

AFTER THE EU CHARTER OF FUNDAMENTAL RIGHTS: THE COURT OF JUSTICE AS A HUMAN RIGHTS ADJUDICATOR?

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ABSTRACT

This article examines the engagement by the Court of Justice of the European Union (CJEU) with the EU Charter of Fundamental Rights over the period since the Charter was made formally binding by the Lisbon Treaty in 2009. A survey of the output of the Court during that time reveals a sharp rise in the number of cases in which a provision of the Charter was cited or argued before the Court. Further, the Court has engaged substantively with and given prominence to the Charter argument in a growing number of these cases. In other words, the incidence of human rights adjudication before the CJEU has been significantly augmented by the adoption of the Charter as a binding legal instrument. The article considers the implications for the Court of Justice of the growing demand for it to function in certain cases as a human rights adjudicator. More particularly, it questions whether the long-standing judicial style and approach of the Court – its self-referential, formulaic and often minimalist style of reasoning – is appropriate to this expanded role. The article argues that the nature and context of the increasing number of human rights claims being made before the Court call for greater openness on the part of the CJEU to the use of international and comparative law and to the possibility of third party interventions. Further, and particularly given the evident unwillingness of the CJEU to countenance the practice of separate concurring or dissenting opinions, the Court should, particularly in cases involving human rights claims, rethink its increasingly frequent practice of dispensing with the Opinion of an Advocate General.

Keywords: Charter; CJEU, comparative law; ECHR; human rights

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§1. INTRODUCTION

The Charter of Fundamental Rights, which was first drafted and adopted in 2000, has been a legally binding instrument of EU law since late 2009, binding both the EU institutions and the Member States when they act within the scope of EU law.¹ Between that time and the end of 2012, the Court of Justice has made reference to or drawn on provisions of the Charter of Rights in at least 122 judgments, and the General Court (previously the Court of First Instance) in at least 37 judgments.² In 27 of these 122 judgments, the CJEU engaged substantially with arguments based on one or more provisions of the Charter, while in 7 of its 37 judgments the General Court did so.³ Even prior to the Charter gaining binding force, the Court – as well as many of its Advocates General – had made reference to its provisions on quite a number of occasions,⁴ but that number has risen very significantly since the Charter acquired legal effect.

Moreover, the growth of the Court's role as a human rights adjudicator is not just a function of the coming into force of the Charter with a binding set of EU human rights commitments for the Court to enforce, but also a consequence of the continued expansion of the scope of EU law and policy. A significant part of the EU's legislative corpus now covers areas such as immigration and asylum, security and privacy, alongside many of the more traditional fields of EU policy including competition and market regulation. The EU, in other words, despite its recent economic woes, is a powerful and pervasive law-making entity with the capacity to impinge on fields of human freedom and welfare in many respects. Further, the coming into force of the Charter has widened the CJEU's human rights role not just by multiplying the rights provisions which it is empowered to enforce,

¹ For discussion of what lies within the scope of EU law for Charter purposes, and what the phrase 'implementing Union law' in Article 51 of the Charter means, see e.g. G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', 26 *European Law Review* 1 (2001), p. 136; L. Besselink, 'The Member States, the national constitutions, and the scope of the Charter', 8 *Maastricht Journal of European and Comparative Law* 1 (2001), p. 68. For more recent analyses of the CJEU's approach to this question, see L. Pech, 'Between Judicial Minimalism and avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*', 49 *Common Market Law Review* 1 (2012), p. 1–40; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8 *European Constitutional Law Review* 3 (2012), p. 375–403; A. Rosas, 'When is the EU Charter of Fundamental Rights applicable at national Level?', 19 *Jurisprudence* 4 (2012), p. 1271. For a recent important ruling by the Grand Chamber of the Court of Justice on the question, see Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, Judgment of 26 February 2013, not yet reported.

² These numbers are based on a search of the case law from 1 December 2009 until 31 December 2012, using the Court's Curia website database, and using a range of search terms intended to capture all relevant cases. It is possible that there are other cases which were not detected by this search, but the analysis in this article is based on the 122 Court of Justice cases and 37 General Court cases which were returned by it.

³ In the remaining 95 cases, the Court of Justice referred to the Charter mainly in a passing manner, while the General Court did so in the 30 remaining cases in which the Charter was cited.

⁴ See e.g. J. Morijn, 'Judicial References to the Charter of Fundamental Rights: First Experiences and Possible Prospects', www.fd.uc.pt/igc/pdf/papers/john_morjin.pdf (last visited 26 March 2013).

but also by expanding the scope of the Court's jurisdiction over these extensive fields of law and policymaking. As has recently been pointed out, the Lisbon Treaty increased the likely extent of the CJEU's case law on fundamental rights issues in three ways: by repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody.⁵ The combination of these various features – the binding force of the Charter of Rights, the ever-expanding scope of EU powers and competences, and the extension of the Court's jurisdiction by the Lisbon Treaty – heralds a growing role for the Court as a human rights tribunal.

Yet the Court's role as a human rights adjudicator is actually a relatively recent one. Despite the fact that the Court has made reference, for several decades since the early 1970s, to fundamental rights as general principles of law, and to provisions of the European Convention on Human Rights as a source of inspiration underpinning these general principles, the number of cases involving substantive human rights claims remained low for those first decades. And although this number has increased over the past decade or so since the Charter was first drafted,⁶ it is really since the coming into force of the Charter that there has been a sharp rise in the number of cases invoking human rights claims.

By comparison with the European Court of Human Rights, which of course is the other regional European court charged with interpreting and enforcing a European Bill of Rights, the Court of Justice has little experience of adjudicating human rights issues in any depth, despite now being tasked with applying the EU Charter of Rights across the whole range of EU powers. With this relative inexperience in mind, this article does not scrutinize the substantive rulings and conclusions reached by

⁵ S. Carrera, M. De Somer and B. Petkova, 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice', in CEPS, *Justice and Home Affairs Liberty and Security in Europe Papers* No. 49 (2012).

⁶ A search of the Court's database from the date the Charter was first proclaimed in 2000 until the date it came into force in late 2009 indicates that the Charter was referred to in 59 judgments of the Court over this 9-year period. Many, if not most, of these references, especially in the early years of this period, were made only in passing and did not entail any serious engagement with Charter provisions. The Charter was also referred to by the Advocate General in a substantial number of other cases during that period, but not by the Court. The European Convention on Human Rights was also referred to in approximately 81 additional judgments over this 9-year period. Indeed, the research carried out by Laurent Scheeck up until 2007, building on the research done in the pre-Charter era by Elspeth Guild and Guillaume Lesieur, showed that: 'from 1998 to 2005, the ECHR is indeed referred to 7.5 times more often than all the other human rights instruments the ECJ occasionally relies on, including the Charter of fundamental rights, *taken together*': see L. Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks', *Garnet Working Paper* 23/07 (2007).

the Court in the growing number of cases raising human rights claims.⁷ Instead it takes a more systematic look at the extent to which the Court has drawn upon other sources of human rights expertise and experience in these cases, and considers the implications for the Court's methodology and approach of its expanding role as a rights adjudicator.

§2. THE ROLE OF COMPARATIVE LAW IN THE COURT OF JUSTICE'S ADJUDICATION OF CHARTER CLAIMS

A. THE CHARTER AS AN 'AUTONOMOUS' EU INSTRUMENT?

With a view to undertaking this systematic assessment, the case law of the Court dealing with rights claims since the Charter came into force is surveyed below. The main question posed concerns the extent to which the CJEU, in addressing the Charter-based claims brought before it since the Charter became binding, has looked for advice or insight into the rulings and reasoning of other tribunals which are comparably charged with interpreting and adjudicating human rights issues. Has the CJEU, in interpreting the provisions of the EU Charter, drawn upon or made use of the way similar human rights questions and controversies have been addressed by other specialized human rights bodies and courts?

A first reason for posing this question is the fact that the Court of Justice has evolved from being a tribunal concerned primarily with economic matters, to one with a much wider range of jurisdiction which is now explicitly tasked with enforcing human rights. As a consequence, the CJEU lacks the kind of expertise and experience that other human rights courts and treaty-bodies – including the European Court of Human Rights – enjoy. The use of international and comparative law in this context would provide the Court of Justice with relevant information on the prevailing international and regional standards of protection for particular rights, and also on the approach of other international and regional courts to addressing comparable claims, as well as demonstrating to litigants and others concerned by its rulings that the Court has engaged fully and knowledgeably with the relevant arguments.⁸

⁷ For substantive analysis, see S. Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty in the ECJ's approach to fundamental rights', 49 *Common Market Law Review* 5 (2012), p. 1565–1612; European Parliament Directorate General for Internal Policies: Citizens Rights and Constitutional Affairs, 'Study of the Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights' (2012).

⁸ For an analysis of the principled reasons for having recourse to foreign and comparative law, see J. Waldron, *Partly Laws Common to Mankind: Foreign Law in American Courts* (Yale University Press, New Haven 2012). For a discussion of the reasons of both usefulness and principle, see J. Bell, 'The Argumentative Status of Foreign Legal Arguments', 8 *Utrecht Law Review* 1 (2012), p. 8–19.

A second reason for examining what use the Court has made of comparative law in this context is prompted by the concern which was expressed, at the time the EU Charter was first adopted in 2000, about the EU's choice to adopt its own Bill of Rights rather than simply incorporating or acceding to the European Convention on Human Rights. The basis for this concern was a fear that the choice to enact an EU Charter suggested a desire on the part of the EU to preserve its own autonomy and exclusive authority, lest its objectives would be limited or constrained by human rights principles interpreted by an authority outside of the EU. Some observers had assumed that this same concern with the autonomy of EU law and the authority of the Court – *id est*, the desire not to subject either the laws of the EU or judgments of the Court of Justice to the review jurisdiction of the European Court of Human Rights – lay behind the Court of Justice's *Opinion 2/94*, in which the Court ruled that Community accession to the ECHR would be constitutionally impermissible in the absence of a Treaty amendment.⁹ Others dismissed the concern that the EU's motivation in adopting the Charter was to protect its autonomy and the authority of the Court of Justice, and argued instead that the EU needed its own, novel Bill of Rights to modernize and update the ECHR by integrating economic and social rights together with civil and political rights as well as 'third generation' and other newer rights in fields such as data protection and biotechnology. It was claimed further, and recent events have borne this out, that the enactment of the EU Charter would not displace either the ECHR or the role of the Strasbourg Court, and that EU accession to the ECHR would be pursued alongside the enactment of the Charter. Nevertheless, despite the important steps taken towards EU accession to the Convention, there has been significant foot-dragging on the part of certain states,¹⁰ and the negotiations on the relationship between the Court of Justice and the European Court of Human Rights have revealed a sharp concern on the part of the CJEU with its autonomy and exclusive authority to rule on matters of EU law.¹¹ There are still concerns, despite the 'judicial diplomacy' which has developed between the CJEU and the European Court of Human Rights,¹² that a disparity between the approaches of the two courts – to the detriment of human rights protection – may grow if the CJEU increasingly distances itself from the jurisprudence of the Strasbourg Court and places emphasis on an autonomous EU approach to the interpretation of the Charter.¹³

⁹ Opinion 2/94 on accession by the Community to the European Convention on Human Rights [1996] ECR I-01759.

¹⁰ See EU Observer, 'UK Obstructing EU accession to human rights Convention', 19 April 2012, <https://euobserver.com/justice/115954> (last visited 26 June 2013). See also BBC News, 'MEPs clash over EU accession to ECHR', news.bbc.co.uk/1/hi/europe/newsid_9709000/9709051.stm (last visited 26 June 2013).

¹¹ See e.g. T. Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order', 48 *Common Market Law Review* 4 (2011), p. 1025; C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', 76 *MLR* 2 (2013), p. 254–285.

¹² L. Scheeck, *Garnet Working Paper* 23/07.

¹³ J. Polakiewicz, 'EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?', *EJIL* (forthcoming, 2013).

Further, quite apart from the risk of divergence of the EU from ECHR standards, the UN Office of the High Commissioner for Human Rights has also highlighted the undesirability of the EU and the CJEU pursuing an approach to human rights protection which is detached from the wider body of international human rights law.¹⁴ The OHCHR report points to the dismissive treatment by the CJEU of the jurisprudence of the UN Human Rights Committee in the *Grant* case,¹⁵ and also notes its more recent failure to look to the guidance of the Committee on the Convention on the Rights of the Child in the CJEU's case law on child custody and other children's rights issues.¹⁶

Speculation that the preference of EU leaders for a new EU Bill of Rights reflected an interest in protecting the autonomy of the EU from the ECHR and from other external human rights influences was also expressed in relation to the drafting of certain provisions of the Charter. Concerns were voiced, for instance, about the fact that Article 52 envisaged limitations being placed on rights when this was necessary to further the general objectives of the EU.¹⁷ The concern was that the wording of Article 52 was different from the kind of limitation clause contained in the ECHR or in other constitutions and human rights instruments which permit limitations that are 'necessary in a democratic society' to protect a range of public interests, and that there was a risk that overarching objectives specific to the EU – including economic objectives – might be invoked to limit or restrict fundamental human rights.¹⁸

While concerns of this kind about the adoption of the Charter were being articulated at the time it was first being drafted and enacted, an assessment of the case law of the CJEU on the Charter over the three years since it gained binding legal force provides an opportunity to consider whether there is any basis for such concern today. In particular, it is possible to examine the extent to which the Court has interpreted and dealt with provisions of the Charter in a way that pays attention to broader developments in human rights law, and to the insights of other international human rights bodies and courts charged with similar questions.

What is evident from the analysis described in more detail below is that there has been a remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights law and jurisprudence. Apart from a very occasional and

¹⁴ See the UN OHCHR Report, 'The European Union and International Human Rights Law' (2011), prepared by I. de Jesus Butler: 'Universality is itself a principle that the EU promotes. Therefore, it seems all the more important that the EU ensures that its own internal human rights regime conforms to UN standards, to which all its Member States have committed themselves, and which it promotes abroad. Any disparity between internal and external approaches to human rights would only serve to undermine the role of the EU in the eyes of its international partners and other third States'.

¹⁵ Case C-249/96 *Grant v. South West Trains* [1998] ECR I-00621, para. 46.

¹⁶ See the I. de Jesus Butler, OHCHR Report, p. 11.

¹⁷ Article 52(1) specifies: 'limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

¹⁸ See the document published by TEAM (The Alliance of Euro-Critical Movements), 'Ten Arguments against the Charter of Fundamental Rights', Factsheet No. 4/2004, in particular argument 8.

increasingly selective use of the case law of the European Court of Human Rights, there have been virtually no references to other human rights jurisprudence or rulings. Further, as will be elaborated below, the procedural rules of the Court of Justice make it very difficult for actors with relevant human rights experience and expertise – whether NGOs, national human rights institutions or other international bodies charged with promoting and protecting human rights – to intervene or participate in proceedings before the Court of Justice which raise human rights questions. The risk, I suggest, is a detached, autonomous and potentially insufficiently informed case law on a growing range of important human rights issues.

B. SUMMARY ANALYSIS OF THE CASE LAW ON THE CHARTER 2009–2012

With a view to conducting a more systematic survey of the Court's approach to Charter claims, an analysis of the available cases in which the Court referred to the Charter from the time it gained binding legal effect in 2009 until the end of 2012 has been carried out. As noted above, the Court of Justice made reference to provisions of the Charter of Rights in at least 122 judgments, and the General Court in at least 37 judgments during this period. In 27 of these 122 judgments, the CJEU engaged in some detail and substance with arguments based on one or more provisions of the Charter, while in 7 of its 37 judgments the General Court did so.¹⁹

Within the 27 cases in which the Court of Justice engaged substantively with a Charter provision, the case law of the European Court of Human Rights was referred to in just 10 of these, and in each of these 10 the Court of Justice approved the reasoning of the Strasbourg Court.²⁰ In the remaining 95 cases in which it referred to the Charter,

¹⁹ See footnotes 2–3 above.

²⁰ These cases were C-411/10 *NS v. Secretary of State for the Home Department*, Judgment of 21 December 2011, not yet reported (on inhuman and degrading treatment of refugees), C-400/10 *JMcB v. LE* [2010] ECR I-8965 (on the right to respect for family life), C-145/09 *Tsakouridis* [2010] ECR I-11979 (on the right to respect for family life), C-507/10 *Criminal Proceedings against X*, Judgment of 21 December 2011, not yet reported (on the right to have criminal proceedings brought against a third party), Joined Cases C-317–320/08 *Rosalba Alassini v. Telecom Italia SpA et al.* [2010] ECR I-2213 (on effective judicial protection), C-92–93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen* [2010] ECR I-11063 (on privacy and data processing), C-208/09 *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien* [2010] ECR I-13693 (private and family life/personal identification), C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* [2010] ECR I-13849 (legal aid, effective judicial protection and the right of access to court), C-292/10 *G v. Cornelius de Visser*, Judgment of 15 March 2012 (fair trial and rights of the defence). In C-199/11 *Otis*, Judgment of 6 November 2012, not yet reported, the Court of Justice referred to a judgment of the ECtHR on Article 6 ECHR and the right to a fair hearing, but found it was not applicable to the case at hand. The Court of Justice also referred, during this period, to the case law of the Strasbourg Court in a case in which it did not cite the EU Charter, i.e. C-249/11, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, Judgment of 4 October 2012, not yet reported (on the right to leave one's country).

but only in passing or without significant analysis,²¹ the Court of Justice referred to a provision of the ECHR in 10 out of those 95. In all, therefore, out of 122 cases involving the Charter, the CJEU referred to the ECHR in just 18, with only 10 of these involving some mention or discussion of ECtHR case law, the other 8 making mention only of the Convention provision. In none of the 122 cases was any other source of human rights jurisprudence referred to by the Court of Justice, and the only other international instruments cited by the Court were the Refugee Convention in a group of the cases dealing with refugee return, and the Convention on the Rights of the Child in cases dealing with expulsion for child sexual offences.²²

While the CJEU referred to the ECHR in only 18 out of 122 cases, the Advocate General referred to the ECHR in 34 of these 122. Further, compared with the CJEU's reference to the case law of the Strasbourg Court in only 10 of the 122 cases, the Advocate General referred to the case law of the Strasbourg Court in 19 of the 122 – almost twice as many times as the Court. Finally, it is notable that of the 122 cases in which the CJEU mentioned the Charter, the Court decided to dispense with the Advocate General's Opinion and to proceed to judgment without an Opinion in 24 (one sixth) of these.

Turning to the EU General Court – previously the Court of First Instance – there have been at least 37 judgments since the Charter of Fundamental Rights came into force in which the General Court made reference to the Charter. The General Court referred to the European Convention on Human Rights in 15 of the 37 judgments in which the Charter was mentioned, and to case law of the European Court of Human Rights in 6.²³ In 7 of the 37 cases, the Court engaged substantively or in some detail with a provision the Charter, while in the other 30 it referred in passing to the Charter but without the Charter provision playing any significant role in the judgment. No other international human rights instruments appear to have been cited by the General Court during that period, apart from a passing reference to the UN Refugee Convention in *Sison*.²⁴

These statistics on the practice of the European Court since the Charter of Rights acquired binding force indicate that the frequency of citations of the European Court to the European Convention on Human Rights has declined, and that whereas the Court used to cite the ECHR significantly more often than the Charter in cases involving human rights claims, the reverse is now the case.²⁵ Further, and more importantly, the Court

²¹ It should be noted that the assessment as to whether the engagement by the two Courts with the Charter-based arguments was substantial or not is subjective, and different observers may reach different conclusions.

²² The Advocate General also referred to the Convention on the Rights of the Child in Case C-507/10 *Criminal Proceedings against X*, Judgment of 21 December 2011, not yet reported.

²³ In addition, there were 4 cases in which the General Court made reference to the ECHR, and to the case law of the ECtHR, but without mentioning the EU Charter of Rights.

²⁴ The reference to the Refugee Convention was made in relation to the findings of the national court in Case T-341/07 *Sison v. Council*, Judgment of 30 September 2009, not yet reported.

²⁵ According to Scheeck, who conducted a study on the rate of references by the CJEU to the ECHR before the Charter gained binding legal force '[f]rom 1998 to 2005, the ECHR is indeed referred to 7.5 times

does not cite or draw in any significant way on the relevant human rights jurisprudence of other courts – including the European Court of Human Rights – when interpreting provisions of the Charter. While it has occasionally (in 10 of 122 cases from the study of the CJEU, and 6 of the 37 cases from the study of the General Court) drawn upon the reasoning of the European Court of Human Rights, it has in most cases chosen not to do so and has interpreted the provisions of the Charter usually in isolation from the jurisprudence emerging from other human rights instruments with similar provisions.

The next section will explore some of the likely reasons for the Court's choice to adopt such an approach in this growing field of human rights litigation.

§3. REASONS FOR THE RELUCTANCE OF THE COURT TO DRAW ON COMPARATIVE LAW

A number of possible reasons may explain the decreasing references by the CJEU to the ECHR, and more generally the Court of Justice's practice of not drawing on international and comparative law in deciding cases involving human rights claims under the Charter.

A first possible reason derives from the original historical choice which was made as to the style, methodology and procedure of the CJEU. More specifically, the Court of Justice at the time of the drafting of the European Coal and Steel Community Treaty in the early 1950s was deliberately modelled along the lines of the French *Conseil d'État*. This decision, apparently made under the influence of Maurice Lagrange,²⁶ who became one of the first Advocates General at the Court of Justice, opted for a particular continental judicial approach over a more discursive judicial style such as that of the German Constitutional Court, or of a common law court.²⁷ As the years passed, the Court of Justice has chosen to maintain much of this original approach, which involves a single collegiate judgment and a formulaic, impersonal and fairly minimalist style of judicial reasoning in most cases.²⁸ Unlike the Court of Human Rights, which also began

more often than all the other human rights instruments the ECJ occasionally relies on, including the Charter of fundamental rights, taken together', L. Scheeck, *Garnet Working Paper* 23/07 (2007). In the cases studied from late 2009–2012 for the purposes of this article, by comparison, the CJEU cites the ECHR in only 18 out of 122 cases.

²⁶ For an account of Lagrange's influence on the early shaping of the Court, in conjunction with Jean Monnet, see D. Tamm, 'The History of the Court of Justice of the European Union since its Origin', in *The Court of Justice and the Construction of Europe, Analyses and Perspectives on Sixty Years of Case-Law* (Springer, New York 2013), citing J. Wilson, 'Jurisconsultes et conseillers de l'Etat: aux origines de l'ordre juridique communautaire', 14 *J. Eur. Integr. Hist.* 1 (2008), p. 35–55.

²⁷ For a comparison of the different styles and approaches of constitutional courts in Europe, see P. Häberle, 'Role and Impact of Constitutional Courts in Comparative Perspective', in I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in Comparative Perspective* (Nomos, Berlin 2006).

²⁸ One of the ways of maintaining consistency of style and approach in drafting judgments has been through the guidance handed down by outgoing members of the Court: see for example the *Vade Mecum*

its career using a somewhat truncated and formalist style of legal reasoning albeit with the possibility of separate concurring or dissenting opinions, but later developed a more discursive and fuller style of reasoning,²⁹ the Court of Justice has chosen not to adapt its style and method when new Member States joined the initial six and when its caseload increased and diversified, but continued largely to adhere to its original approach. Some commentators have pointed to a more discursive turn in the Court's approach in recent years.³⁰ Nevertheless, while it is true that certain judgments can be singled out in which the CJEU has treated arguments more carefully and in more detail than it had done in the past, the more fully reasoned recent judgments of the Court tend to be in certain high profile Grand Chamber cases,³¹ or in cases which respond to criticism of previous related rulings in which the reasoning was truncated or obscure.³² The default style of the vast majority of CJEU rulings, however, remains fairly formulaic and minimalist.

A second reason to explain the CJEU's failure to draw on comparative and international legal sources may stem from the fact that such sources have only rarely been cited to the Court, and are not often (although they are sometimes³³) discussed by Advocates General. By comparison with the European Court of Human Rights, the CJEU does not accept or use *amicus* briefs in direct actions other than from the EU institutions or a Member State or in certain circumstances in which a third party 'can establish an interest in the result of a case submitted to the Court of Justice'.³⁴ As far as preliminary

(Handbook) established by Judge Pierre Pescatore on the occasion of his retiring from the Court, which discusses amongst other matters the style of drafting, structure and various formulas to be followed in different kinds of legal proceedings before the Court: P. Pescatore, *Vade Mecum, Recueil de Formules et de Conseils Pratiques à l'Usage des Rédacteurs d'Arrêts* (3rd edition, Bruylant, Brussels 2007).

²⁹ See, for example, the formulaic style of the early case of *Lawless v. Ireland*, Application No. 332/57, Judgment of 1 July 1961. On the use of separate and dissenting Opinions by the ECtHR, see R. White and I. Boussiakou, 'Separate Opinions in the European Court of Human Rights', 9 *Human Rights Law Review* 1 (2009), p. 37; R. White, 'Judgments in the Strasbourg Court: Some Reflections', [http://papers/ssrn.com/sol3/papers.cfm?abstract_id=1435197](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435197) (last visited 26 June 2013).

³⁰ See e.g. M. Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the US Supreme Court', 4 *International Journal of Constitutional Law* 4 (2006), p. 629; and especially G. Itzcovich, 'Constitutional Reasoning in the European Court of Justice' (forthcoming 2013), <http://ssrn.com/abstract=2228979> (last visited 26 June 2013), who dates the change in the Court's style and its somewhat more elaborate reasoning to the year 1979.

³¹ See e.g. Joined Cases C-402/05 and 415/05 *Kadi* [2008] ECR I-00635.

³² See Case C-256/11 *Dereci*, Judgment of 15 November 2011, not yet reported, in which the Court elaborated on its much-criticized reasoning in Case C-34/09 *Zambrano*, Judgment of 8 March 2011, not yet reported.

³³ For earlier analyses, see P. Herzog, 'United States Supreme Court Cases in the Court of Justice of the European Communities', 21 *Hastings International and Comparative Law Review* 4 (1998), p. 903; C. Baudenbacher, 'Judicial Globalization: New Development or Old Wine in New Bottles?', 38 *Texas Journal of International Law* 3 (2003), p. 505; L. Faircloth Peoples, 'The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities', 35 *Syracuse Journal of International Law and Commerce* 2 (2008), p. 218. Taken together, these three studies found references to foreign law in 49 Opinions of the Advocates General over the 28-year period from 1980–2008.

³⁴ See Article 40 of the Statute of the Court of Justice. For a recent rejection of an *amicus* brief from the Foundation for a Free Information Infrastructure in the case of the Commission's request to the Court

references from national courts are concerned, the statute of the Court does not permit third party interventions other than from specified institutions, agencies or Member States,³⁵ but there is a possibility for third party briefs to be submitted in cases where the third party has already been granted rights of intervention before the domestic court from which the reference has been made.³⁶ This may have the effect that international and comparative human rights case law is not often brought to the attention of the Court of Justice.³⁷

A third reason may be the argument which is sometimes made in response to the criticism that the CJEU never cites the judgments of national courts of the Member States, which is that the Court of Justice has deliberately refrained from citing the rulings of national courts in order to avoid allegations of cherry-picking or of the privileging of the rulings of one or more Member State courts over others. Other pragmatic arguments have been made, such as the Court's desire to keep judgments short to avoid excessive translation costs.³⁸

A fourth reason may be that the Court considers that its legitimacy, and the acceptability of its rulings in particular to Member State courts, is best served by maintaining a cautious and minimalist stance. This may be perceived as a way of protecting the judgments of the Court from the greater contestation and challenge that might follow from providing more fully reasoned judgments which more openly acknowledge different possible lines of argument and sources of influence.

Finally, one of the frequent responses of those, including some of the Court's former judges, who have defended the CJEU's style of reasoning and its practice of not citing international and comparative case law, is that the judgments are not actually uninformed by relevant case law but that they simply do not cite the international or foreign sources they have considered and read, or that may have been considered or mentioned by the Advocate General, when writing their judgment.³⁹

for an opinion on the compatibility of the ACTA agreement with the EU treaties, leading to publicly expressed disappointment on the part of the potential interveners with the procedures of the court, see acta.ffii.org/?p=1683 (last visited 26 June 2013).

³⁵ See Article 23 of the Statute of the Court of Justice.

³⁶ For some of the relatively rare examples of the latter, see Case C-192/99 *R v. Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-01237; and Joined Cases C-411/10 and C-493/10 *NS v. Secretary of State for the Home Department*, Judgment of 21 December 2011, not yet reported.

³⁷ For an argument that 'The shortage of factual data, evidence and expertise can hamper the Luxembourg Court's ability to deliver solid, evidence-based judgments in complex cases on fundamental rights', see S. Carrera, M. De Somer and B. Petkova, *Justice and Home Affairs Liberty and Security in Europe Papers* No. 49 (2012).

³⁸ For a suggestion that the costs of translation may explain the CJEU's avoidance of citation of comparative law, see M. Hilf, 'The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities', in A. de Mestral et al. (ed.), *The Limitation of Human Rights in Comparative Constitutional Law* (Éditions Yvon Blais, Cowansville 1986), p. 549.

³⁹ See C.N. Kakouris, 'Use of the Comparative Method by the Court of Justice of the European Communities', 6 *Pace International Law Review* 2 (1994), p. 276-277.

§4. CHALLENGING THE RELUCTANCE OF THE COURT TO DRAW ON COMPARATIVE LAW

Many of the arguments above have convincingly been addressed by Vlad Perju in an article in which he argues for the introduction of separate concurring and dissenting Opinions in the CJEU, to overcome the limited and stilted reasoning which results from the need to obtain consensus on a single judgment.⁴⁰ He argues for a shift away from an authority-based towards a more openly justificatory judicial style, and dismisses the risk that such a shift might negatively disrupt the institutional design and culture of the Court, or that it might undermine the effectiveness of EU law, the collegiality of the Court, or the role of the Advocate General. More positively, he argues that any such changes would be offset by the gains in external legitimacy and influence that the Court would enjoy. Here, I will supplement Perju's persuasive analysis by canvassing a few of the arguments most relevant to my proposal that the Court should be more open to the jurisprudence of other human rights bodies and courts, and to hearing argument from those with relevant expertise on the human rights issues arising before it.

While the argument based on the historical origins of the Court carries some explanatory value, it does not provide a convincing reason for the Court not to engage with the jurisprudence and reasoning of other human rights courts and tribunals in cases in which genuine human rights arguments are raised before it. The fact that the CJEU was originally envisaged as a continental court modelled on the French *Conseil d'État* rather than as a discursive constitutional or common law-style court provides a path-dependent account of the judicial style of the Court, but does not in itself provide a justification for its continuation.

The failure of the parties before the Court to cite the relevant case law of other courts or treaty-bodies to the Court is also not a convincing reason for the Court not to pay attention to the jurisprudence of other courts which have ruled on similar issues. The CJEU is well staffed not only by academically-trained *référéndaires*, but also has an excellent Research and Documentation Department capable of providing a thorough comparative law note to a judge in any case in which it is requested. Such requests could be made as a matter of normal practice in any case in which a genuine human rights or Charter argument is raised.⁴¹ While there is no public way of ascertaining the number of cases in which a comparative law note has been requested by the Court, anecdotal evidence and interviews with members of the Court suggest that the practice is rare.

⁴⁰ V.F. Perju, 'Reason and Authority in the European Court of Justice', 49 *Virginia Journal of International Law* 2 (2009), p. 307-378. See also J. Azizi, 'Unveiling the EU Courts Internal Decision making Process: A case for dissenting opinions', 12 *ERA Forum* 1 (2011); S. Seyr, 'Verfassungsgerichte und Verfassungsvergleichung: Der EuGH', 18 *Journal für Rechtspolitik* (2010), p. 230.

⁴¹ Further, Article 25 of the Protocol to the Statute of the Court, which sets out the rules of procedure of the Court, permit it to 'entrust any individual, body, authority, committee or other organization it chooses with the task of giving an expert opinion'.

The argument that CJEU judgments may well be based on thorough and sound argumentation and may well be informed by relevant international or comparative law even where these reasons and sources are not cited is not convincing. Apart from the fact that we do not necessarily know which judgments are supported in this way and which are not, transparency and reason-giving are central principles of EU law and, as Perju has argued, they are also central to the legitimacy and persuasiveness of the Court's rulings in the eyes of European citizens.⁴² Further, the role of the Advocate General's Opinion, while a very important counterbalance to the formalism and minimalism of the Court's judicial style,⁴³ is obviously not part of the judgment itself and is not a substitute for properly reasoned judicial decisions.⁴⁴ Further, and more significantly, the CJEU in recent years has taken advantage of the possibility introduced after the Nice Treaty of dispensing with the Opinion of the Advocate General 'where it considers that the case raises no new point of law'.⁴⁵ This has been happening with increasing regularity, given the constant expansion of the Court's caseload and its attempts to deal with overburdening and delay, to the extent that one member of the Court has estimated that the Advocate General's Opinion is now dispensed with in approximately 50% of cases. It seems unlikely, to put it mildly, that 50% of cases litigated before the CJEU raise no new point of law, and it seems likely that the Court is making use of the possibility to dispense with an Advocate General's Opinion as a pragmatic way of dealing with problems of overburdening and delay. And while this pragmatic concern is fully understandable, the omission of the crucial counter-balance which the Advocate General provides to the Court's judicial style risks further damaging the quality of the judicial output of the Court and the legitimacy of its judgments.

The argument that citation of international and comparative law leads to judicial 'cherry-picking' is not a negligible concern, but it is reduced in the context of human rights cases by the fact that there is a relatively small number of respected courts and treaty bodies which regularly and consistently rule on issues of human rights, and whose rulings can be expected to be of relevance for particular kinds of cases. The risk of the other kind of cherry-picking – *id est*, of choosing to cite rulings which support the outcome favoured by the judges – has been questioned by Jeremy Waldron, relying in part on the reactions of judges themselves who have responded that the very process of adjudication necessarily involves selection, weeding out what is considered irrelevant

⁴² V.F. Perju, 49 *Virginia Journal of International Law* 2 (2009), p. 307–378.

⁴³ See M. Lasser, *Judicial Deliberations* (Oxford University Press, Oxford 2005). See also K. Lenaerts, 'Interpretation and the Court of Justice: A Basis for Comparative Reflection', 41 *International Lawyer* 4 (2007), p. 1027–1028.

⁴⁴ For discussion of the role of the Advocate General more broadly, see N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford University Press, Oxford 2007); C. Ritter, 'A New Look at the Role and Impact of Advocates General – Collectively and Individually', 12 *Columbia Journal of European Law* 3 (2006), p. 751.

⁴⁵ Article 20(5) of the Statute of the Court of Justice.

and emphasizing what is considered most useful in the interpretative exercise.⁴⁶ Further, the availability to the CJEU of the Research and Documentation Unit which can carry out a balanced examination of a variety of relevant international and foreign cases, and not only those which are cited by interested parties, helps to further avert the risk of partial or preferential treatment of certain judicial sources by the Court.

Finally, the argument that the legitimacy of the Court and the acceptability of its rulings to national courts is better served by continuing with its traditional approach and style is not easily testable. It is unquestionable that the CJEU is legitimately concerned with the acceptability of its rulings to the national courts to which they are addressed. However it is equally possible, and perhaps even more likely, that a better-informed and fuller style of judicial ruling which acknowledges contestation and which expressly engages with international and regional standards of human rights protection would enjoy greater legitimacy than the current approach of the Court.⁴⁷ Even if it were accepted that a change in the Court's style of reasoning and citation of other judicial authority might risk occasionally alienating certain Member State courts or weakening their acceptance of the authority of Court of Justice rulings by exposing contestation – an assumption which this paper challenges – there are other important audiences for the CJEU's rulings apart from national courts. Many other important actors and institutions, both within and outside the EU, as well as the citizens of the EU have an interest in the Court's rulings on matters of general concern, such as those which raise human rights issues. And it is certainly arguable, not only in cases which touch on human rights but perhaps especially in those kinds of cases, that the oracular and minimalist style of the Court is more likely to undermine its legitimacy and the acceptability of its rulings to these other audiences than to enhance them.

There are also other positive reasons for the Court to consider having recourse to international and comparative jurisprudence in cases raising human rights issues. Two of the most important reasons – the 'learning' argument and the 'consistency' argument – have been articulated by Waldron in his defence of the recourse by US courts to foreign law principles and norms.⁴⁸ The learning argument has already been mentioned above, namely that courts can usefully learn from what other courts are doing and from their accumulated experience when they are addressing similar questions in comparable contexts. The consistency argument is an argument of fairness, to the effect that it is important to treat like cases alike even across the globe, particularly on issues concerning

⁴⁶ J. Waldron, *Partly Laws Common to All Mankind: Foreign law in American Courts* (Yale University Press, New Haven 2012), p. 174–175.

⁴⁷ See V. Perju, 49 *Virginia Journal of International Law* 2 (2009), p. 307–378, for a more elaborated version of this argument in relation to his proposal to introduce separate concurring and dissenting Opinions.

⁴⁸ J. Waldron, *Partly Laws Common to All Mankind: Foreign law in American Courts*, Chapters 4 and 5. For a survey of the different kinds of reasons for recourse by higher courts to international and comparative law, see A. Hol, 'Highest Courts and Transnational Interaction: Introductory and Concluding remarks', 8 *Utrecht Law Review* 2 (2012).

fundamental human rights associated with the dignity of the human person, regardless of country or jurisdiction.

Each of these arguments – the importance of learning from other experienced courts and tribunals, and the importance of consistent standards of human rights – is clearly relevant to the situation of the Court of Justice. However, there is also a third argument in favour of greater reliance by the Court of Justice on international and comparative law, and that is the fact that the Court has a growing international role and profile, such that its rulings have implications and influence not just beyond the immediate parties to a given case, but also beyond the boundaries of the Member States and of the EU. This may at first sight seem a more contentious proposition than the arguments from learning and from consistency, particularly since the Court of Justice may have no conception of itself as an international court, or as a court with responsibilities flowing from the international influence exerted by its rulings. And yet, even if the CJEU currently understands itself primarily as a constitutional court whose main task is to promote the acceptance and enforcement of the EU treaties in the Member States, it is viewed by many observers both within and outside the EU as an international court whose rulings – on a whole range of issues, but most importantly for the purposes of this paper, on issues of fundamental rights – increasingly have the kind of external relevance and impact that the judgments of the European Court of Human Rights have.

As legal observers both within and outside the United States will know, there was a heated debate some years ago in the US about the desirability or otherwise of the Supreme Court citing foreign law, and the question for a time became something of a litmus test in the process of judicial appointments to the Supreme Court. There is now a vast academic literature on the subject,⁴⁹ with both commentators and members of the court alike divided between those who advocate openness on the part of the Court to foreign law and those who sharply reject its appropriateness or relevance to the interpretation of US constitutional provisions, including the US Bill of Rights.⁵⁰ It would be extremely surprising, however, to hear a similarly polarized debate either within the academic community or within the EU judiciary on the question whether the Court of Justice should cite comparative and international law. We are accustomed to thinking of the

⁴⁹ For some of the many examples from the recent debate see D. Farber, 'The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History', 95 *California Law Review* (2007), p. 1335; S. Calabresi and S. Dotson Zimdahl, 'The Supreme Court and Foreign Sources of Law', 47 *William and Mary Law Review* 3 (2005), p. 743; F. Easterbrook, 'Foreign Sources and the American Constitution', 30 *Harvard Journal of Law and Public Policy* 3 (2006), p. 223; G. Neuman, 'International Law as a Resource in Constitutional Interpretation', 30 *Harvard Journal of Law and Public Policy* 3 (2006), p. 177; E. Young, 'Foreign Law and the Denominator Problem', 119 *Harvard Law Review* 1 (2005), p. 148; M. Tushnet, 'When is knowing less better than knowing more – Unpacking the controversy over Supreme Court reference to non-US law', 90 *Minnesota Law Review* 5 (2005), p. 1275.

⁵⁰ For the public debate between Justice Breyer and Scalia on the relevance of foreign law for American constitutional adjudication, see www.wcl.american.edu/secler/founders/2005/050113.cfm (last visited 26 June 2013).

United States as an 'exceptionalist' and even at times an 'isolationist' actor on matters of international and comparative law. Hence there is little surprise at the existence of a heated debate within the Supreme Court on the use of foreign law in constitutional adjudication, or at the fact that a majority of the Court's members may be strongly opposed to this. It seems to be accepted, further, that this reluctance to cite foreign and international law has contributed to a decline in the influence of the Supreme Court.⁵¹

We do not, however, think of the EU as a polity which is in any way hostile to or suspicious of international and comparative law, nor do we generally think of its highest court as a judicial body which is resistant to the invocation and citation of international and comparative law. On the contrary, the EU officially presents itself as an entity which is firmly committed to the observance and development of international law,⁵² and which is entirely open to transnational cooperation of all kinds, political, legal and indeed judicial. When considered in this context, therefore, the avoidance by the CJEU of reference to comparative and international law in its judgments, and particularly in judgments dealing with human rights claims, seems curious. If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too. If either of these two major courts were to avoid recourse to international and comparative law in adjudicating on human rights claims, we would surely expect it to be the Supreme Court of the US and not the Court of Justice of the European Union. And yet, despite the fact that there has not been a public or polarizing debate about the issue, the reality is that the Court of Justice rarely draws on the rulings of other courts or on the relevant jurisprudence of regional and international bodies when interpreting and establishing human rights standards under the EU Charter of Rights. The rulings of the CJEU on human rights matters thus far are, with the exception of a rare reference to the case law of the Court of Human Rights, conspicuously detached from other relevant sources of human rights law and jurisprudence.⁵³

⁵¹ In an article on 'The Declining Influence of the US Constitution', 87 *NYU Law Review* 6 (2012), p. 767, 852–854; D. Law and M. Versteeg describe the views of a range of scholars that 'the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights.... The reluctance of the U.S. Supreme Court to pay "decent respect to the opinions of mankind" by participating in an ongoing "transnational judicial dialogue" is supposedly diminishing the global appeal and influence of American constitutional jurisprudence. Studies conducted by scholars in other countries have begun to yield empirical evidence that citation to U.S. Supreme Court decisions by foreign courts is in fact on the decline'.

⁵² Articles 3(5) and 21(1) of the Treaty on European Union proclaim the EU's commitment to the protection of human rights and 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.

⁵³ The judgments of the Strasbourg court, by comparison, are generally rich in citations to other relevant sources of human rights law, including not only the judgments of the CJEU and provisions of the EU Charter of Rights, but also rulings of the Inter-American Commission and Court, the Canadian and

§5. CONCLUSION

I have argued in this article that the advent of the Charter of Rights and the increase in rights-based arguments being made before the CJEU have – together with other developments – placed increasing pressure on the traditional judicial style and approach of the Court, and have made it more difficult to justify this approach today. The self-referential, formulaic and often minimal style of the single collegiate judgment seems increasingly ill-suited to the changing circumstances and docket of the Court. While calls for change in the style and reasoning of the CJEU's judgments have been made before,⁵⁴ the significant growth in the use of rights-based arguments in litigation since the Charter became binding provides a powerful new impetus to these arguments. And yet the three years since the Charter came into force reveals that the CJEU is referring even less now to the ECHR than it did before, and even more rarely to the case law of the Court of Human Rights. More worryingly still, there has been a steady trend towards dispensing with the need for an Advocate General's Opinion in a great many cases, including in 22 of the 124 cases raising human rights claims based on the Charter since 2009.

At present, the CJEU's main focus seems to be on ensuring the acceptability of its judgments to the national courts of the Member States, with less regard for other relevant constituencies including litigants and the public more broadly. Notably, the Court seems largely unconcerned about the external impact and influence of its rulings. The Court appears to have concluded that its existing style and methodology is best suited to maintaining its legitimacy and the acceptability of its rulings to Member State courts. By so doing, however, I suggest that the CJEU, by emphasizing the autonomy of EU law and of its own interpretation, is missing the opportunity of developing informed expertise in the field of human rights adjudication, and of ensuring that its standards of rights protection are at least as developed as the relevant regional and international standards. The Court is also missing the opportunity to improve the quality and fairness of its judgments and to strengthen their legitimacy in the eyes of European citizens and other relevant constituencies. Further, its self-referential and detached style of judgment is also curiously at odds with the internationalist orientation of the EU. The Court's adherence to its conventional style and its avoidance of engagement with the relevant jurisprudence of other bodies and courts in cases involving human rights claims limits the potential influence of its rulings, despite their increasing impact and significance for many actors both within and outside the EU.

South African Supreme Courts, the UN human rights treaty bodies including the CRC, ICCPR and ICESR committees, and an array of other Council of Europe instruments.

⁵⁴ See V.F. Perju, 49 *Virginia Journal of International Law* 2 (2009), p. 307–378. See also J.H.H. Weiler, 'Epilogue: The Judicial Après Nice', in G. de Búrca and J.H.H. Weiler (eds.), *The European Court of Justice* (Oxford University Press, Oxford 2001).