As far as the sources of that influence are concerned, it is demonstrated that they are not confined to the – indisputably important – case law of the CJEU, but include the full spectrum of EU legal materials – primary and secondary European Union law, CJEU decisions, and other legal materials.¹⁴

⁹ *Ibid*, para 97 (emphasis added).

¹⁰ The CJEU's 'major role in redefining the limits of covert data gathering' was e.g. expressly recognised by Judge Pinto de Albuquerque in *Szabó and Vissy v Hungary* App no 37138/14 (ECtHR, 12 January 2016).

¹¹ See in particular *Matthews v United Kingdom* ECHR 1999-I, para 32; as well as the presumption of Convention compliance in *Bosphorus v Ireland* ECHR 2005-VI, paras 155-156.

¹² *A, B and C v Ireland* ECHR 2010; in a similar vein in *Mendizabal v France* the applicant complained successfully that France had violated her right to private and family life according to Article 8 ECHR because the French authorities had refused to grant her a residence permit for a prolonged period of time even though she was entitled to one under EU law *Mendizabal v France* App no 51431/99 (ECtHR, 17 January 2006). The legal situation under EU law also informed the case of *Piermont v France* concerned a conflict around Article 16 ECHR, which allows states to impose restrictions on the political activity of aliens. The applicant was a German national and Member of the European Parliament who had demonstrated against nuclear tests in French Polynesia. She was expelled from French Polynesia and subjected to a ban on re-entry. France relied on Article 16 ECHR as a justification for the interference with Article 10 ECHR. The ECtHR however did not consider her to be an alien for the purpose of Article 16 as she had the nationality of an EU Member State and was a Member of the European Parliament, in the elections of which the people living in French Polynesia were entitled to take part *Piermont v France* (1995) Series A no 314, paras 61-64. EU law was used in the same way in *S.A. Dangeville v France* ECHR 2002-III where the ECtHR found a violation of Article 1 of Protocol 1 because of a misapplication of the Sixth VAT Directive.

¹³ *A, B and C v Ireland* (n 12) para 226.

¹⁴ Hereinafter referred to collectively as 'EU law'.

This classification is accompanied by an analysis asking whether the ECtHR's approaches are normatively sound drawing inspiration from the literature on cross-fertilization. References to developments in other legal orders, and in particular to the case law of other courts, can result in a number of advantages identified in this literature: The use of comparative methods strengthens the influence of and effectiveness of a court.¹⁵ Cross-references are further likely to improve the law by revealing errors or inconsistencies of past legal solutions.¹⁶ The resulting engagement of a multitude of courts in a common enterprise also implies mutual legitimation.¹⁷ Moreover, on a very practical level, looking towards other legal orders allows judges to learn and see questions in a new light.¹⁸ Where domestic court references to international courts or supranational courts are concerned cross-references can lead to a higher likelihood of these approaches trickling down to the national level and being applied there given that an international court has the opportunity to canvass different national and supranational approaches so that its decisions are particularly persuasive.¹⁹ One can thus identify two key virtues of cross-referencing and cross-fertilization: 'better law' resulting from clear and coherent common standards; and increased legitimacy of a court's reasoning, which is of particular importance for international courts such as the ECtHR. 'Legitimacy' is, admittedly, a somewhat elusive and much-debated concept.²⁰ For the purposes of this article it should be understood as acceptability. It works on the assumption that compliance with the ECtHR's decisions increases with the amount of respect for its authority the addressees of its decisions and other stakeholders (such as national courts) have.

This article reaches the conclusion that in light of these arguments the ECtHR's engagement with developments at the European Union level should be welcomed. At the same time, it voices a normative critique that is underpinned by a concern that the ECtHR's reasoning is often lacking in clarity and exposition of argument, which is liable to undermining the potentially positive impact of cross-fertilization. It is therefore important that the ECtHR is open about the relevance that EU law had in its reasoning. The need for such openness is particularly acute where the ECtHR embarks on an evolutive interpretation of the Convention, as this is by some perceived to be an instance of problematic judicial activism. Where the ECtHR cannot demonstrate clearly why it ended up with the resulting expansive reading of the scope of a Convention right, it is likely to encounter claims of illegitimacy.

Deficits in the ECtHR's methodology are most apparent and problematic where legal transplants are concerned. There is evidence in the ECtHR's case law of EU law concepts being transplanted into ECHR doctrine without taking into account their wider constitutional context

¹⁵ Thijmen Koopmans, 'The Birth Of European Law At The CrossRoads Of Legal Traditions' (1991) 39 *American Journal of Comparative Law* 493, 505.

¹⁶ Anne-Marie Slaughter and Laurence R. Helfer, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 325.

¹⁷ *Ibid*, 325-326.

¹⁸ Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, 201.

¹⁹ Koopmans (n 15) 505.

²⁰ For an overview of the different strands of this debate in the context of international human rights courts see Başak Çali, Anne Koch and Nicola Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 955, 958-961; Andreas Follesdal, 'The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory' (2013) 14 *Theoretical Inquiries in Law* 339, 345-346.

correctly. A thorough understanding of this context is, however, necessary in order to avoid inappropriate or ill-informed transplants. Otherwise, both virtues of cross-fertilization are in danger: 'better law' is not achieved, and this ultimately undermines the legitimacy of the ECtHR's decisions.

By contrast, the article finds that the theoretically existing problems associated with the ECtHR's use of consensus based on EU law in cases against non-EU Member States have not materialised. The key argument against basing an evolutive interpretation of Convention rights on a narrow margin of appreciation on developments under EU law would be that non-EU Member States deliberately steered clear of these developments by not acceding to the EU. Hence, reading EU law developments into the Convention might lead to them being bound through the back door. However, it will be shown that while these dangers are real, they have hitherto not become acute. Nonetheless, the tenor underlying this article rings true in these cases as well: demonstrated awareness of this issue and a clearer articulation of the weight accorded to EU law influences would lead to more convincing decisions and a more resilient body of case law.

The ECHR and EU law: a special relationship

It would go beyond the remit of this article to provide a complete account of the relationship between EU law and the law of the ECHR, let alone a fully worked-out theoretical framework. Nonetheless, some basic propositions are necessary in order to frame the following discussion. All EU Member States are parties to the ECHR; indeed, ECHR compliance of prospective Member States is closely monitored during the process of accession to the EU.²¹ While the ECHR has been opened up for EU membership,²² the EU is not yet a party to the ECHR.²³ Nonetheless, the ECHR formed the original source of inspiration for the development of the EU's own fundamental rights by the CJEU as part of the general principles of EU.²⁴ Moreover, Articles 6 (3) TEU and 52 (3) CFR are provisions opening up the EU legal order to ECHR influence. By contrast, there is no such express reference to EU law in the ECHR. However, this article will demonstrate in some detail that the ECtHR regularly refers to EU law in its reasoning so that it has opened up the ECHR legal order to EU law influence.

This leaves the question as to the theoretical nature of the relationship between the EU and the ECtHR legal orders. One encounters some difficulty in trying to locate it on the complex constitutionalism-pluralism spectrum, which has come to dominate the academic discussion in the last two decades.²⁵ In the absence of EU accession to the ECHR, the relationship between the two

²¹ This is part of the process of assessing compliance with the EU's values laid down in Article 2 TEU (see Article 49 TEU).

²² See Article 59 (2) ECHR.

²³ The first serious attempt for EU accession to the ECHR has famously been thwarted by the Court of Justice in *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

²⁴ See n 3 for references.

²⁵ The constitutionalism/pluralism discussion is taking place in various dimensions. For the EU law-national law question see e.g. Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1; and Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317; for the relations between ECHR law and national law, see e.g. Nico Krisch, 'The open architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183; for the EU law-international law dimension see e.g. Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1; and for the international law discussion see e.g. William W. Burke-White, 'International Legal Pluralism' (2004) 25 *Michigan Journal of International Law* 963.

legal orders cannot be considered fully constitutionalised. It is thus fair to describe it as pluralist.²⁶ However, given in particular the provisions opening up EU law to the ECHR, their relationship is not reflective of a pure form of pluralism, but could rather be described as an expression of a form of constitutional pluralism given the norms that expressly open up EU law to ECHR influence. Indeed, viewed from the perspective of EU law there appears to be room for an analogy to the concept of a composite constitution (*Verfassungsverbund*) developed with regard to the relationship between the EU and its Member States.²⁷ The basic argument of this theory is that the EU Treaties and the constitutions of the Member States are integral parts of a composite constitution, evidence for which is derived from provisions opening up Member State law to EU law and vice versa.²⁸ Yet this theory may not be capable of explaining the reverse situation given a lack of references to EU law in the ECHR. Viewed from that perspective, the relationship appears more strongly pluralistic.

This might lead one to suggest that from the perspective of the ECHR, EU law could be regarded as ‘foreign (international) law’. While this may be true at one level, it would ignore the fact that by virtue of the doctrines of direct effect²⁹ and primacy,³⁰ some EU law forms part of the law of the EU Member States. As will be discussed, this has implications for the ECtHR’s consensus doctrine in that EU law may well be considered ‘domestic’ for the purpose of determining consensus. The close connection between EU law and the ECHR is particularly clear if one adopts the perspective of the EU Member States: they can be faced with cases of competing obligations under EU law and under the law of the ECHR. *Prima facie* at least there is no evident solution to such conflicts, which explains the complex case law on the responsibility of EU Member States for violations of the Convention triggered by EU law.³¹ At the same time one needs to be conscious of the situation of non-EU Member States. From their perspective, EU law is ‘foreign’ law and there appears to be no obvious reason why they should somehow be subjected to its influence by virtue of the ECHR.

Therefore, the relationship between EU law and the ECHR is multidimensional and highly complex. Suffice it to say that it is pluralist in nature with strong constitutional elements at least as far as its influence on EU Member States is concerned. In that sense at least, it is a very special relationship. This diagnosis may help explain some the lack of a coherent approach to EU law in the case law of the ECtHR.

The practice of the ECtHR: four categories of EU law influence

The analysis in this section is based on case law in which the ECtHR has mentioned the “European Union”, the “European Community”, the “European Communities” or the “Charter of Fundamental

²⁶ For a strong endorsement of a pluralistic understanding see Krisch (n 25).

²⁷ See e.g. Leonard F. M. Besselink, *A Composite European Constitution* (Europa Law Publishing 2008); Armin von Bogdandy and Stephan Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) 48 *Common Market Law Review* 1417.

²⁸ von Bogdandy and Schill (n 27) 1421.

²⁹ Starting with Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1.

³⁰ Starting with Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

³¹ See the cases of *Matthews* and *Bosphorus* (n 11) and the references to literature in n 4.

Rights” as a source of material on which it based its decision.³² The ECtHR refers to a number of different EU legal outputs. They include primary and secondary EU law, such as the Treaties, the Charter of Fundamental Rights, Directives, and Regulations.³³ Alongside these, the ECtHR cites the decisions of the CJEU on how these legal texts are interpreted.³⁴ Finally, the ECtHR refers to soft law originating in the European Union, such as Commission recommendations³⁵ and European Parliament resolutions.³⁶

One can identify four categories of cases in which EU material is used in the ECtHR. EU law and practice are cited in the materials section of the judgment, but not in the ECtHR’s reasoning (first category). EU legal material is also used to support an argument regarding the interpretation of the Convention. This can happen in three distinct ways. EU law and materials are cited to support an established way of reasoning, i.e. a static interpretation of the Convention (second category); EU law concepts are transplanted into ECHR doctrine (third category); EU law is referred to in the determination of European consensus and as a justification for an evolutive interpretation of the Convention (fourth category).

Of course, it cannot be said with military precision how influential EU legal materials were in the cases discussed. In each one of them the ECtHR cites them alongside other sources, for instance comparative law of the members of the Council of Europe, comparative law from non-European jurisdictions, international treaties, and so on. In addition, EU law has only been referred to in a relatively small number of cases compared with the overall number decided by the European Court of Human Rights.³⁷ Consequently, Dickson, for instance, concludes that the influence of the Charter of Fundamental Rights has been supportive rather than leading.³⁸ It is contended here, however, that these references to EU law, and in particular the Charter of Fundamental Rights, suggest that these sources exert an increasing influence on the ECtHR. This is evidenced by the fact that the case law of the CJEU is referred to more than that of any other court. A search in the ECtHR’s HUDOC database revealed a total of 449 results compared with 137 for the International Court of Justice or

³² HUDOC search in “International Law and Other Relevant Material”; search terms “European Union”; “European Community”; “European Communities”; and “Charter of Fundamental Rights” (conducted on 20 April 2016).

³³ E.g. reference to the principle of non-refoulement in Article 19 (2) CFR in *Babar Ahmad and Others v United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012), para 80 and reference to Directive 2004/23/EC on the setting of standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells in *S.H. and Others v Austria* ECHR 2011, para 44

³⁴ E.g. reference to Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Silvio Berlusconi and Others* [2005] ECR I-3565 in *Scoppola v Italy (no. 2)* App no 10249/03 (ECtHR, 17 September 2009), para 38.

³⁵ E.g. European Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector (2009/384/EC) in *N.K.M. v Hungary* App no 66529/11 (ECtHR, 14 May 2013), para 22.

³⁶ Resolutions on conscientious objections in *Bayatyan v Armenia* ECHR 2011, para 56.

³⁷ A HUDOC search (20 April 2016) in the section ‘international law and other relevant material’ yielded 44 results for ‘European Union’; 28 for ‘European Communities’; and 5 for ‘European Community’ in English – compare this with more than 41,000 cases (judgments and decisions) available on the same database in English.

³⁸ Brice Dickson, ‘The EU Charter of Fundamental Rights in the case law of the European Court of Human Rights’ [2015] *European Human Rights Law Review* 27, 40.

69 for the Inter-American Court of Human Rights.³⁹ Admittedly, these numbers are somewhat crude as they do not reveal how many of these cases were concerned with the responsibility of EU Member States for Convention violations originating in EU law or with scenarios as in *A, B and C v Ireland*. Nonetheless, they suggest that the case law of the CJEU – and by extension EU law in general – is of distinct significance in the development of the ECtHR’s doctrines. Moreover, this influence is likely to increase further with the CJEU becoming more and more active in the field of fundamental rights. It is therefore important to categorise the influence of EU law and provide a normative critique of its use by the ECtHR.

Mere reference to EU law and practice

The first category consists of cases in which the ECtHR merely mentions European Union law but does not refer back to it in its reasoning. The ECtHR often includes comparative material resulting from comparative law reports compiled by its research division for informational purposes.⁴⁰ It has rightly been argued that a demonstration by the ECtHR that it was aware of the possible solutions to a particular legal problem helps to enhance the legitimacy of a decision.⁴¹

In some instances, EU material serves as a general informational backdrop to the case.⁴² In others European Union law is mentioned in the arguments of one of the parties or in a separate opinion so that reference to it in the materials section of the judgment is necessary for a proper understanding of these arguments.⁴³ Sometimes EU law, in particular CJEU case law, is cited but not

³⁹ A HUDOC ‘simple search’ in English (20 April 2016) for ‘European Court of Justice’ yielded 190 results; 170 for ‘Court of Justice of the European Communities’; and 115 for ‘Court of Justice of the European Union’ (i.e. a total of 475). By comparison, a ‘simple search’ for ‘International Court of Justice’ produced 140 results; there were 71 for ‘Inter-American Court of Human Rights’; and 140 for ‘United Nations Human Rights Committee’. As for domestic courts, there were 69 results in a ‘simple search’ for ‘United States Supreme Court’; 22 for ‘Canadian Supreme Court’. As for European domestic courts, there were many more results, but mostly in cases brought against the home state of the respective court: 1384 for ‘Federal Constitutional Court’ (but 1294 of these were cases against Germany, leaving 90 cases in which that court was referred to in cases not brought against Germany); 1201 for ‘House of Lords’ (1158 of these were cases brought against the UK, leaving 43 non-UK cases); 11 for ‘UK Supreme Court’ (8 of these against the UK, leaving 3 non-UK cases); 49 for ‘Italian Constitutional Court’ (37 of these against Italy, leaving 12 non-Italian cases).

⁴⁰ Kanstantsin Dzehtsiarou and Vasily Lukashevich, ‘Informed Decision-Making: the Comparative Endeavours of the Strasbourg Court’ (2012) 30 *Netherlands Quarterly of Human Rights* 272, 273.

⁴¹ *Ibid*, 274.

⁴² This seems to have been the case in *Nordisk Film & TV A/S v Denmark* ECHR 2005-XIII; other cases include *Pishchalnikov v Russia* App no 7025/04 (ECtHR, 24 September 2009) mentioning Article 48 CFR; in *Iskandarov v Russia* App no 17185/05 (ECtHR, 22 September 2010) mentioning a letter by the EU Council Presidency to Russia; in *van Kück v Germany* ECHR 2003-VII directive 76/207 and CJEU decisions were mentioned; the European Parliament’s Resolution on the Confidentiality of Journalists’ Sources was mentioned in *Sanoma Uitgevers B. V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2009); the 1991 Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences is mentioned in *Smith v Germany* App no 27801/05 (ECtHR, 1 April 2010); in *Niemietz v Germany* (1992) Series A no 251-B the ECtHR mentioned *inter alia* the CJEU’s decision in *Joined Cases 46/87 and 227/88 Hoechst v Commission* [1989] ECR 2859.

⁴³ E.g. *Saadi v United Kingdom* ECHR 2008 in which Art 18 CFR was mentioned in a dissenting opinion and Directive 2005/85/EC was referred to by a third party; in *Bekos and Koutropoulos v Greece* ECHR 2005-XII the EU’s anti-discrimination directives were only referred to by the government; in *Nachova and Others v Bulgaria* ECHR 2005-VII the EU anti-discrimination directives were referred to by a third party; in *Sejdic and Finci v Bosnia and Herzegovina* ECHR 2009 Directive 2000/43 was mentioned by the applicants; in *Open Door and Dublin Well Woman v Ireland* (1992) Series A no 246-A the CJEU decision in *Case C-159/90 The Society for the*

referred to in the ECtHR's reasoning, but a thorough analysis of the outcome strongly suggests that the ECtHR's distinct awareness of the CJEU's position shaped the outcome of its decision.

For example in *Rantsev* the ECtHR mentioned the EU's Framework Decision on combating trafficking in human beings⁴⁴, but did not refer back to it in its reasoning even though it dynamically interpreted Article 4 (1) ECHR to prohibit human trafficking.⁴⁵ Given that the Framework Decision had been adopted unanimously by all (then) 15 Member States of the EU,⁴⁶ it could have served as evidence of a European consensus, thus providing a powerful argument in support of the evolutive interpretation adopted.⁴⁷

In such scenarios it would be preferable if the ECtHR were straightforward about the relevance of EU material.⁴⁸ Not only would such clarity strengthen its argument and make it more convincing, but it would also enhance the ECtHR's function as a catalyst for dialogue: by clearly pointing to the strengths and weaknesses of a particular solution found in EU law, the ECtHR could either encourage the CJEU and the EU legislator to revise their positions on a specific human rights question; or it could provoke them to themselves defend their position in a more convincing manner.

References made in the context of static interpretation

This subsection reveals how the ECtHR refers to EU law in order to come up with an initial interpretation of the right in question or an interpretation that is concordant with its own earlier case law, i.e. a static – as opposed to evolutive – interpretation. Admittedly, the distinction between the two categories is sometimes hard to draw as in both cases the substantive content of Convention rights is determined by reference to EU legal sources. The distinguishing feature is that evolutive interpretation concerns situations where reference to EU law is made in order to demonstrate new developments in the law – typically introduced by reference to the Convention as a 'living instrument' – which justify a deviation from an earlier interpretation.

From a normative perspective such references are generally to be welcomed as they have the potential to result in cross-fertilization. The cases of *Babar Ahmad* and *Sørensen and Rasmussen* show how the ECtHR expressly points to developments in EU law in order to confirm its findings. In *Babar Ahmad* the ECtHR found confirmation for its traditional approach that in extradition cases

Protection of Unborn Children Ireland Ltd v Stephen Grogan and others [1991] ECR I-4685 was referred to by the applicants and in the dissenting opinion; in *Vinter and Others v United Kingdom* ECHR 2013 the EU Framework Decision on the European Arrest Warrant was referred to by the government; in *Saunders v United Kingdom* ECHR 1996-VI the CJEU's decision in Case 374/87 *Orkem v Commission* [1989] ECR 3283 was mentioned by the applicant and in a dissenting opinion; the same case was referred to by the government in *Funke v France* (1993) Series A no 256-A.

⁴⁴ 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings [2002] OJ L 203/1.

⁴⁵ *Rantsev v Cyprus and Russia* ECHR 2010; the converse situation, i.e. the ECtHR not following the CJEU, can be found in *Niemietz v Germany* (n 42).

⁴⁶ See Article 34 TEU (Treaty of Amsterdam version).

⁴⁷ On consensus see below at 4.

⁴⁸ On the role of EU legal materials for the evolutive interpretation of the Convention, cf. *infra*; in a similar way, in the case of *Cha'are Shalom ve Tsedek v France* the ECtHR referred to an exception to the duty to slaughter animals with stunning contained in two EU Directives for ritual purposes only as part of the general background to the case, cf. *Cha'are Shalom ve Tsedek v. France* app no 27417/95 ECHR 2000-VII, para 20.

there could be no balancing of the reasons for removal of a person from a Contracting State with the danger of ill-treatment in the receiving state in Article 19 (2) CFR, which contains an absolute prohibition on so-called *refoulement*.⁴⁹ In *Sørensen and Rasmussen* the ECtHR relied on EU law in order to consider the Danish state's authorization of a closed-shop agreement⁵⁰ to be disproportionate and thus incompatible with Article 11 ECHR.⁵¹ It quoted *inter alia* the European Community Charter of the Fundamental Social Rights of Workers and Article 12 CFR and concluded that there was 'little support in the Contracting States for the maintenance of closed-shop agreements'.⁵² These examples show how confirmatory references to EU law serve to strengthen the legitimacy of the ECtHR reasoning. Moreover, they can help the ECtHR refine its case law by highlighting relevant differences under EU law.⁵³

Most importantly, perhaps, cross-references to EU law lead to increased coherence in the fundamental rights protection within Europe. After all, due to overlaps in their respective membership, the ECHR and EU law share a legal space so that the development and maintenance of common standards is desirable. This is *inter alia* demonstrated by the decision *Sindicatul "Păstorul cel Bun"*.⁵⁴ Legislative developments at the EU level suggested that a blanket exclusion of church employees from the right to form a trade union did not reflect common European standards and could not be maintained.⁵⁵ The ECtHR thereby not only confirmed the personal scope of Article 11 ECHR to include members of the clergy, but also strengthened the EU's Framework Directive⁵⁶ by confirming that it correctly reflected the current state of human rights protection in Europe in that it expressly lays down that even though an employer's ethos may demand a heightened degree of loyalty it does not prejudice the right to establish unions.⁵⁷ This coherence in interpretation results not only in greater predictability of judgments handed down at the European level, but also greater clarity in guiding national courts when deciding human rights question 'on the ground'. This consideration chimes with a further dimension of cross-fertilization between EU law and the ECHR in that both are integral to the larger project of European integration.⁵⁸

Legal transplants

⁴⁹ *Babar Ahmad and Others v United Kingdom* (n 33) para 175; reference to Article 19 (2) was made to the same effect in *Hirsi Jamaa v Italy* ECHR 2012, para. 135.

⁵⁰ The applicants in this case were compelled to join a trade union in order to keep their jobs.

⁵¹ *Sørensen and Rasmussen v Denmark* ECHR 2006-I.

⁵² EU law was used in a similar manner in the case of *N.K.M. v Hungary* (n 35) where the ECtHR took into account Article 34 CFR and the CJEU's decision in Case C-499/08 *Andersen v. Region Syddanmark* ECLI:EU:C:2010:600 in finding a tax disproportionate. A similar approach was taken in *Schüth v Germany* ECHR 2010.

⁵³ As e.g. happened in *Kress v France* ECHR 2001-VI.

⁵⁴ Another example is *Stec and Others v United Kingdom* ECHR 2006-VI.

⁵⁵ *Sindicatul "Păstorul cel Bun" v. Romania* ECHR 2013, para 142.

⁵⁶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁵⁷ A similar line of reasoning was adopted in *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009) where the ECtHR based parts of its findings of a violation of a positive obligation under Article 8 ECHR on the existence of the precautionary principle in environmental law, which is *inter alia* laid down in the law of the EU (at para 120).

⁵⁸ Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *Oxford Journal of Legal Studies* 499, 521-522; Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', 652-653.

The ECtHR has gone so far as to transplant legal concepts from European Union law into the context of the ECHR. Despite similarities with the consensus method discussed in the next section, legal transplants pose unique problems which justify a separate discussion at this point.

A problematic example of the use of a legal transplant can be found in *Posti and Rahko v Finland*, which concerned the question whether Article 6 (1) ECHR had to be construed in such a way as to allow individuals to challenge a governmental decree, which had been addressed to the public at large banning fishing with certain type of gear.⁵⁹ Such a challenge was not possible under Finnish law. The question for the ECtHR was whether notwithstanding the fact that the decree was not addressed to the applicants, there was a dispute over a 'right' in the present case. The ECtHR highlighted that Article 6 (1) ECHR had to be interpreted autonomously so that the legal situation under Finnish law was not determinative of the question. It pointed out that the applicants, who were professional fishermen, could claim a right to fish in certain State-owned waters because they had signed a lease with the State to that effect. The ECtHR then added a more general consideration based on the CJEU's case law on Article 263 (4) TFEU. That provision allows individuals to directly challenge acts of the European Union. If these are not addressed to them, the individual challenging them must show that the act is of 'direct and individual concern' to them. The ECtHR repeated almost verbatim the CJEU's famous *Plaumann*-formula, which contains the definition of 'individual concern':⁶⁰

It follows that where a decree, decision or other measure, albeit not formally addressed to any individual natural or legal person, in substance does affect the "civil rights" or "obligations" of such a person or of a group of persons in a similar situation, whether by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons, Article 6 § 1 may require that the substance of the decision or measure in question is capable of being challenged by that person or group before a "tribunal" meeting the requirements of that provision.⁶¹

Remarkably, while on the surface using the same test as the CJEU, the ECtHR gave it a broader understanding. While the CJEU requires that persons so affected must belong to a closed group of applicants, the ECtHR seemed to be content that the requirements of the test were met because the decree was 'directly related to [the applicants'] occupation as professional fishermen.'⁶² Under the *Plaumann*-test the mere engagement in a commercial activity would not be enough as, in theory at least, everyone would be able to take it up.⁶³ Interestingly, the ECtHR quoted as confirmation for its interpretation not the *Plaumann* decision, but the CJEU's decision in *Extramet*.⁶⁴

⁵⁹ *Posti and Rahko v Finland* ECHR 2002-VII; another problematic case in this regard is *Pellegrin v France* ECHR 1999-VIII.

⁶⁰ Case 25/62 *Plaumann v Commission* ECLI:EU:C:1963:17, where the CJEU held: 'Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'

⁶¹ *Posti and Rahko v Finland* (n 59) para 53.

⁶² *Ibid*, para 52.

⁶³ To this effect see *Plaumann v Commission* (n 60) which dealt with the importation of clementines – another type of commercial activity.

⁶⁴ Case C-358/89 *Extramet Industrie SA v Council of the European Communities* ECLI:EU:C:1992:257.

Most of the academic discussion on legal transplants is concerned with legislative or constitutional transplants, and not with transplants in case law.⁶⁵ Nonetheless, the criteria for legal transplants developed there can be useful to assess the ECtHR's approach to them. The ECtHR's willingness to transplant concepts of European Union law into ECHR doctrine demonstrates a similar openness to that of the CJEU towards the ECHR when it was confronted with the task of developing fundamental rights as general principles.⁶⁶ The arguments for such a development are broadly the same as those for cross-references explored in the introduction. The use of legal transplants, however, goes an important step further, which brings with it certain risks. Some of the strong caveats voiced against the use of transplants point to cultural differences and a danger of upsetting the political power-balance within constitutional orders.⁶⁷ These concerns are arguably less important where transplants between two European legal orders designed to pierce through national legal boundaries are concerned. At the same time, they cannot be entirely ignored. The particular difficulties associated with the use of transplants were pointed out by Fedtke.⁶⁸ His work focuses on transplants in domestic constitutional law, but his observations on fundamental rights transplants are nonetheless instructive. He says that fundamental rights 'shape the relationship between the state and the individual, and are often a carefully balanced expression of a society's most basic values and aspirations.'⁶⁹ Of course, the European Union is not a state and is not underpinned by a homogenous society. Yet the EU's Treaties are a reflection of similar compromises, not so much between society and the state, but between different Member States. Hence constitutional equilibrium is as important for the EU as it is for individual states. This came to the fore in *Opinion 2/13* on the EU's accession to the ECHR, where the CJEU considered the draft agreement on the EU's accession to the ECHR to be incompatible with the Treaties as it was liable to undermine the EU's constitutional order.⁷⁰ With this in mind, Fedtke's warning that the borrowing of constitutional ideas can be an 'unpredictable and potentially even hazardous activity' must apply to borrowings from EU law as well. This echoes the wider discussion in the field of comparative law that both the normative and the social context of norms must be taken into account when comparisons are made. The comparator should avoid simple comparisons and subsequent transplants of the black letter of the law, but instead look for functional equivalence of the norms compared.⁷¹

Posti and Rahko throws the problems that an uncritical use of transplants can have into sharp relief. As pointed out above the CJEU's case law on direct access to it under Article 263 (4) TFEU is anything but generous. The CJEU requires that a person, who is not an addressee of a Union act, be a member of a closed group of applicants, into which the applicants in the case before the

⁶⁵ Starting (simultaneously) with Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 and Alan Watson, *Legal transplants: an approach to comparative law* (Scottish Academic Press 1974).

⁶⁶ For a discussion of these cases see e.g. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (n 6).

⁶⁷ See Kahn-Freund (n 65).

⁶⁸ Jörg Fedtke, 'Constitutional Transplants: Returning to the Garden' (2009) 61 *Current Legal Problems* 49.

⁶⁹ *Ibid*, 50.

⁷⁰ *Opinion 2/13* (n 23).

⁷¹ See e.g. John C. Reitz, 'How to Do Comparative Law' (1998) 46 *American Journal of Comparative Law* 617, 620 et seq.

ECtHR, would not fall as the decree affects all current and future fishermen.⁷² The decision in *Extramet* relied on by the ECtHR is a noted exception to this strict case law but it is only applicable in anti-dumping cases.⁷³ Hence reliance on this exception-oriented strand of case law, which is confined to the peculiar situation of anti-dumping measures under EU law, whilst ignoring the standard – much less generous – case law of the CJEU, is not appropriate.

Nonetheless, transplants can be justified by the quality of a given ‘foreign’ solution.⁷⁴ The case of *D.H. v Czech Republic* provides an example for an appropriate use of a transplant from European Union law to ECHR law.⁷⁵ In this case the transplant was used to justify a more progressive approach to the burden of proof in discrimination cases under Article 14 ECHR. The ECtHR placed heavy reliance on various EU directives and the CJEU’s case law on indirect discrimination. The key question was whether it was sufficient proof of indirect discrimination if applicants could produce statistical evidence only, which had previously not been accepted by the ECtHR.⁷⁶ The applicants in *D.H.* had complained against the racial discrimination of Roma children and were able to produce statistics which showed that in one school district Roma children were disproportionately represented in schools for children with special needs. The evidence revealed that more than 50% of all children in such special schools were of Roma origin, whereas the proportion of Roma children attending primary schools in the district was only around 2% and only 1.8% of all children were placed in special schools. The ECtHR relied on the case law of the CJEU, which allowed such statistics to establish prima facie evidence, i.e. a rebuttable presumption that discrimination had occurred.⁷⁷ The adoption of the CJEU’s approach on the evidence required to show indirect discrimination is convincing. First, the CJEU can boast more expertise in matters of discrimination law. Second, the legal question that the ECtHR had to determine in *D.H.* was identical to the legal questions with which the CJEU is regularly confronted: was there an indirect discrimination or not? Hence a transplant was justifiable and worked well.⁷⁸

The examples show the methodological problems with reliance on ‘snippets’ of a vast and sophisticated legal order when interpreting the Convention. While transplants can be successful and lead to ‘better law’, as demonstrated in *D.H.*, the key problem in the other two cases seems to have been that the ECtHR transplanted solutions from EU law originating in areas that have nothing to do

⁷² This case law started with *Plaumann v Commission* (n 60) and was recently confirmed in Case C-583/11 P *Inuit Tapiriit Kanatami and Others* ECLI:EU:C:2013:625.

⁷³ On this in more detail see Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart 2015) 374-377.

⁷⁴ Fedtke (n 68) 51.

⁷⁵ *D. H. and others v Czech Republic* ECHR 2007-IV.

⁷⁶ Cf. the Chamber judgment in the same case: *D. H. v Czech Republic* app no 57325/00, 7 February 2006, para 46; *Hugh Jordan v United Kingdom* ECHR 2001, para 154.

⁷⁷ In particular, Case 170/84 *Bilka Kaufhaus GmbH v Karin Weber von Hartz* ECLI:EU:C:1986:204; Case C-167/97 *R v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* ECLI:EU:C:1999:60; Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* ECLI:EU:C:2003:583; Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services* ECLI:EU:C:2004:18; Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427.

⁷⁸ Another instance of a transplant was the case of *Marckx v Belgium* where the ECtHR used the approach taken by the CJEU in Case 43/75 *Defrenne v Sabena* ECLI:EU:C:1976:56, paras 69-75 to limit the temporal effects of an evolutive interpretation to cases not yet settled. The ECtHR anticipated that its decision to declare a differential treatment of ‘legitimate’ and ‘illegitimate’ children incompatible with Article 14 in conjunction with Article 8 ECHR had the potential to affect settled cases predating its decision, see *Marckx v Belgium* (1979) Series A no 31, para 58.

with human rights. This demonstrates a need to for careful scrutiny and thorough reasoning which takes account of the wider constitutional context of a provision before transplanting a solution from EU law into the law of the ECHR.⁷⁹ Otherwise the use of legal transplants may yield the exact opposite of the result envisaged and undermine the legitimacy of the ECtHR's decisions.

Reference to EU law to determine European consensus

Finally, the ECtHR makes reference to EU law to support findings on the existence of a European consensus. The following analysis of the ECtHR's case law is preceded by an overview of the use of European consensus by the ECtHR and the academic debate accompanying it. It is then shown that the ECtHR relies on a number of different EU sources when determining consensus. References to EU law can be identified mainly in the context of evolutive interpretation, but there are also examples of such references in margin of appreciation cases. The subsequent survey of the case law is preceded by a short introduction of the ECtHR's consensus method and is followed by a normative discussion as to the prudence of using EU law in connection with European consensus.

European consensus in the ECtHR's reasoning

In the ECtHR's own words, '[t]he consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the ECtHR when it interprets the provisions of the Convention in specific cases.'⁸⁰ The ECtHR often relies on a presence or absence of consensus when using one of its two signature doctrinal methods: evolutive interpretation and the margin of appreciation. Where a European consensus is absent, it tends to allow a broader margin of appreciation, and where consensus is present it may embark on evolutive interpretation. Despite some controversy about the the extent it should have⁸¹, an evolutive approach to the interpretation of the ECHR is today not disputed on a principled basis.⁸² Indeed, the effectiveness of the ECHR as a human rights instrument would be seriously compromised if it had to be interpreted in the same manner as it would have been understood in the 1950s; and it is hardly conceivable that this would have been the intention of the drafters so that a certain degree of flexibility embodied by evolutive interpretation can be considered to be built into the Convention.

The flipside to evolutive interpretation is the margin of appreciation, which gives the respondent state some discretion when restricting a Convention right.⁸³ It limits the ECtHR's powers of review because it is an international court interpreting an international convention.⁸⁴ It is based on a notion of subsidiarity resulting in the ECtHR showing a degree of deference to the decisions made by national authorities when it comes to the balancing of rights with common goals or other rights. It is

⁷⁹ Fedtke (n 68) 91; Dzehtsiarou (n 2) 105-109.

⁸⁰ *Demir and Baykara v Turkey* ECHR 2008, para 84.

⁸¹ See e.g. Lord Hoffmann, 'The universality of human rights' (2009) 125 *Law Quarterly Review* 416.

⁸² Note, however, the strictly originalist view of Judge Fitzmaurice in his dissenting opinion in *Marckx v Belgium* (n 78) para 7.

⁸³ David Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 14; the margin of appreciation was first introduced in *Handyside v United Kingdom* (1976) Series A no 24, para 48.

⁸⁴ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), 90, who calls this the structural concept of the margin of appreciation. He also identified another, substantive, concept, see *ibid* 84 et seq.

thus a tool for accommodating diversity within Europe in that the ECtHR will not second-guess a proportionality finding by a national court if it finds a margin of appreciation to exist.⁸⁵

The key rationale behind the ECtHR's consensus method is legitimacy. As pointed out by de Londras and Dzehtsiarou, the ECtHR – as a court whose jurisdiction is subsidiary to that of domestic courts – needs to make an effort to maintain a functioning relationship with its key stakeholders, the contracting states.⁸⁶ Otherwise it risks undermining the acceptance and execution of its judgments and an erosion of the basis for its effective functioning. By basing its findings on consensus, the ECtHR shows that it justifiably goes beyond what may have been the original intention of the contracting states. If the level of human rights protection in most of the parties to the Convention is shown to have improved, the ECtHR can therefore legitimately increase that level for the Convention system as a whole.

In terms of methodology, consensus is based on socio-political and legally comparative factors with the latter reflecting the former.⁸⁷ Of course, it should be noted that consensus is never the only factor in the ECtHR's reasoning.⁸⁸ The case of *Ünal Tekeli v Turkey* serves as a good illustration of an 'ideal' consensus argument – in this case in the context of the margin of appreciation.⁸⁹ Turkey was the only country in the Council of Europe not to allow married women to keep their birth name. The ECtHR supported its argument that the unequal treatment of men and women in respect of their private life was not justifiable by reference to consensus. It drew on a number of declarations by the Council of Europe on gender equality and pointed to developments under the auspices of the United Nations. Crucially, the ECtHR noted 'the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing'.⁹⁰ In response to an argument by Turkey that a common surname was necessary to ensure family unity, the ECtHR again made reference to the practice of the other contracting states, which led it to conclude that 'it is perfectly conceivable that family unity will be preserved and consolidated where a married couple chooses not to bear a joint family name.'

Thus the gist of the ECtHR's consensus reasoning is that the legitimacy of an evolutive interpretation of the Convention or of a narrow margin of appreciation increases if the parties to the Convention can be regarded to have agreed to it either by signing up to international treaties, which

⁸⁵ Aaron A. Ostrovsky, 'What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals' (2005) 1 *Hanse Law Review* 47, 48.

⁸⁶ Fiona De Londras and Kanstantsin Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 523, 527.

⁸⁷ Kanstantsin Dzehtsiarou, 'European Consensus: A Way of Reasoning' University College Dublin Law Research Paper No 11/2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411063> accessed 6 November 2015, 4

⁸⁸ Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 *Human Rights Law Journal* 248, 250; consensus is not without its critics: see for instance Tom Zwart, 'More human rights than Court: why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court Of Human Rights And Its Discontents* (Elgar 2013) 71, 91; John L. Murray, 'Consensus: concordance, or hegemony of the majority?' in European Court of Human Rights (ed), *Dialogue between judges* (2008); Hoffmann (n **Error! Bookmark not defined.**) 428-429.

⁸⁹ *Ünal Tekeli v. Turkey* ECHR 2004-X; on the margin of appreciation see below.

⁹⁰ *Ibid*, para 61.

mirror such an evolutive interpretation, or by passing legislation to the same effect. As will be shown, the attributes of EU law – its multilateral nature, uniform application, direct effect, membership of 28 out of 47 parties to the ECHR, easy accessibility – make it a theoretically very potent factor in the consensus analysis. It can in effect be regarded as part of their domestic law. At the same time, its use in cases against non-EU Member States can be potentially problematic. For them it is clearly foreign law. The consensus method derives its strength from the fact that if the ECtHR demonstrates that other European states have progressed in a certain way, the state affected by a judgment based on consensus will find it easier to accept it.⁹¹ Yet if a non-EU Member State is in effect judged by standards developed in a legal order it either chose not to join or was not allowed to join, this strength could see itself transformed into a weakness.

Survey of the case law

A survey of the ECtHR's case law reveals that it regularly refers to EU law sources when determining the existence of a European consensus. In some cases, these sources are expressly relied on in order to demonstrate consensus or a lack thereof, in other cases an influence to this effect can only be inferred from the judgment as a whole. The following discussion distinguishes three types of cases: first, those in which the CFR serves as a reference point; second, those in which other sources of EU law are relied on; and third, cases that do not explicitly mention consensus, but where there are nonetheless reasons to suggest that the ECtHR's interpretation was based on consensus and that EU law influenced its determination.

References to the CFR: an updated understanding of the Convention

Many provisions of the CFR replicate those found in the ECHR but contain slight modifications, and indeed modernisations. Perhaps unsurprisingly, the cases reviewed in this study reveal a pattern in recent ECtHR case law of giving the Charter the role of an updated version of the Convention; and the Charter is explicitly used to demonstrate contemporary consensus.

In *Bayatyan v Armenia* the Grand Chamber of the ECtHR decided that Article 9 ECHR entailed a right to conscientious objection.⁹² It overturned previous decisions by the European Commission on Human Rights which had been based on the wording of Article 4 (3) (b) ECHR, which suggests that conscientious objection is only protected by the Convention if recognised by the contracting party.⁹³ In justifying an evolutive interpretation of Article 9 ECHR, the ECtHR relied amongst other materials on Article 10 CFR, which is modelled on Article 9 ECHR but explicitly recognises the right to conscientious objection. From this the ECtHR concluded 'unanimous recognition of the right to conscientious objection in the Member States of the European Union as well as the weight attached that right in modern European society.'⁹⁴ This phrase encapsulates the potential influence of – and problem with engaging – the Charter in order to determine consensus: not only is it reflective of a consensus between twenty-eight European countries, but the ECtHR gives it *additional* weight by

⁹¹ Judge Renate Jaeger, quoted in Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] Public Law 534, 545.

⁹² *Bayatyan v Armenia* (n 36).

⁹³ Starting with *Grandrath v Germany* app no 2299/64 DR 31, para 32.

⁹⁴ *Bayatyan v Armenia* (n 36) para 106.

equating those twenty-eight countries with ‘modern European society’.⁹⁵ Applying a similar method in *Neulinger v Switzerland* the ECtHR Grand Chamber based its finding of a ‘broad consensus’ that the best interest of the child must be paramount ‘in particular’ on Article 24 (2) CFR.⁹⁶

By contrast, in *Schalk and Kopf v Austria* the ECtHR showed the limits of the invocation of the Charter.⁹⁷ Despite the open wording of Article 9 CFR, the ECtHR hesitated to extend the corresponding Article 12 ECHR to encompass same-sex marriage. Its argument that there was a lack of consensus on this question given that only six contracting parties allow it shows that updated Convention rights enshrined in the Charter merely contain the potential for evolutive interpretation, but are not in themselves sufficient.⁹⁸ This is consistent with the rationale that consensus is concerned with actual progress in the states bound by the Convention and not with the potential for progress. However, at first glance at least it sits uneasily with *Christine Goodwin* on the right of post-operative transsexuals to marry a person of the sex opposite to their re-assigned gender where the legal situation in the UK was very much in line with that in other European countries.⁹⁹ The ECtHR admitted that there was a ‘lack of evidence of a common European approach’ and justified an evolutive interpretation by relying on a ‘continuing international trend’ instead. This could be read to suggest that developments in the Charter – even if not yet reflective of practice in the EU Member States – can be used to justify consensus where there is additionally an emerging international consensus. Of course, this makes the ECHR’s approach in *Schalk and Kopf* difficult to explain as, arguably, a similar international trend is discernible with regard to same-sex marriage.¹⁰⁰ This suggests that the case law in this regard is somewhat mixed up and clarification would certainly be welcome.

References to other EU sources

While the Charter is the most obvious point of reference for aiding with the interpretation of the ECHR, other sources of European Union law can equally help to reveal the existence or non-existence of consensus. In *Micallef v Malta* the ECtHR made reference to a CJEU judgment¹⁰¹ to support an evolutive interpretation to extend fair trial rights to interim proceedings. By contrast, in *S.H. v Austria* the ECtHR relied on an explicit provision in Directive 2004/23/EC on the setting of standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells to show that there was no consensus at the material time. That provision expressly states that the Directive does not interfere with the decisions of Member States on the use of human cells, so that the ECtHR did not find that the

⁹⁵ Article 9 CFR was used in a similar manner as an update to Article 12 ECHR in *Christine Goodwin v United Kingdom* ECHR 2002-VI; a similar line of argument can also be found in *Scoppola v Italy (no. 2)* (n 34) which overturned the ECommHR’s decision in *X v Germany* app no 7900/77, DR 13, p 71 holding that in light of Article 49 CFR, Article 7 ECHR now had to be interpreted to require that a more lenient penalty retroactively where at the time when the offence was committed a more severe penalty would have had to be imposed.

⁹⁶ *Neulinger and Shuruk v Switzerland* ECHR 2010, para 135; confirmed in *X v Latvia* ECHR 2013, para 97.

⁹⁷ *Schalk and Kopf v Austria* ECHR 2010.

⁹⁸ Additionally, it should be noted that Article 9 CFR does not mandate the introduction of same-sex marriage in EU Member States. It expressly states that marriage is ‘guaranteed in accordance with the national laws governing [its] exercise’. Hence it opened up its scope to same-sex couples, but only in so far as Member States allow their recognition.

⁹⁹ *Christine Goodwin v United Kingdom* (n 95).

¹⁰⁰ See the international case law referred to in *Schalk and Kopf v Austria* (n 97) para 48.

¹⁰¹ Case 125/79 *Bernard Denilauler v SNC Couchet Frères* ECLI:EU:C:1980:130.

respondent state overstepped the limits of the margin of appreciation resulting from the lack of consensus.¹⁰²

Cases not explicitly mentioning consensus

There are additionally cases in which the ECtHR justified an evolutive interpretation of the Convention with reference to developments under EU law without expressly mentioning consensus, even though its reasoning is evidently based on it. In *Sergey Zolotukhin v Russia* the Grand Chamber of the ECtHR followed the approach taken in EU law to the determination of what constitutes the ‘same offence’ offence for the purpose of the *non bis in idem* principle laid down in Article 4 Protocol 7 ECHR.¹⁰³ Quoting Article 50 CFR, which adopts the same ambiguous wording as Article 4 Protocol 7 ECHR, and Article 54 of the Convention Implementing the Schengen Agreement, which speaks of ‘same facts’, the ECtHR referred to a number of CJEU decisions, all of which were in favour of looking at the identity of the facts rather than the legal classification of the offence.¹⁰⁴ The ECtHR therefore consolidated its hitherto inconsistent case law on the question by adopting the ‘same facts’ approach. While it did not expressly mention consensus its reasoning appears to have been based on consensus-type considerations.¹⁰⁵ In a similar vein, in *Konstantin Markin v Russia* the ECtHR decided that the denial of parental leave to a fathers working in the military, while entitling mothers in the same line of employment, constituted discrimination and was in breach of Article 14 in conjunction with Article 8 ECHR. The ECtHR relied *inter alia* on EU legislation and CJEU case law on the matter¹⁰⁶ to show that society had evolved since its judgment in *Petrovic v Austria*, where it had found a similar provision of Austrian law to not be discriminatory since there existed no European consensus on the matter at the material time.¹⁰⁷ Like in *Markin*, the ECtHR itself did not explicitly refer to European consensus, even though the fact that it overturned *Petrovic* and the (on this point) concurring opinion by Judge Pinto de Albuquerque, who expressly mentions consensus, suggest that this was a consensus case.¹⁰⁸ Both cases are furthermore instances of the ECtHR basing an evolutive interpretation in cases brought against non-EU Member States on developments under EU law. This will be problematized in the following section.

EU law and European consensus: some normative questions

The previous discussion has shown that the ECtHR is minded to make reference to EU law sources when determining the existence of a European consensus. As argued above, the resulting cross-fertilization is generally to be welcomed as a positive development. However, consensus analysis goes a step further and poses its own challenges. As will be shown in particular, the ECtHR bases its

¹⁰² *S.H. and Others v Austria* (n 33) para 106-107.

¹⁰³ *Sergey Zolotukhin v Russia* ECHR 2009.

¹⁰⁴ Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C - 250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij NV (LVM) and others v. Commission* ECLI:EU:C:2002:582; Joined Cases C-204/00 P, 205/00 P, 211/00 P, 213/00 P, 217/00 P, 219/00 P *Aalborg Portland and others v. Commission* ECLI:EU:C:2004:6; Case C-436/04 *Leopold Henri Van Esbroeck* ECLI:EU:C:2006:165; Case C-367/05 *Norma Kraaijenbrink* ECLI:EU:C:2007:444.

¹⁰⁵ *Sergey Zolotukhin v Russia* (n 103) para 79-81.

¹⁰⁶ See *Konstantin Markin v Russia* ECHR 2012, para 140, where the ECtHR refers to the comparative material quoted at the beginning of the judgment, which includes many references to EU law and CJEU decisions on the matter.

¹⁰⁷ *Petrovic v Austria* ECHR 1998-II.

¹⁰⁸ Partly concurring, partly dissenting opinion by Judge Pinto de Albuquerque, *Konstantin Markin v Russia*.

findings on EU law not only in cases brought against EU Member States, but also in cases against non-EU Member States. Here the difficulties in categorizing EU law mentioned above come to the fore.

There are generally good reasons for references to EU law in order to support a finding of European consensus. First, comparative analysis forming the basis of the determination of consensus is highly complex and the ECtHR's research unit has limited resources.¹⁰⁹ In this respect references to European Union law have the great advantage of automatically reflecting an agreement between twenty-eight out of forty-seven states bound by the Convention. On a practical level, EU law is moreover readily accessible in the two working languages of the ECtHR, French and English. Second, EU law is of a unique quality which makes it more akin to domestic law than international law. It not only takes primacy over conflicting provisions of national law,¹¹⁰ but is also capable of having direct effect, i.e. being directly relied upon in the courts of the Member States.¹¹¹ Its harmonising quality and decentralised application thus make it a highly persuasive and ideal basis of consensus.¹¹² As such it would be appropriate to consider it part of the domestic consensus rather than international consensus, which implies a high persuasive value.¹¹³ Third, the ECHR and the European Union are founded on shared values. Both systems have the 'European idea' as a common heritage, most visible in their use of the European flag as a symbol.¹¹⁴ Fourth, there may be good substantive reasons why a particular solution found in EU law is convincing. This may be particularly so where EU law can claim special expertise, e.g. in anti-discrimination law. In sum, taking inspiration from EU law could result in European consensus *par excellence*.

The following paragraphs subject this argument to some scrutiny, however. While it is acceptable for EU law sources to form an important aspect of the consensus analysis, some caution is warranted in particular in cases with non-Member States as respondents. Nonetheless, it transpires from the analysis of the ECtHR's practice that it has largely managed to avoid the theoretically existent pitfalls.

As far as cases brought against EU Member States are concerned there is at first glance little that would speak against references to EU law developments for the determination of consensus. It is a rule of international treaty interpretation reflected in Article 31 (3) (c) VCLT that an interpreter must take into account '[a]ny relevant rules of international law applicable in the relations between

¹⁰⁹ Kanstantsin Dzehtsiarou, 'Consensus from within the Palace Walls' UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No 40/2010, 6.

¹¹⁰ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49; *Costa v ENEL*.

¹¹¹ Starting with *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

¹¹² Wildhaber, Hjartarson and Donnelly (n 88) 255.

¹¹³ This is pointed out in the context of EU accession to the ECHR by Kanstantsin Dzehtsiarou and Pavel Repyeuski, 'European Consensus and EU Accession' in Vasiliki Kosta, Nikos Skoutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 309, 318.

¹¹⁴ A common aim was the prevention of tyrannical rule and to provide an answer to the 'German problem' in (Western) Europe, see for the history of the ECHR Ed Bates, *The Evolution of the European Convention on Human Rights* (OUP 2010) 5 et seq, and for the development of the EU Desmond Dinan, 'Fifty Years of European Integration: A Remarkable Achievement' (2008) 31 *Fordham International Law Journal* 1118. As is well known, the answers differed and some countries opted for economic integration by forming the European Coal and Steel Community and the European Economic Community whereas others opted for less integration and merely signed up to the Council of Europe. Others still became parties to both regimes.

the parties.’ In the case of the EU Member States this obviously includes EU law. Closely related to this is the argument that the ECtHR would be faced with a situation in which the Member State concerned had expressed its consent to a certain solution under one regime (the EU) so that it is justifiable to hold it to a similar standard under the ECHR. Indeed, a Member State could be accused of inconsistent behaviour (*venire contra factum proprium*) if it does not live up to the commitments made under EU law in a case brought against it pending before the ECtHR.

There is one consideration, however, which suggests that even in cases brought against EU Member States the ECtHR should not only rely on the consensus within the EU. This would in particular be the case where consensus was used to justify an evolutive interpretation or a narrow margin of appreciation.¹¹⁵ The reason is that the ECtHR follows a *de facto* doctrine of precedent. While it does not consider itself formally bound by a doctrine of *stare decisis* akin to that under the common law it will normally refer to its earlier judgments in the ‘interests of legal certainty, foreseeability and equality before the law’.¹¹⁶ It thus bases later decisions on earlier ones unless there are good reasons not to do so.¹¹⁷ The *de facto* resulting *erga omnes* effect of the ECtHR’s judgments is likely to lead to spill-over effects into cases not concerning EU Member States even where an evolutive interpretation of the Convention was mainly based on a consensus between EU Member States.

A connected point needs to be made as far as the ECtHR’s tendency to treat the EU Charter of Fundamental Rights as an updated version of the ECHR is concerned. As Article 51 (1) CFR demonstrates, the Charter is always binding on the Union and its institutions, but only binding on the Member States ‘when they are implementing Union law’. This restricted applicability to the Member States stems from the fact that most of the time European Union law is applied through them. The Union’s model of executive federalism thus necessitates that where the Member States are acting as ‘agents’ of the Union, they must abide by the Charter. Consequently, where Member States are not implementing Union law, they are not bound by the Charter.¹¹⁸ The Member States were adamant to make this clear by expressly stating that the Charter does not extend the competences of the EU in both Article 6 (1) TEU and Article 51 (2) CFR. This shows that they did not consent to being bound by the Charter in all situations. It cannot therefore be considered a harmonised standard of fundamental rights for all Member States in all situations. Moreover, given that the Union itself is not (yet) a party to the ECHR, some additional caution as to the Charter’s evidentiary value for the proof of European consensus is required. It should therefore not be uncritically read into the Convention as being straightforwardly an updated version of the original.

Similar considerations warrant caution in this regard as far as cases brought against non-EU Member States are concerned. While it is true, as the ECtHR has itself pointed out, that ‘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’¹¹⁹, it would be wrong if in

¹¹⁵ Where a finding that no consensus exists is based on EU law, such as in *S.H. and Others v Austria* (n 33), there is no issue.

¹¹⁶ *Scoppola v Italy (no. 2)* (n 34) para 104.

¹¹⁷ See for instance Alastair Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’ (2009) 9 Human Rights Law Review 179.

¹¹⁸ See e.g. Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126.

¹¹⁹ *Demir and Baykara v Turkey* (n 80) para 86.

such cases the ECtHR relied purely on a numbers game when determining consensus. This would result in the non-EU members being co-opted into developments brought about by a group of contracting states without the possibility of those states which perhaps deliberately stayed out of the EU having had the chance to influence such developments. There is already a tendency that the ECtHR adopts a formal approach purely based on numbers.¹²⁰ This tendency is perhaps best encapsulated in the following quote by former ECtHR Judge Rozakis:

It is undeniable that evidence of the existence of a European consensus in situations where and advanced protection is offered by the EU legal order is easily detectable. [...] The evidence that the EU Member States consent to an advanced protection suffices, I think, to prove the existence of European consensus [...].¹²¹

It is suggested that a formal approach such as this would be problematic. First, the ECtHR needs to ensure that its approach regarding the determination of consensus does not violate the rule laid down in Article 34 VCLT that a treaty does not create obligations for third parties without their consent. Thus consensus needs to be based on more than pure numbers. With regard to EU law it should additionally be pointed out that legislation can usually be adopted with a qualified majority of Member States voting in its favour so that sole reliance on numbers may not even reflect the true consensus amongst EU Member States.

Second, the driving force behind the consensus approach appears to be with the legitimacy of the ECtHR's decisions, the rationale being that the respondent would find a decision easier to accept if it can be shown that there is a consensus amongst the other parties to the ECHR. One can voice some doubt as to whether a decision would be as easily acceptable where a non-EU state was the respondent and an interpretation was mainly based on developments in EU Member States. This chimes with Murray's criticism that consensus analysis could lead to a 'hegemony of the majority'.¹²² The legitimising potential of consensus consists in its conception as an implicit consent of the parties to the ECHR, which in the case of non-EU Member States may be considered lacking as far as the Charter is concerned.¹²³ It is thus important that in such cases the ECtHR is aware of the problems that references to EU materials can create. It should ensure that it either bases its reasoning not purely on consensus or treats a consensus determined on the basis of developments in EU Member States as having less force than it ordinarily would. Otherwise it risks undermining the ECHR system by effecting the exact opposite of what consensus sets out to achieve, namely increasing the acceptability of its decisions. Moreover, the ECtHR should remain open to not following a consensus if there are good reasons for not doing so.¹²⁴ In connection with the previous discussion, one of

¹²⁰ Dzehtsiarou and Repyeuski (n 113) 322, even though they admit that there is some academic debate as to whether this is so.

¹²¹ Christos L. Rozakis, 'Enlarging the Field of Protection of Human Rights' in Vasiliki Kosta, Nikos Skoutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart 2014) 327, 331.

¹²² Murray (n 88).

¹²³ See a parallel argument in respect of the ECtHR's reliance on an 'international trend' in *Christine Goodwin v United Kingdom* (n 95) by Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* 67.

¹²⁴ *Schalk and Kopf v Austria* (n 97) is an example of a case where the ECtHR was open in that way and did not follow an 'emerging consensus'.

these good reasons – though not actually employed by the ECtHR so far – could be that in a case brought against a non-EU Member State a consensus is mainly based on developments in EU law.

With this in mind, it is now appropriate to revisit the above-discussed cases brought against non-EU Member States, in which the ECtHR relied on EU legal materials in the context of a consensus analysis. The problem lies in the special status of EU law for the ECHR legal order. As pointed out above, on the one hand it shares many features of domestic law, but on the other hand, for non-Member States it is clearly ‘foreign’. An express recognition of this ambiguity on part of the ECtHR could perhaps be coupled with an admission that a ‘one type of consensus fits all approach’ may not be appropriate and result in a greater degree of clarity and acceptability on part of non-Member States. While there are some deficits in the ECtHR’s reasoning in some of these cases, the following brief analysis reveals that overall the ECtHR’s use of EU materials in cases brought against non-Member States is sound – as it has not placed sole reliance on developments at the EU level – and that therefore the theoretically existent dangers have not materialised to a large degree. Nonetheless, it would the ECtHR could improve its reasoning by clarifying the relative weight accorded to each of the sources cited.

In all cases brought against non-EU Member States referred to above the ECtHR did not solely rely on developments under EU law in order to show consensus. For instance in *Demir and Baykara v Turkey*, the Charter was one of many sources cited alongside *inter alia* the International Covenant on Civil and Political Rights (ICCPR), an ILO Convention and Council of Europe instruments.¹²⁵ In *Sergey Zolotukhin v Russia* the ECtHR’s approach was a little more problematic as the only instrument relied upon to which Russia had ratified was the ICCPR. All other instruments, such as the Statute of the International Criminal Court, or the case law of the Inter-American Court of Human Rights and of the United States Supreme Court, as well as the EU legal materials referred to had not been signed up to by Russia. While this does not mean that the consensus analysis is illegitimate here, it would have been positive if the ECtHR had provided more detail as to why this solution was considered convincing enough to justify an evolutive interpretation that is binding on Russia. There is in particular a lack of analysis of the domestic law of non-EU Member States that are parties to the ECHR. The approach taken in *Bayatyan v Armenia* is more appropriate in this regard. The ECtHR was in a position to point not only to the CFR, but also to the fact that only four other contracting parties did not respect the right to conscientious objection. Thus European Union law was only one piece of evidence in this regard.¹²⁶ The overall consensus was strong and not only present among the EU’s Member States but also in non-EU countries. In *Neulinger v Switzerland* the ECtHR appeared to place a special emphasis on the Charter as it was the only instrument referred to and highlighted (‘in particular’) in the actual reasoning even though numerous other treaties which Switzerland was bound by appeared in the ‘relevant domestic law and international law and practice’ section of the judgment. Hence while the dangers exist in theory – and the ECtHR should be aware of them – in practice they have not materialised.

Conclusion: call for an open and consistent approach

The discussion in this article has shown that the ECtHR makes regular use of European Union legal materials in its judgments. While the tenor of the argument is generally supportive of references of

¹²⁵ *Demir and Baykara v Turkey* (n 80) paras 98-108.

¹²⁶ *Bayatyan v Armenia* (n 36) para 103.

this kind as they are likely to result in ‘better law’ and increased legitimacy of the ECtHR’s decisions, the article expresses some unease as to the exact way in which the ECtHR uses European Union law in its judgments. The various criticisms revealed in the above discussion can be condensed as follows. First, the ECtHR should be open about the relevance of EU law referred to in any given case. It must be clear why the ECtHR makes reference to it and in how far recourse to EU law has influenced its judgment. Clarity strengthens the argument and is therefore conducive to achieving the two aims of ‘better law’ and legitimacy. Second, when adopting approaches first developed in European Union law, the ECtHR should ensure that it takes account of the wider constitutional context surrounding the respective piece of European Union law. This is not only important when considering legal transplants, but also where the ECtHR relies on EU law to demonstrate the existence of a European consensus. Third, the ECtHR should become clear about the classification of European Union law as supranational law *sui generis*. It would be useful to acknowledge that it is neither domestic nor international law, but possesses unique qualities. Clarity of classification will become particularly relevant in case the European Union finally signs up to the Convention.¹²⁷ Such a move could result in further question marks regarding references to EU law for the purpose of the ECtHR’s consensus analysis. This is because European Union law could no longer be treated as a source of international law to which the majority of the ECHR’s contracting parties have signed up, but it would at the same time be the ‘domestic law’ of one of those contracting parties. In this scenario, the double-faced nature of European Union law is likely to become even more visible and it will be necessary to acknowledge it as such.

The ECtHR is thus called upon to adopt a more consistent and open approach. In particular, it should avoid argumentative shortcuts by uncritically copying EU law approaches without properly scrutinising their ‘fit’. By contrast, a more thorough legal analysis and the resulting more convincing legal argument would lead to ‘better law’. Moreover, as de Londras has pointed out, the ECtHR forms an important part of European constitutionalisation.¹²⁸ Its decisions influence the development of fundamental rights conceptions at the national, supranational, and international level. Its influence varies, of course, but its position has been described as a ‘shadow constitution’ for some domestic legal orders.¹²⁹ If the ECtHR wishes to continue fulfilling this role – and there are good reasons that it should¹³⁰ – then it must ensure that its decisions are perceived as legitimate. Thorough reasoning and a consistent and open approach as to the origin of a particular approach taken are tools to enhance the legitimacy of judgments. Enhanced legitimacy and ‘better law’ would also provide an encouragement for the CJEU and for national courts to base their decisions on the ECtHR. This way the ECtHR would make the most of its constitutionalist role in the European legal space and continue to contribute to the development of the rule of law beyond.

¹²⁷ The achievement of this goal has recently been made more complicated by the Court of Justice, see *Opinion 2/13* (n 23).

¹²⁸ Fiona De Londras, ‘Dual functionality and the persistent frailty of the European Court of Human Rights’ [2013] *European Human Rights Law Review* 38, 40.

¹²⁹ Alec Stone Sweet, ‘Sur la constitutionalisation de la Convention européenne des droits de l’homme: cinquante ans après son installation, la Cour européenne des droits de l’homme conçue comme une cour constitutionnelle’ (2009) 80 *Revue Trimestrielle des Droits de l’Homme* 923, 935.

¹³⁰ See e.g. De Londras (n 128).