

PART A: ARTICLES

INFORMED DECISION-MAKING: THE COMPARATIVE ENDEAVOURS OF THE STRASBOURG COURT

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Abstract

The article explores the use of comparative surveys in judgments of the European Court of Human Rights (ECtHR). It argues that the inclusion of a comparative survey serves an informational purpose that may increase the substantive legitimacy of ECtHR rulings. The article aims to provide a broad, however preliminary account of the use of comparative data by focusing on a number of pertinent doctrinal, methodological, and practical issues.

Keywords: comparative law; decision-making process; European Court of Human Rights; interpretation; judicial reasoning

1. INTRODUCTION

The nature of the European Court of Human Rights (ECtHR or Court) as an international judicial institution is predetermined by the necessity to seek precise and consistent reasoning for particular outcomes in individual cases. However, the norms of the European Convention of Human Rights (ECHR) are frequently abstract and far from being straightforward. When the wording of the ECHR is not precise enough the Court has to look for additional sources of inspiration such as the laws of the

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Contracting Parties,¹ relevant international treaties,² internal developments within the respondent State³ as well as other sources. The Court has deployed these sources to clarify the meaning of the ECHR and the Protocols, which are the only ones legally binding and support a particular outcome of a case and, therefore, such sources serve a persuasive purpose emphasizing particular interpretations.

This paper argues that alongside the classical distinction between binding and persuasive legal sources the Court uses comparative data, prepared in its comparative law report, for an informational purpose. A comparative law report does not advocate a particular approach but rather presents a spectrum of possible outcomes of a particular issue.⁴ Such reports inform the Court about the context in which a particular legal phenomenon operates in different European countries.

One can suggest that if a comparative survey reveals a trend in Europe then such a survey is more likely to be used for a persuasive purpose. However, deployment of comparative law for a persuasive purpose is not clearly dependent on whether the comparative survey reveals a common European trend in relation to a particular legal issue. Sometimes, a lack of consensus can justify the Court's reluctance to intervene and therefore supports a broader margin of appreciation.⁵

Currently, comparative law reports are prepared for almost all Grand Chamber cases⁶ as well as for some cases dealt with by the Chambers. Research is carried out upon a request from the *Judge-Rapporteur*⁷ by the Research Division of the Court, which operates within the Court's Registry. The *Judge-Rapporteur* frames the questions and the questions are then forwarded by the Research Division to national lawyers working at the Court, who each prepare a report summarising the law and practice in their respective countries. Each national report is then signed by the judge of the ECtHR elected in respect of the country concerned. Afterwards, the national reports are compiled by the Research Division in a composite report which is then

¹ See, ECtHR *Taxquet v. Belgium*, 16 November 2010 (Appl.no. 926/05).

² See, ECtHR *M.S.S. v. Belgium and Greece*, 21 January 2011 (Appl.no. 30696/09); ECtHR *Neulinger and Shuruk v. Switzerland*, 6 July 2010 (Appl.no 41615/07).

³ See, ECtHR *Dudgeon v. the United Kingdom*, 23 September 1981 (Appl.no. 7525/76) discussing the reform of the criminal legislation concerning homosexuality and application of these laws in practice.

⁴ Judge Garlicki maintained that comparative analysis can inform the Court about possible solutions to a particular legal issue. Dzehtsiarou, K., *Interview with Judge of the ECtHR Lech Garlicki* (ECtHR, Strasbourg, 2009). For the purposes of this paper thirteen judges of the ECtHR were interviewed by the first mentioned author in Strasbourg and Florence in 2008–2010. All interviews were digitally recorded and scripted. For the summary of some interviews see Dzehtsiarou, K., 'Consensus from within the Palace Walls' (September 17, 2010). *UCD Working Papers in Law, Criminology & Socio-Legal Studies* Research Paper No.40/2010, available at: ssrn.com/abstract=1678424.

⁵ See, for example ECtHR *Lautsi and others v. Italy*, 18 March 2011 (Appl.no. 30814/06), at para. 70.

⁶ Dzehtsiarou, K., *Interview with Judge of the ECtHR Ján Šikuta* (ECtHR, Strasbourg, 2010).

⁷ A *Judge-Rapporteur* is a judge appointed by the Section President according with Rule 49 which provides that where an application is made under Article 34 of the Convention and its examination by a Chamber or a Committee seems justified, the President of the Section to which the case has been assigned shall designate a judge as *Judge-Rapporteur*, who shall examine the application.

sent to the *Judge-Rapporteur* and other judges of the Chamber or Grand Chamber respectively. These reports are confidential and not accessible to the general public.

Ultimately, the Court decides what weight it will attach to the comparative analysis in a particular case. Even if the report is not cited in the final judgment or the comparative data does not form a part of a justificatory argument, it can provide the Court with useful information. An informed decision bolsters the substantive legitimacy of the ECtHR judgments. In accordance with Richard Fallon's work, substantive legitimacy is understood here as the stakeholders' perception of a decision as substantively correct and encompassing all relevant points of dispute.⁸ Substantive legitimacy may be contrasted with process legitimacy, which is concerned with adherence to established decision-making procedure.⁹ Comparative data is a useful source of relevant information even if it is not integrated into a persuasive argument by the ECtHR since it increases the Court's awareness of relevant approaches taken in the Contracting Parties and hence increases the substantive legitimacy of the judgments. The fact that comparative law is not explicitly deployed as a part of a persuasive argument does not seem to negate its legitimising potential. It is argued that if the Court articulates its awareness of the various approaches adopted by the Contracting Parties it confirms that the ECtHR has searched for the most optimal solution in the case.

The first section of the paper examines the substantive legitimacy of the ECtHR's judgments. The second section of the paper establishes a framework for distinguishing between comparative data used for persuasive and informational purposes. It is argued that a comparative report is solely a source of information if it has not been used in the reasoning as a part of a compelling argument.¹⁰ Finally, having established that comparative data can increase the substantive legitimacy of the Court's judgments this article argues that the Court should take care to avoid common pitfalls in comparative research. The judges of the ECtHR can rely on comparative analysis only if it is methodologically adequate and represents the current state of the law in the Contracting Parties and, occasionally, in jurisdictions outside of Europe. In this way,

⁸ Fallon, R.H., Jr., 'Legitimacy and the Constitution', *Harvard Law Review*, Vol. 118, No. 6, 2005, pp. 1787–1853.

⁹ See, Franck, T.M., 'Why a Quest for Legitimacy', *UC Davis Law Review*, Vol. 21, No. 3, 1987, pp. 535–548, at p. 543; Hershovitz, S., 'Legitimacy, Democracy, and Razian Authority', *Legal Theory*, Vol. 9, No. 3, 2003, pp. 201–220; Dzehtsiarou, K., 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights', *Public Law*, No. 3, 2011, 534–553, at p. 535.

¹⁰ The interviewed judges of the ECtHR mentioned that they use comparative analysis as a source of background information and of alternative solutions to a certain legal problem. Lech Garlicki mentioned that he was a *Judge-Rapporteur* in *Demir and Baykara v. Turkey*. He pointed out that 'we decided that we would like to have this information [comparative research]. And it also was partly because collective labour law is not my field and I wanted to be better informed'. Dzehtsiarou, K., *Interview with Judge of the ECtHR Lech Garlicki*. Judge Šikuta pointed out that 'a comparative report or study is a source of information. The more information the judge has the better it is. He/she can take more issues into account, can evaluate them, can make balancing exercise. Better and more informed decision will be delivered'. Dzehtsiarou, K., *Interview with Judge of the ECtHR Ján Šikuta*.

the positive influence of comparative research on legitimacy, what is discussed in the first part of the paper, can be ensured. The relative advantages of various institutions capable of doing such research are also considered.

2. LEGITIMACY OF THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The judgments of the ECtHR should be legitimate in order to ensure State compliance,¹¹ and the legitimacy of the ECtHR is based on the consent of the States that agreed to be supervised.¹² However, it seems farfetched to suggest that the Contracting Parties *a priori* accept any ruling of the Court.¹³ One can argue that the Contracting Parties agree to be ruled by the ECtHR by virtue of ratification of the ECHR giving their original consent, which is, however, not all-embracing.¹⁴ If the Court relies entirely on original consent, the States can rationally disagree with a judgment and claim that the matter at issue was not anticipated at the time of ratification.¹⁵ Moreover, the reliance on original consent makes the Court's competence to deploy dynamic interpretation questionable. Therefore, each judgment should possess qualities that can confirm

¹¹ Dzehtsiarou, *loc.cit* note 9, p. 535.

¹² In classical international law the jurisdiction of international organisations was entirely dependent on the consent of the Member States, and while it plays a less important role in contemporary international law theory it still possesses a legitimising potential. Kumm, M., 'The legitimacy of international law: a constitutionalist framework of analysis', *European Journal of International Law*, Vol. 15, No. 5, 2004, pp. 907–931, at p. 914; O'Rahilly, A., 'The Sovereignty of the People', *Studies: An Irish Quarterly Review*, Vol. 10, No. 37, 1921, pp. 39–56, at p. 49; Krisch, N., *Beyond Constitutionalism, The Pluralist Structure of Postnational Law*, Oxford University Press, Oxford, 2010, p. 13; Buchanan A., 'The Legitimacy of International Law', in: Besson, S. and Tasioulas, J. (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, pp. 79–118, at p. 90.

¹³ Rozakis, C., 'The European Judge as Comparatist', *Tulane Law Review*, Vol. 80, No. 1, 2005, pp. 257–279, at p. 258; Dzehtsiarou, *loc.cit* note 9, at p. 537.

¹⁴ Lord Hoffmann argues that '[w]hen we [the United Kingdom] joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity'. Hoffmann, L., 'Human Rights and the House of Lords', *Modern Law Review*, Vol. 62, No. 2, 1999, pp. 159–166, at p. 159. Buchanan maintains that '[e]ven though... [international] institutions are created by State consent and cannot function without State support, they engage in ongoing governance activities, including the generation of laws and/or law like rules that are not controlled by the 'specific consent' of States'. Buchanan, *op.cit.* note 12, at p. 91.

¹⁵ Lord Hoffmann points out that '[t]he proposition that the Convention is a 'living instrument' is the banner under which the Strasbourg Court has assumed power to legislate what they consider to be required by 'European public order'. I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times.' Hoffmann, L., 'The Universality of Human Rights', *Law Quarterly Review*, Vol. 125, No. 3, 2009, pp. 416–432, at p. 428.

substantive legitimacy reaching the level of a convincing judgment delivered by an authoritative and well informed institution.

The legitimacy of judicial review is the subject of fierce academic debate, particularly in systems influenced by the American model of judicial review.¹⁶ However, unlike the US Supreme Court, the ECtHR conducts a “review” in which a legal act incompatible with the ECHR is not struck down but the national authorities are requested to revise this act or practice. While this form of review seems to be less controversial for an international institution,¹⁷ the national authorities need to perceive the judgments as legitimate and persuasive in order to alter the national legislation or practice as required by the ECtHR.

There is no commonly accepted theory of legitimacy and commentators usually are divided into two main schools of thought: process legitimacy and substantive legitimacy.¹⁸ Some theorists have integrated these two models into hybrid legitimacy. Process theorists such as Waldron,¹⁹ Dahl,²⁰ Weber,²¹ and Kelsen²² define legitimacy as an attribute which a norm, decision, or institution possesses only if it was adopted or created in accordance with accepted procedure. Process legitimacy of judicial decision-making is associated with such factors as transparency,²³ coherency, consistency, and predictability of reasoning.²⁴

¹⁶ The American model is a system of a strong judicial review where a court has a competence to struck down a piece of legislation this court deems unconstitutional. Friedman, B., ‘The Counter-majoritarian Problem and the Pathology of Constitutional Scholarship’, *Northwestern University Law Review*, Vol. 95, No. 3, 2001, pp. 933–954, at pp. 932–945. Constitutional scholarship has been so intensely fixated on the counter-majoritarian difficulty, that the paradigm has been alternately referred to as an “obsession,” a “preoccupation,” and even a “platitude, by others within the academia. Martens, A.M., ‘Reconsidering Judicial Supremacy: From the Counter-Majoritarian Difficulty to Constitutional Transformations’, *Perspectives on Politics*, Vol. 5, No. 3, 2007, pp. 447–459, at p. 448. See also Masterman, R., *The Separation of Powers in the Contemporary Constitution*, Cambridge University Press, Cambridge, 2011, p. 39.

¹⁷ Waldron, J., ‘The Core of the Case Against Judicial Review’, *Yale Law Journal*, Vol. 115, 2006, pp. 1346–1406.

¹⁸ Franck distinguished process, substantive and outcome legitimacy. Franck, *loc.cit.* note 9, at p. 543. Some commentators categorise legitimacy into input and output legitimacy. Scharpf, F.W., ‘Problem-Solving Effectiveness and Democratic Accountability in the EU’, MPIfG Working Paper, Vol. 3, 2003.

¹⁹ Waldron argues that judicial review is illegitimate since it is conducted by unelected judges who do not have popular mandate. See, Waldron, *loc.cit.* note 17. Waldron considers substantive reasons for legitimacy as well, but these reasons play an auxiliary role in his argument. His primary concern is lack of democratic mandate on the side of judiciary. Waldron, *loc.cit.* note 17, at pp. 1371–1372.

²⁰ Dahl argued that ‘even the best-designed judicial system can guarantee only procedural justice; it cannot guarantee substantive justice. A constitution can ensure a right to a fair trial; it cannot absolutely guarantee that a fair trial will always lead to the right verdict. But it is precisely because no such guarantee is possible that we place such a high value on a fair trial’. Dahl, R.A., *Democracy and Its Critics*, Yale University Press, New Haven/London, 1989, p. 169.

²¹ Weber, M., *Wirtschaft und Gesellschaft*, Mohr, Tübingen, 1972, p. 19.

²² Kelsen, H., *Pure Theory of Law*, University of California Press, Berkeley/London, 1989, p. 198.

²³ Kumm, *loc.cit.* note 12, at p. 926.

²⁴ It was argued that at very least it is not fair to the losing party not to be aware of the applicable standards in advance. King, J.A., ‘Institutional Approaches to Judicial Restraint’, *Oxford Journal*

In contrast with process theorists, substantive legitimacy theorists insist that the content of a ruling must be taken into account in assessing its legitimacy.²⁵ Waldron assessed substantive legitimacy through outcome-related reasons. He argued that ‘outcome-related reasons are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome (i.e., a good, just, or right decision)’.²⁶ According to Waldron, rational disagreement is possible in assessment of judgments, namely some people can think that they are just, right or good while the others can rationally disagree.²⁷ This article argues that while disagreement about these categories is possible, the Court is likely to produce a “good, just, or right decision” if all relevant information is duly taken into account. Information about legal regulation of a matter in European and non-European countries other than the respondent State or States is a valuable source of information for the Court. French points out:

[I]nterpreting a treaty through reference to other law permits a tribunal to ensure that the narrow application of a rule is not allowed to overrule broader notions of justice. By referring to other rules of law, a tribunal can seek to provide for a more just answer than one that a restricted interpretation might otherwise give.²⁸

Decision-making informed by comparative law is not a *panacea* against “bad” decisions; “wrong”, “unfair”, “biased” choices are still possible. However, it seems commonplace to say that an informed decision-maker is less likely to make a “bad” decision.²⁹ Moreover, and not less important for legitimacy, an informed decision seems to present itself as more fair and better. Therefore, decision-making explicitly informed by comparative law increases the substantive legitimacy of the judgments produced by the ECtHR.³⁰

of Legal Studies, Vol. 28, No. 3, 2008, pp. 409–441, at p. 412 Buchanan argues that an enforcement mechanism can be legitimate if the rules are reasonably clear and legal consequences are predictable. Buchanan, A., ‘Human Rights and the Legitimacy of the International Order’, *Legal Theory*, Vol. 14, No. 1, 2008, pp. 39–70, at p. 41.

²⁵ Raz has constructed a so called ‘normal justification thesis’. He argues that authority should be obeyed if it can be shown that ‘the alleged subject is likely better to comply with the reasons which apply to him (other than the alleged authoritative directive) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.’ Raz, J., *The Morality of Freedom*, Clarendon, Oxford, 1988, at p. 53. If Razian theory is correct then legitimacy of the order is dependent on the content of the order rather than on the process through which it was adopted.

²⁶ Waldron, *loc.cit.* note 17, at p. 1373.

²⁷ Waldron, J., ‘Moral Truth and Judicial Review’, *American Journal of Jurisprudence*, Vol. 43, 1998, pp. 75–97, at p. 77.

²⁸ French, D., ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, pp. 281–314, at p. 286.

²⁹ See, Murray, P., Poole, D. and Jones, G., *Contemporary issues in management and organisational behavior*, Thomson Learning, Southbank, 2006, pp. 154–155.

³⁰ Research conducted by Başak Çalı, Anne Koch and Nicola Bruch was aimed to trace how legitimacy of the ECtHR is perceived by the stakeholders: lawyers, politicians, and judges from five Member States: Bulgaria, Germany, Ireland, Turkey and the United Kingdom. 20% of respondents made a

In the context of the ECtHR, information acquires even greater legitimising potential than on the national level. The ECtHR's judges, with the exception of a national judge in a specific case, are less familiar with the legal and social context of the specific respondent State. The Court is further remote from the matter at issue. This article argues that, if summarised in the judgment, the comparative report on the state of the law in the Contracting Parties and the relevant international law increases the legitimacy of the Court since it shows the stakeholders that the decision is well informed.

Comparative data can positively affect another aspect of substantive legitimacy, namely requirement for the judgments to be realistic, executable, and beneficial for the Respondent State.³¹ Judge Jaeger points out that including comparative analysis in the judgments can be a good supporting tool for national governments that wish to implement these judgments.³² The Court can underline the practices that are in compliance with the Convention and, therefore, make execution of the judgments more straightforward. In this case, comparative data should not necessarily form a compelling argument but can be a source of inspiration and information for the judges and the respondent parties.

3. INFORMATIONAL PURPOSE OF COMPARATIVE LAW IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

3.1. PURPOSES OF COMPARATIVE ANALYSIS IN THE REASONING OF THE ECtHR

As stated above, in the ECtHR a comparative analysis is conducted and a report on the results is drafted by the Research Division following a request from a *Judge-*

reference to knowledge of domestic facts and law as an issue increasing legitimacy. This result was higher than for such criteria as 'judicial independence', 'case law coherence', and 'enforcement'. However, it is lower than such criteria as 'length of proceeding' and 'qualification and experience of the judges'. Çalı, B., Koch, A. and Bruch, N., 'The Legitimacy of the European Court of Human Rights: The View from the Ground', 2011, p. 13. Decision-making by informed judges is therefore considered by the stakeholders as relevant consideration for legitimacy of the judgments.

³¹ Certain parallels can be drawn with the argument constructed by Slaughter in relation to the role of comparative law in the reasoning of national Court. She explained that 'by pointing to the actions of fellow States, a national court can reassure itself (and its government) that it will not disadvantage the nation in dealing with other nations'. Slaughter, A-M., 'A Typology of Transnational Communication', *University of Richmond Law Review*, Vol. 29, 1994, pp. 99–137, at p. 116.

³² 'This information is not for the Court it is for the outside world. Many law journals only print extracts from the law part and not the facts. Within the facts you can find a lot – not only factual basis of the single case but also on the legal situation. And this is just a way to inform the States. We did not use it neither in your favour nor against you but perhaps in the context of this question you can inform yourself – that there is a European movement in some direction'. Dzehtsiarou, K., *Interview with Judge of the ECtHR Renate Jaeger* (ECtHR, Strasbourg, 2010).

Rapporteur. After a report is prepared there is a variety of possible ways in which the comparative data may affect the judgment of the Court. First, it may not appear in the final judgment at all. Judges Spielmann, Tulkens and Birsan explicitly mentioned this possibility.³³ Second, comparative data may be outlined in a separate part of a judgment, but not mentioned in the Court's reasoning or, where mentioned, may form no part of a compelling argument. Third, the ECtHR may use the data in its reasoning as a persuasive argument.

One can most vividly distinguish between these purposes by considering the part of the judgment where the comparative data is mentioned and the degree of direct influence the data has on the outcome of the case.³⁴ If the comparative data appears to be explicitly acknowledged in the reasoning of the judgment and explicitly affects the outcome, one can conclude that it has served a *persuasive* purpose. If conclusions of comparative analysis are mentioned in the judgment but they have no explicitly acknowledged effect on the reasoning, or if comparative research was conducted but it is not even mentioned in the reasoning then the comparative data serves an *informational* purpose.³⁵

In a number of cases, the ECtHR used comparative data to decide about the presence or absence of European consensus or common European trends with respect to a particular legal issue. For instance, in *Ünal Tekeli v. Turkey*, the ECtHR, in light of the laws accepted by the majority of the Contracting States, found a violation where Turkish legislation forbade married women from retaining their maiden names.³⁶ Comparative data can be found in this judgment in the chapter dedicated to international law. At the same time, the reference to comparative analysis was made in the part of the judgment explaining the Court's reasoning. While noting the width of the margin of appreciation the State can enjoy in this case, the Court stated:

[T]he Court notes 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.

³³ Dzehtsiarou, K., *Interview with Judge of the ECtHR Dean Spielmann* (ECtHR, Strasbourg, 2010), Dzehtsiarou, K., *Interview with Judge of the ECtHR Corneliu Birsan* (ECtHR, Strasbourg, 2010); Dzehtsiarou, K., *Interview with Judge of the ECtHR Françoise Tulkens* (ECtHR, Strasbourg, 2010).

³⁴ Unlike judgments of national courts from some common law countries judgments of the ECtHR are rigidly structured. Zupančič pointed out that each judgment of the European Court of Human Rights is 'divided into three principal sections. The first one is entitled "The Facts," the second one "The Law" whereas the so-called Operative Part at the end represents the implemental ruling of the Court'. Zupančič, B., *The Owl of Minerva: Essays on Human Rights*, Eleven International Publisher, Utrecht, 2008, p. 377. This makes the separation between informational and persuasive task less arbitrary as it is in relation to less structured judgments of national courts.

³⁵ Slaughter acknowledged a form of transjudicial communication which does not have persuasive effect but merely 'provide[s] inspiration for the solution of a particular legal problem'. Slaughter, *loc. cit.* note 31, at p. 117. Certain analogies can be drawn with informational purpose of comparative law. However, informational purpose of comparative law is not solely concerned with transjudicial communication; it can also include communication between the ECtHR and national parliaments through laws.

³⁶ ECtHR, *Ünal Tekeli v. Turkey*, 16 November 2004 (Appl.no. 48616/99).

Of the member states of the Council of Europe Turkey is the only country which legally imposes – even where the couple prefers an alternative arrangement – the husband’s name as the couple’s surname and thus the automatic loss of the woman’s own surname on her marriage.³⁷

The comparative analysis in this and similar cases serves a persuasive purpose since the ECtHR supports its finding by referring to the laws accepted in the majority of the Contracting Parties. It appears unnecessary to go further into the detailed examination of this purpose, since, unlike the informational purpose, it has received a much greater degree of scholarly attention.³⁸

As regards the informational purpose of comparative law, the apparent limitation of this research is that comparative law reports prepared by the Registry of the ECtHR are confidential. Moreover, it is not publicly available whether such reports are prepared in a particular case or not. For that reason, it is not possible to claim definitively that there are cases where comparative analysis is done but is not mentioned in the text of the judgment at all. The plausible conclusion about availability of such cases can be drawn from information shared by the judges during the interviews with one of the authors. For example, Judge Šikuta maintains that comparative research is conducted in nearly all Grand Chamber cases,³⁹ but the judgments in all these cases do not necessarily contain summaries of comparative research.

In some cases, a comparative report is not referred to in the final judgment due to some limitations. Judge Tulkens points out:

[I]n the *Lautsi* Chamber case – we had 17 countries with different situation from one country to another. But at the end of the day we decided not to use this comparative analysis in the Chamber judgment. And, indeed, how we can use it if there are only 17 out of 47. It is not representative enough.⁴⁰

Nevertheless, the judges had access to the report and it served an informational purpose. A more detailed comparative report was prepared for the Grand Chamber judgment in *Lautsi and others v. Italy*.⁴¹

³⁷ *Ibidem* at para. 61.

³⁸ Helfer, L.R., ‘Consensus, Coherence and the European Convention on Human Rights’, *Cornell International Law Journal*, Vol. 23, No. 1, 1993, pp. 133–166; Benvenisti, E., ‘Margin of Appreciation, Consensus, and Universal Standards’, *Journal of International Law and Politics*, Vol. 31, No. 4, 1999, pp. 843–854; Murray J.L., ‘Consensus: concordance, or hegemony of majority’ in: *Dialogues between Judges*, Council of Europe, Strasbourg, 2008; Letsas, G., *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2009; Dzehtsiarou, *loc. cit.* note 9; Dzehtsiarou, K., ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’, *German Law Journal*, Vol. 12, No. 10, 2011, pp. 1730–1745.

³⁹ Dzehtsiarou, *Interview with Judge of the ECtHR Ján Šikuta*.

⁴⁰ Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*.

⁴¹ *Lautsi and others v. Italy*, *supra* note 5, at para. 70.

Frequently, the Court is quite willing to demonstrate its awareness of the national legal regulations of the Contracting Parties. For example, in *K.U. v. Finland*, the case concerning data protection on the Internet, the Court mentioned comparative data in the judgment but it did not appear in the reasoning of the judgment.⁴² In *Nachova and others v. Bulgaria* the Court quoted comparative data on European States specifically prosecuting ‘racial violence’.⁴³ This data did not find its way to the Court’s reasoning. In *Anheuser-Busch Inc. v. Portugal* the Court considered a dispute over the registration of a trademark, however after describing how trademarks are registered in the Contracting Parties, the Court omitted the comparative data in its reasoning. In *Burden v. the United Kingdom*, the Court chose a different approach by clearly stating that comparison is not relevant and avoiding it as a compelling argument.⁴⁴ While in *Perdigão v. Portugal*⁴⁵ and *Depalle v. France*⁴⁶ the comparative law section was included in the judgment but only got passing mention in the reasoning.

While this outline of the Court’s case law is far from being exhaustive, it suggests that comparative analysis is used for informational purposes in cases concerning a wide array of rights, rather than in any particular set of them. Furthermore, the use of comparative law for informational purposes is not a mere coincidence but a deliberate choice of the Court. Comparative data is called upon to show that the ECtHR is aware of the European legal context of the matter at issue.⁴⁷ Representation of this data can arguably increase the confidence of the stakeholders in the judgments of the Court as being informed and can, therefore, increase the substantive legitimacy of the Court’s judgments.

3.2. USE OF COMPARATIVE ANALYSIS FOR INFORMATIONAL PURPOSE IN THE CASE LAW OF THE ECtHR

The report of the Research Division containing comparative data can be used for informational purposes in two ways: 1) quoted, but not mentioned in the final

⁴² ECtHR, *K.U. v. Finland*, 2 December 2008 (Appl.no. 2872/02).

⁴³ ECtHR, *Nachova and others v. Bulgaria*, 6 July 2005 (Appl.no. 43577/98 and 43579/98), at para. 82.

⁴⁴ ECtHR, *Burden v. United Kingdom*, 29 April 2008 (Appl.no. 13378/05).

⁴⁵ ECtHR, *Perdigão v. Portugal*, 16 November 2010 (Appl.no. 24768/06), at paras. 47–50 In this case the Court concluded that if the compensation for expropriation is fully absorbed by the amount payable to the State in court fees such arrangement violates Article 1 of Protocol 1. Comparative data was briefly mentioned in the Court’s reasoning, but it was not used for persuasive purposes and was simply deployed to confirm that the obligation to pay fees is of fiscal nature. *Ibidem* at para. 61.

⁴⁶ In *Depalle v. France* the Court considered if the French authorities violated the Convention by refusing to authorise the applicant to continue living in the house on the coastal land. This case is discussed in more details below.

⁴⁷ Judge Tulkens pointed out that comparative law can be cited for informational purpose: ‘just to feel the context of what is going on in Europe’. Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*.

judgment; or 2) mentioned in the reasoning of the Court, but still be treated as informational only.⁴⁸ These two options are now examined in turn.

3.2.1. *Abandoned Comparative Data?*

There are cases where the ECtHR quotes the summary of the comparative research but makes no inferences in its reasoning based on comparative law. In *K.U. v Finland*, an unknown person disclosed personal information of a 12-year-old applicant on a dating website.⁴⁹ The service provider, however, refused to divulge the identity of the holder of the IP address in question, regarding itself bound by the confidentiality of telecommunications, as defined by law. The applicant complained to the ECtHR that Finland failed to fulfil its obligations under Article 8 of the Convention. The ECtHR cited comparative data in the judgment in very general terms:

A comparative review of national legislation of the member States of the Council of Europe shows that in most countries there is a specific obligation on the part of telecommunications service providers to submit computer data, including subscriber information, in response to a request by the investigating or judicial authorities, regardless of the nature of a crime.⁵⁰

This information was not referred to in the reasoning of the judgment. Despite the fact that the ECtHR mentioned the margin of appreciation of the Contracting Party⁵¹ and ‘converging standards’ as limits for the margin of appreciation,⁵² the analysis was articulated in general terms and was not grounded in the comparative research outlined in the judgment. It is noteworthy to mention that the width of the margin of appreciation is often determined by the degree of convergence of legal standards in Europe: broader acceptance of a particular standard narrows down the margin of appreciation.⁵³ The ECtHR instead used the principle of effectiveness of rights to decide the case.⁵⁴

While not being dispositive in *K.U. v Finland*, comparative analysis was implicitly used to support the findings of the ECtHR made by other means of interpretation. The comparative analysis mentioned by the Court supports the finding of a violation in this case. Mahoney argues that ‘[t]he comparative method in the ECHR system serves as an evidentiary accompaniment or supporting factor for other interpretative

⁴⁸ While it might be desirable to provide definite proof of the comparative data being used, but not reproduced in the final text of a judgment, such attempt is virtually impossible due to the simple fact that the data is not mentioned. However, one may rely on the statements of the Judges presented above.

⁴⁹ *K.U. v Finland*, *supra* note 42.

⁵⁰ *Ibidem* at para. 32.

⁵¹ *Ibidem* at para. 43.

⁵² *Ibidem* at para. 44.

⁵³ See, for example, ECtHR, *Evans v. the United Kingdom*, 10 April 2007 (Appl.no. 6339/05), at para. 77.

⁵⁴ *K.U. v Finland*, *supra* note 42, at para. 49.

considerations that point to a given meaning'.⁵⁵ In other words, comparative law materials support findings that were reached by other means of interpretation by providing the general framework of legal regulation in Europe.

In the Grand Chamber judgment *Depalle v. France*, the Court dealt with the planning of a coastal area.⁵⁶ The applicant complained that Article 1 of Protocol 1 was violated as a result of the French authorities' refusal to authorise the applicant to continue occupying a house built on maritime public land. The judgment contains a summary of a comparative research:

The Court examined the situation in sixteen coastal member States. Only four States (Albania, Bosnia-Herzegovina, the United Kingdom and Sweden) do not recognise the existence of maritime public property exclusive of any private ownership rights. In the other twelve States (Germany, Croatia, Spain, Greece, Ireland, Italy, Malta, Monaco, Montenegro, the Netherlands, Slovenia and Turkey), maritime public property belongs either to the State or to other public bodies and is inalienable on that basis.⁵⁷

The Court further described certain particularities of legal regulation in Croatia, Spain and Turkey,⁵⁸ and the relevant texts adopted by the organs of the Council of Europe.⁵⁹ The Court made two references to the state of the law in European countries in its reasoning. The Court also made a reference to the Council of Europe texts while arguing that the measures in question 'pursued a legitimate aim that was in the general interest: to promote unrestricted access to the shore, the importance of which is clearly established'.⁶⁰ Finally, the ECtHR mentioned common European law in its conclusion that it is necessary to adopt a firmer policy regarding the protection of the maritime zone. The ECtHR stated:

The refusal to renew authorisation of occupancy and the measure ordering the applicant to restore the site to its condition prior to the construction of the house correspond to a concern to apply the law consistently and more strictly, having regard to the increasing need to protect coastal areas and their use by the public, but also to ensure compliance with planning regulations. Having regard to the appeal of the coast and the degree to which it is coveted, the need for planning control and unrestricted public access to the coast makes it necessary to adopt a firmer policy of management of this part of the country. The same is true of all European coastal areas.⁶¹

⁵⁵ Mahoney, P., 'The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law' in: Canivet, G., Andenas, M. and Fairgrieve, D. (eds), *Comparative Law Before the Courts*, British Institute of International and Comparative Law, London, 2004, p. 146.

⁵⁶ ECtHR, *Depalle v. France*, 29 March 2010 (Appl.no. 34044/02).

⁵⁷ *Ibidem* at para. 52.

⁵⁸ *Ibidem* at para. 53.

⁵⁹ *Ibidem* at para. 54.

⁶⁰ *Ibidem* at para. 81.

⁶¹ *Ibidem* at para. 54.

No more reference was made to comparative law in the reasoning of the judgment and no violation of Article 1 of the Protocol 1 was found in this case. It seems safe to suggest that the ECtHR did not use comparative data here as a compelling argument. No consensus could be identified from the comparison and therefore it does not seem that comparative analysis is included in the judgment for the purpose of persuasion. Moreover, a lack of consensus or common practice was also not explicitly acknowledged by the Court.

3.2.2. Irrelevant Comparative Law?

There are cases where the ECtHR quotes comparative analysis and refers to it in its reasoning but states that it is not relevant to the matter at issue. In *Burden v. the United Kingdom*, the issue was whether cohabiting sisters can be treated equally with married couples and same sex partners in civil partnership for the purposes of inheritance tax.⁶² A husband inheriting from a wife or a wife inheriting from a husband is exempt from the inheritance tax in the United Kingdom. The same applies to a partner of the same sex partnership inheriting from another partner. However, the cohabiting siblings would have to pay the inheritance tax. Chapter 3 entitled 'Relevant comparative law and material' was included in the judgement. This chapter contained comparative analysis of the domestic legislations of some of the Contracting Parties regarding the issue, although the ECtHR did not identify any commonly accepted standard in the area.⁶³

The ECtHR acknowledged that the legislation in respect to inheritance taxes is diverse in Europe and it confirmed that some Contracting Parties might allow inheritance tax exemption for siblings. Nevertheless, it stated that the legal issue in this case concerned the legal difference between married couples and cohabiting siblings rather than taxation policy in the Member States:

Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple. This view is unaffected by the fact that [...] Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; States, in principle, remaining free to devise different rules in the field of taxation policy.⁶⁴

The fact that there is no consensus in Europe regarding the matter at issue did not play a decisive role in finding no violation by the Contracting Party. The ECtHR stated

⁶² *Burden v. United Kingdom*, *supra* note 44.

⁶³ *Ibidem* at para. 26.

⁶⁴ *Ibidem* at para. 65.

that there is a more fundamental difference between cohabiting sisters and married couples which cannot be rebutted by an agreement among the Contracting Parties, and even more so when no such agreement exists. The ECtHR underlined the fact that the legislation of the Contracting Parties might change but this will not change the legal character of the matter. For that reason, the comparative data in this case served only an informational purpose and did not affect the final judgment directly.

3.3. INFORMED DECISION-MAKING AND REFERENCES TO FOREIGN LAWS IN NATIONAL COURTS

The use of comparative law for informational purposes by the ECtHR is similar to the use of foreign laws by domestic superior and constitutional courts and therefore legitimacy issues of deployment of foreign laws in domestic tribunals are often relevant for the ECtHR. McCrudden argues that '[t]he phenomenon of borrowing and transplantation from the international to national, from the national to international, from national jurisdiction to national jurisdiction is now commonplace'.⁶⁵ This interaction is sometimes called 'cross-fertilisation among legal systems'.⁶⁶ However, legitimacy of citing foreign laws in constitutional adjudication is a subject of keen debate with options ranging from total rejection of the foreign sources as irrelevant⁶⁷ to welcoming them as legitimate legal sources.⁶⁸

It is arguable that national tribunals also use comparative law for informational purposes⁶⁹ and this shows that the informational comparative law approach is, at a very minimum, not an isolated method used exclusively by the ECtHR. Cram

⁶⁵ McCrudden, C., 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford Journal of Legal Studies*, Vol. 20, No. 4, 2000, pp. 499–532, at p. 501.

⁶⁶ Slaughter, *loc.cit.* note 31, at p. 99.

⁶⁷ See, Alford, R.P., 'Misusing International Sources to Interpret the Constitution', *American Journal of International Law*, Vol. 98, No. 1, 2004, pp. 57–69, at p. 58. Saunders summarised the arguments commonly used by the opponents of comparative law: 'the opposition is based upon one or both of the following grounds. The first concerns the legitimacy of the use of foreign precedent in constitutional adjudication at all. This is the ground on which Justice Scalia objected to the reference to German federal practice in *Printz*, when he wrote that comparative analysis is 'inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one'. The second ground of opposition is the potential for abuse or, less pejoratively, misuse, of foreign law, in terms of either judicial or comparative method. Saunders C., 'The Use and Misuse of Comparative Constitutional Law', *Indiana Journal of Global Legal Studies*, Vol. 13, No. 1, pp. 37–76, at p. 41.

⁶⁸ Judge La Forest of the Canadian Supreme Court points out that '[t]he greater use of foreign material affords another source, another tool for the construction of better judgments... The greater use of foreign materials by courts and counsel in all countries can, I think, only enhance their effectiveness and sophistication'. La Forest, G.V. 'The Use of American Precedents in Canadian Courts', *Maine Law Review*, Vol. 46, No. 2, pp. 211–220, at p. 216. See also, Markesinis, B and Fedtke, J, 'The Judge as Comparatist', *Tulane Law Review*, Vol. 80, No. 1, 2005, pp. 11–67; Kentridge, S, 'Comparative Law in Constitutional Adjudication: The South African Experience', *Tulane Law Review*, Vol. 80, No. 1, pp. 245–256.

⁶⁹ Slaughter argued that 'taking account of the position of fellow national courts in accepting the obligations of a common treaty may simply be an instance of taking advantage of a quick source of

examined references to foreign cases in the reasoning of the UK House of Lords and the Court of Appeal and concluded:

Most foreign cases cited in the House of Lords and Court of Appeal lie somewhere between the “supportive” and “minor influence” points of the spectrum employed in this study. However, there are instances where a foreign authority has been treated as a persuasive authority.⁷⁰

Since comparative law used by the ECtHR also can be deployed for persuasive and informational purposes the following points from the studies of domestic legal systems are relevant to the ECtHR.

3.3.1. *The Sources Should be Acknowledged*

Slaughter argues that in the majority of cases where national courts deploy foreign cases as a source of inspiration they do not explicitly acknowledge the sources.⁷¹ The judges of the ECtHR confirmed that this situation is also possible in the context of the ECtHR⁷² and this can partially explain why in some cases comparative law is not cited by the ECtHR in its judgments. However, it is argued that acknowledgment of the sources can increase legitimacy of the judgment. Slaughter, for example, observes:

[F]or courts [...] committed to the need to persuade⁷³ as well as to coerce their audience of litigants, lawyers, and citizens in any particular case – the persuasiveness of any one particular decision may be enhanced by a simple demonstration that others have trodden a similar path.⁷⁴

Therefore, if the legitimacy of the ECtHR’s judgments is to be strengthened, the Court should clearly establish its sources. Even if such sources are used for information only.

3.3.2. *Broader Effect of Well-Informed Judgments.*

Flanagan and Ahern conducted a survey study of 43 judges from the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Courts of Ireland, India, Israel, Canada, New

information about the degree of reciprocal acceptance of these obligations...’ Slaughter, *loc.cit.* note 31, at p. 101.

⁷⁰ Cram, I., ‘Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence with Reference to Terrorism Cases’, *Cambridge Law Journal*, Vol. 68, No. 1, 2009, pp. 118–141, at p. 140.

⁷¹ Slaughter, *loc.cit.* note 31, at p. 118.

⁷² Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens.*

⁷³ As it is mentioned above, the ECtHR should put more focus on persuasion than the national courts since the Convention execution machinery is much less capable of coercion.

⁷⁴ Slaughter, *loc.cit.* note 31, at p. 119.

Zealand and the United States.⁷⁵ One of the findings they acquired is relevant for the use of comparative law for informational purposes in the ECtHR's judgments. Flanagan and Ahern established a link between deployment of foreign sources and the concern of the judges for their judgments to be internationally recognised. They pointed out:

The hypothesis [transnational judicial acceptance] is also consistent with the large proportion of judges for whom foreign judges form part of their judgment audience (47 percent), and the fact that half of those judges noted their responsiveness to their audience's attitude towards the use of comparative material.⁷⁶

National judges appear concerned with the transnational acceptance of their judgments. This concern is even more appropriate in the context of the ECtHR since the embeddedness of the ECtHR's rules through the medium of the national judiciary ensures effectiveness of the Court's mechanism.⁷⁷ If national judges quote foreign sources to bolster transnational judicial acceptance of their judgments, it is suggested that the national judges would more readily accept judgments of the ECtHR if their domestic legal rules were mentioned in the ECtHR judgments.

3.4. JUDGES ABOUT INFORMATIONAL PURPOSE OF COMPARATIVE LAW

The judges of the Court acknowledged the informational function of comparative analysis during the interviews conducted in 2008–2010. Thirteen judges of the ECtHR representing different legal systems were interviewed. It is worth mentioning that even those judges who were critical about comparative law as a source of the Court's reasoning were much more positive with respect to the informational function of comparative research. Judge Zupančič, for instance, while seeing little relevance in comparative analysis and European consensus as a persuasive source, mentioned that comparative analysis can give a general impression about the way European law 'tends to go'.⁷⁸

Judge Kovler pointed out that the comparative research helps judges to see the problem in the case from other angles.⁷⁹ Deputy Registrar of the Court Michael

⁷⁵ Flanagan, B. and Ahern, S., 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges', *International and Comparative Law Quarterly*, Vol. 60, No. 1, 2011, pp. 1–28.

⁷⁶ *Ibidem* at p. 19.

⁷⁷ Helfer, L.R., 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 125–159.

⁷⁸ Dzehtsiarou, K., *Interview with Judge of the ECtHR Bostjan Zupančič* (ECtHR, Strasbourg, 2010). For more see, Dzehtsiarou, *loc.cit.* note 38.

⁷⁹ Dzehtsiarou K., *Interview with Judge of the ECtHR Anatoly Kovler* (ECtHR, Strasbourg, 2009).

O'Boyle also underlined that it is a natural process for a lawyer to want to know what the law in other countries is.⁸⁰

The judges cannot be expected to be experts in all areas and branches of law with which they deal, and comparative law gives them a broader spectrum of possible solutions to a particular legal problem. Judge Rozakis emphasised:

[T]he fact remains that law extraneous to the Court's own case law has gained ground, and is increasingly gaining ground, in the ECHR's mode of operating before it reaches a decision. This is a good sign for the founders of a court of law protecting values which by their nature are inherently indivisible and global.⁸¹

While disagreeing on the weight that the ECtHR should attach to comparative data the judges seem to see comparative law as a valuable source of information that can give them an impression about the general legal framework in Europe and provide information about other possible solutions in similar circumstances.

To sum up the ECtHR is willing to use comparative analysis in its decision-making process. Not only does such a tendency coincide with the current views and trends in legal scholarship and practice, but it proves to be highly useful for the Court itself, allowing it to see a bigger picture of the European context, and supplying an array of possible solutions. Whether the judges in a specific case decide to reproduce, or not, the findings of the comparative analysis there is no doubt that comparative law is indeed used both for persuasive and informational purposes.

However, it is clear that for the ECtHR the use of comparative law in decision-making is far from being conceptually and methodologically settled; even less so when it is used for informational purpose only. The Court faces a complex task of transparently delineating the cases in which comparative law merits mentioning in the reasoning and where it does not.

Both the academic sources and practice demonstrate the legitimising potential of the decision informed by the foreign and comparative experience, but at the same time the broader use of these sources would necessitate significant changes to the existing approaches. The foreign sources need to be openly acknowledged and the comparative law analysis should not be left outside the text if the substantive legitimisation is to be achieved.

The use of comparative law for informational purpose is a novel technique in the "arsenal" of the ECtHR, providing the intellectual richness and flexibility of argumentation; however, it needs to be properly applied to ensure a positive effect. The rather welcoming attitude of the judges and the Registry to comparative sources suggests that such accommodation will unlikely encounter excessive obstacles.

⁸⁰ Dzehtsiarou K., *Interview with Michael O'Boyle* (ECtHR, Strasbourg, 2009).

⁸¹ Rozakis, *loc.cit.* note 13, at p. 279.

4. PARTICULAR ISSUES OF COMPARATIVE ANALYSIS

If comparative data is collected for informational purposes this data should be adequate and reflect the current regulation of a particular legal issue in the laws of the Contracting Parties. Otherwise, misrepresentation can distort the legal basis of the findings and compromise the position of the Court as a competent and independent arbiter in human rights disputes because inadequate and misleading comparative information can reduce substantive legitimacy of the judgments. If national judges and lawyers find out that their national law was presented inadequately, they will become dissatisfied with the judgment and their dissatisfaction can damage the legitimacy of the judgment.⁸²

When a *Judge-Rapporteur* requests a comparative analysis he is not in a position to predict for what purpose the report completed by the Research Division will ultimately serve. Therefore, from the outset, comparative law research should be designed in a manner that permits both persuasive and informational use. It is inevitable that only a small part of the comparative research will be reproduced in the final judgment of the Court, and, thus, it seems logical that if the Court is using comparative data for informational purposes the results of the analysis may be presented in more general terms. In cases where the comparative research is used for persuasive purposes, it is desirable for the ECtHR to present a more detailed account of the research.

4.1. 'CHERRY-PICKING' CHALLENGE

The so-called 'cherry-picking' challenge is one of the most common points of criticism of any comparative analysis regardless of its scope and potential use.⁸³ Indeed, in the world of comparison the choice of comparators appears to be determinative and crucial. However, it is important to distinguish between considerations of what jurisdictions to compare and considerations of representative selection and the need to avoid bias. These latter considerations might not be fully pertinent to every single representation of a full-scale comparative endeavour.

This section does not aim to contribute to the general academic debate on the issue of proper comparators in constitutional adjudication. In the majority of

⁸² See, Çalı B., 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions', *Human Rights Quarterly*, Vol. 29, No. 1, 2007, pp. 251–270.

⁸³ De Cruz, P., *Comparative Law in a Changing World*, Cavendish, London, 1999, p. 219. '[A]ll the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends'. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia J., dissenting) The 'cherry-picking problem' is not confined to judicial case selection. It is also typical for academic comparative law. Hirschl pointed out that 'too many constitutional comparativists still adhere to a convenient "cherry picking" approach to case selection while overlooking (or being unaware of) basic methodological principles of controlled comparison and research design frequently drawn upon in the social sciences. Continuous reliance on such an a-systematic and methodology-light practice of research design and case selection does not serve the cause of serious theory building well. Hirschl, R., 'The Question of Case Selection in Comparative Constitutional Law', *American Journal of Comparative Law*, Vol. 53, No. 1, 2005, pp. 125–155, at p. 154.

cases the Court tends to explore the laws of all 47 Contracting Parties.⁸⁴ However, it is argued here that the ECtHR should be extra careful in the selection and representation of laws in the final judgment because inadequate representation may reduce the legitimising potential of comparative law. The manner in which the results of a comparative analysis conducted by the ECtHR are represented in the text of a judgment should be determined by the purpose of comparison and it is possible to argue that informational and persuasive purposes lay down diverging sets of rules for proper selection of jurisdictions to be mentioned.

The persuasive use of comparative analysis is essentially linked to establishing the presence or absence of a European consensus about a legal issue.⁸⁵ Consequently, any such attempt to persuade will largely depend on the ability of the Court to show that a conclusion as to a consensus has a reliable empirical basis. The persuasive use of comparative analysis demands a choice of jurisdictions that is representative and free of bias.

Informational purposes of comparative analysis in ECtHR case law allows for a less rigid set of rules for choosing comparators. The desired effect of an analysis aimed to inform the Court, Contracting Parties and the public is achieved by showing an array of existing and possible solutions to a problem, rather than by persuading that a certain solution is the most plausible. However it is not suggested here that information used should not be carefully verified but rather that its representation in the judgment can be reduced to a necessary minimum.

It seems that frivolous cherry-picking would undermine the validity of an analysis, but picking up illustrative solutions appears to be justified in satisfying the informational purpose. The informational purpose does not necessarily call for a selection to be representative, because on some occasions the ECtHR might wish to highlight unconventional and/or extreme approaches. Moreover, selective representation of comparative analysis is arguably inevitable considering the fact that the ECtHR is constrained by the need to be reasonable in expanding the length of a judgment and, thus, unable to outline the minutiae of the Registry's report.

4.2. CHOOSING PROPER COMPARATORS: REASONS VERSUS OUTCOMES

Comparative analysis conducted by the ECtHR is not aimed at explaining the differences and commonalities between different legal systems which is very often the case with respect to academic comparative research. De Cruz points out:

A systematic comparison which is the essence of comparative law, seeks to explain the similarities and divergences between the legal systems selected for comparison. The

⁸⁴ Dzehtsiarou, *Interview with Judge of the ECtHR Corneliu Bîrsan*.

⁸⁵ Dzehtsiarou, *loc.cit.* note 9.

reasons for these differences and similarities are very often extra-legal and cannot be causally linked to any legal rule or principle.⁸⁶

Occasionally, the ECtHR's comparative analysis focuses on descriptive rather than analytical aspects. The Research Division provides a description of the ways a particular legal matter is regulated in the Contracting Parties and does not explain the similarities and differences in-depth. In *Leyla Şahin v. Turkey*, the ECtHR included the results of the comparative law research in the judgment without making any major attempts to carry out detailed analysis of the reasons behind such results; the ECtHR appeared to be more interested in the outcomes themselves.⁸⁷

Significantly, it was mentioned by Judge Spielmann that in an ideal situation the reasons for adopting a particular solution by the States could assist the Court in coming to the most adequate and appropriate decision. In particular, the inquest into the reasons behind the absence of relevant legislation in a particular field could be enlightening in appraising the reasons for a lack of consensus in certain domains.⁸⁸ However, research revealing all of the complicated sets of political negotiations bringing a particular solution into a national legal system can only be conducted if an in-depth analysis is carried out. This would need to take into consideration the legislative history of a particular bill, lobbying and stakeholders' behaviour, legislative traditions, media coverage, social stereotypes, convictions of the members of parliament, and multiple other factors.⁸⁹

Yet, it seems implausible to be fully convinced that the true and precise reasons were discerned and that no factor was omitted or misinterpreted. Furthermore, one has to keep in mind that after all the research and analysis has been carried out, the Court will inevitably face the question of whether these reasons still matter for interpretation. The best illustration of the complexity of such endeavours is the infamous originalism debate concerning the interpretation of the US Constitution.⁹⁰

While it may be impossible to set out clearly the reasons which led a specific national jurisdiction to adopt a certain solution to a legal problem, comparative analysis does not need to avoid these attempts altogether. Various hints as to the underlying reasons

⁸⁶ De Cruz, *op.cit.* note 83, at p. 230.

⁸⁷ ECtHR, *Leyla Şahin v. Turkey*, 10 November 2005 (Appl.no. 44774/98), paras. 55–65.

⁸⁸ *Dialogue between judges*, Council of Europe, Strasbourg, 2008, p. 26.

⁸⁹ Lyons, D., 'Original Intent and Legal Interpretation', *Australian Journal of Legal Philosophy*, Vol. 24, No. 1, 1999, pp. 2–26; Pannier R.F., 'Analysis of the Theory of Original Intent', *William Mitchell Law Review*, Vol. 18, No., 1992, pp. 695–731; Gilhooley, S., 'The Textual Constitution and the Origins of Original Intent', 2010, *Western Political Science Association 2010 Annual Meeting Paper*, available at: ssrn.com/abstract=1580761.

⁹⁰ See, Goldford D.J., *The American Constitution and the Debate over Originalism*, Cambridge University Press, New York, 2005; Whittington, K.E., 'Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review', available at: news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/, and recent splash in public media caused by nomination of Elena Kagan to the US Supreme Court, available at: www.huffingtonpost.com/alain-l-sanders/constitutional-hunting-se_b_612573.html.

might be obtained by deducing the inner logic of a particular legal solution. Arguably, the basic methodological principle of comparative law – functionality – is in itself aimed at the same goal.⁹¹

Functionality, as the basic methodological principle, is common to virtually all existing methodologies of comparative analysis. One may compare objects which are incomparable in principle; however, the output of such comparison is not likely to surpass a plain recognition of divergence. Comparative analysis should be based on an examination of functional equivalents aimed at analogous outcomes in the jurisdictions to be compared. A choice of these equivalents should not be limited to discerning black letter law constructs alone, but should include relevant political and social considerations as well as enforcement practice. As Lando points out:

Another phenomenon should also be noticed. A rule of law found in most countries may not exist at all in a certain country. In such cases social norms of a kind different from law may have done what in other countries the rule of law aims at doing. These norms may be compared to the Chinese rites or the Japanese “giri.” The English law of contract offers a well-known example. In many Continental countries an offer is binding on the offer or unless the contrary has been stated in the offer. In England an offer is revocable until it has been accepted. In English business circles however, it is very often considered unfair to revoke an offer, and so it is not done.⁹²

Functional equivalents and specific outcomes are both preceded and predetermined by the underlying reasons which led to the adoption of a specific legal scheme. A serviceably good understanding of these reasons can be deduced through the reconstruction of the inner logic of functional equivalents. Basically, the analysis should follow the reverse path – from outcomes to reasons. However, it is crucial to keep the scrutiny focused on functionality itself. A profound understanding of a legal problem can be achieved through the appreciation of the legal means employed, their place in a legal system, the social, political, and cultural environment. All of these elements combined reveal the inner logic of a functional equivalent, and it might well be anticipated that this logic will expose the reasons for the adoption of a certain approach.

4.3. WHO SHOULD DO THE COMPARISON?

4.3.1. *Comparative Analysis Conducted by the Court*

A summary of the research report produced upon a request of a *Judge-Rapporteur* is often included in the judgment and entitled ‘law in Contracting States’,⁹³ ‘comparative

⁹¹ Zweigert, K. and Kötz, H, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Institutionen, Tübingen, 1969–1971, pp. 27–48.

⁹² Lando, O., ‘The Contribution of Comparative Law to Law Reform by International Organizations’, *American Journal of Comparative Law*, Vol. 25, No. 4, 1977, pp. 641–657, at p. 650.

⁹³ ECtHR, *A, B and C v. Ireland*, 16 December 2010 (Appl.no. 25579/05), at para. 112.

and international law⁹⁴ or ‘relevant comparative law and material’.⁹⁵ By means of an example, in the *A., B., and C. v. Ireland* case the ECtHR stated:

Abortion is available on request (according to certain criteria including gestational limits) in some 30 Contracting States. An abortion justified on health grounds is available in some 40 Contracting States and justified on well-being grounds in some 35 such States. Three Contracting States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal and Spain).⁹⁶

Based on these findings, the ECtHR stated that ‘contrary to the Government’s submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law’.⁹⁷

Likewise, the Court also quotes comparative data to support its finding concerning an absence of European consensus. The Court provides examples of a variety of possible solutions to the matter at issue. In *Murphy v. Ireland*, the Court examined the law prohibiting religious advertisements in mass media. The Court stated:

[T]here appears to be no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements. Certain States have similar prohibitions (for example, Greece, Switzerland and Portugal), certain prohibit religious advertisements considered offensive (for example, Spain and see also Council Directive 89/552/EEC) and certain have no legislative restriction (the Netherlands). There appears to be no ‘uniform conception of the requirements of the protection of the rights of others’ in the context of the legislative regulation of the broadcasting of religious advertising.⁹⁸

The Court is not in a position to quote in full a comparative report prepared by the Research Division.⁹⁹ However, even a short quote such as the one outlined above shows that the Court is making an informed decision.

It should be noted that the Court’s engagement in comparative research is not free from potential and searching criticism. First, the lawyers and the judges of the ECtHR cannot specialise in all of the particular legal areas under review. As such, there may be circumstances when this absence of specific expert knowledge might lead the lawyers to form an account of the national law based predominantly on the black-letter law. At the same time, black-letter law and applicable law can be considerably different.

⁹⁴ ECtHR, *Stoll v. Switzerland*, 10 December 2007 (Appl.no. 69698/01), at para. 44.

⁹⁵ *Burden v. United Kingdom*, *supra* note 44, at paras. 25–26.

⁹⁶ *A., B. and C. v. Ireland*, *supra* note 93, at para. 112.

⁹⁷ *Ibidem* at para. 235.

⁹⁸ ECtHR, *Murphy v. Ireland*, 10 July 2003 (Appl.no. 44179/98), at para. 81.

⁹⁹ Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*.

The application of particular laws and recent developments in case law can also have a significant impact on the regulation of a particular legal issue. Judge Tulkens framed this challenge as follows: ‘we ask the lawyer to see in the literature what the position of national law is. However, it is very hard for the lawyer to be aware of all the recent developments’.¹⁰⁰ Therefore, the Court’s practice of considering third parties’ submissions and other sources of information should be welcomed as they collectively can provide a multifaceted description of a given legal issue.¹⁰¹

Second, due to the heavy workload of the lawyers¹⁰² and the judges of the Court (the Court’s backlog in 2011 was roughly 151,600 pending applications),¹⁰³ it is extremely burdensome for the lawyers to engage in lengthy and detailed research on a particular legal topic. That said, the Court’s engagement in comparative research makes it possible for the Court to base its decision on more reliable data.

Comparative analysis is complicated and time consuming.¹⁰⁴ Çalı, Koch, and Bruch point out that the reasonable length of proceedings in the ECtHR is considered by the stakeholders as an important legitimising factor.¹⁰⁵ However, comparative analysis will not seriously affect the length of proceeding since it is only deployed in the complex cases, while the reason for the lengthy procedure in the ECtHR is an overwhelming amount of repetitive cases.¹⁰⁶ Moreover, comparative research is typically requested when a case is relinquished by the Chamber and accepted by the Grand Chamber of the Court,¹⁰⁷ which deals with no more than several dozen cases.¹⁰⁸

4.3.2. Comparative Research Conducted by Third Parties

Occasionally, the Court summarises comparative analysis provided by third parties and deploys it in its reasoning.¹⁰⁹ Most of the judges interviewed indicated a positive appreciation of third parties’ reports. Judge Spielmann, for example, points out that

¹⁰⁰ *Idem.*

¹⁰¹ Umbricht argues that ‘in any decision-making process, the greater the amount of information and views considered, the greater the chance for a good outcome’. Umbricht, G.C., ‘An *Amicus Curiae* Brief’ on *Amicus Curiae* Briefs at the WTO’, *Journal of International Economic Law*, Vol. 4, No. 4, 2001, pp. 773–794, at p. 774.

¹⁰² Frequently the national contributions incorporated in the report of the Research Division are prepared by those lawyers who deal with the applications submitted to the Court before they are communicated to the Government.

¹⁰³ ECtHR, Annual Report 2011, Strasbourg, 2012, p. 151.

¹⁰⁴ Dzehtsiarou, *Interview with Michael O’Boyle*.

¹⁰⁵ Çalı, Koch and Bruch, *op.cit.* note 30, at p. 13.

¹⁰⁶ See, Interlaken Declaration adopted on 19 February 2010; Izmir Declaration adopted on 27 April 2011.

¹⁰⁷ K Dzehtsiarou, *Interview with Judge of the ECtHR Ján Šikuta*.

¹⁰⁸ ECtHR HUDOC database search.

¹⁰⁹ In some cases the parties to the case engage European consensus or lack of it in their arguments. See, for example, ECtHR, *Hirst v. the United Kingdom (No 2)*, 24 July 2001 (Appl.no. 40787/98).

‘[w]e rely more on our Research Division but if what the Research Division report provides is confirmed by NGOs then it is very important’.¹¹⁰ Various sources of information can mitigate the possible limitations of the research conducted by the Court, as outlined in the previous section.

The Court has used external expertise in deciding a number of cases; these include third party interventions from NGOs,¹¹¹ universities¹¹² and non-respondent governments.¹¹³ The Court is prepared to use the externally arranged comparative surveys; however, this is not the preferred current approach, which tends to be based on research conducted by the staff of the Court.¹¹⁴

Sometimes, the Court deploys comparative analysis from *amicus curiae* briefs prepared by NGOs. In *Sheffield and Horsham v. the United Kingdom*, the Court considered if a failure by the authorities to amend birth certificates after gender reassignment surgery amounted to a violation of Article 8 of the Convention. The ECtHR summarised the *amicus curiae* brief in the judgment¹¹⁵ and relied on it in its reasoning.¹¹⁶

The judges interviewed for this study attached different values to the *amicus curiae* briefs submitted by NGOs. Most of them pointed out that such *amicus curiae* briefs reflect the biases of the NGOs that draft them.¹¹⁷ Judge Jaeger was of the opinion that quoting an NGO’s *amicus curiae* brief ‘is nothing more than a matter of politeness. The Court tries to strengthen human rights NGOs in their role and, therefore, it acknowledges their reports in the judgments. However, the main role of NGOs is on the implementation stage’.¹¹⁸ It should be noted that the opinion of Judge Jaeger is not shared by many of the judges interviewed.

These cases are not considered for the purposes of this section since they form a part of legal argumentation of the parties.

¹¹⁰ Dzehtsiarou, *Interview with Judge of the ECtHR Dean Spielmann*.

¹¹¹ *K.U. v. Finland*, *supra* note 42, at paras. 33–34.

¹¹² Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*. See also, ECtHR, *Z and others v. the United Kingdom*, 10 May 2001 (Appl.no. 29392/95), at para. 7.

¹¹³ *Lautsi v. Italy*, *supra* note 5, at para. 47–49.

¹¹⁴ Judge Garlicki points out that the ECtHR could come up with the conclusion about the European consensus in a particular case based on the general knowledge of the judges or that it was possible to arrange some research by the case lawyer. Dzehtsiarou, *Interview with Judge of the ECtHR Lech Garlicki*.

¹¹⁵ ECtHR, *Sheffield and Horsham v. the United Kingdom*, 30 July 1998 (Appl.no. 22985/93), at para. 35.

¹¹⁶ *Ibidem* at para. 57.

¹¹⁷ Judge Myjer states that judges were aware that the data provided by the parties might be sometimes one sided and for that reason the conclusion of European consensus based on this data might not illustrate the real legal position in Europe. Therefore, Judge Myjer said, it is very wise for the Court to have its own Research Division. Dzehtsiarou, *Interview with Judge of the ECtHR Egbert Myjer*. Judge Tulkens points out that human rights NGOs are agenda driven and their reports are treated by the judges taking into account their bias. Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*. O’Boyle mentioned that the ECtHR sometimes could not use the NGOs report because their submissions were one-sided. Dzehtsiarou, *Interview with Michael O’Boyle*.

¹¹⁸ Dzehtsiarou, *Interview with Judge of the ECtHR Renate Jaeger*.

The practice of NGOs' involvement in the activities of international organisations is quite common.¹¹⁹ An advantage of NGOs is that they focus on a particular legal issue and can be considered experts in the area of their activity. Furthermore, they are not subordinate to the Contracting Parties and for that reason they can independently assess national laws and practice.¹²⁰ That said, NGOs are agenda-driven and, therefore, their assessment can be affected by the aim they are striving to achieve.¹²¹ Moreover, some NGOs may operate only within one jurisdiction and lack sufficient awareness of foreign legal systems, which can lead to inadequate conclusions.

Alternatively, the ECtHR might request comparative analysis from universities. The Court has not used this theoretically available possibility so far; while on few occasions the Court has accepted third-party interventions from the universities.¹²² Some of the advantages of this method of conducting comparative research are experience, independence, methodological adequacy, consistency, and flexibility.¹²³ However, considering the specific nature of the requests from the ECtHR, a university or any other research institution will have to put in place a rigid supervision and control mechanism, which might not be too welcome in an institution based on

¹¹⁹ NGOs are involved in the decision-making of the WTO. See, Umbricht, *loc.cit.* note 101; Van den Bossche, P., 'NGO Involvement in the WTO: a Comparative Perspective', *Journal of International Economic Law*, Vol. 11, No. 4, 2008, pp. 717–749. The CJEU also accepts *amicus curiae* briefs from NGOs. See, Peel, J. 'Giving the Public Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization', *Colorado Journal of International Environmental Law and Policy*, Vol. 12, No. 1, 2001, pp. 47–76. NGO reports are accepted by the UN institutions. See Martens, K., *NGOs and the United Nations: Institutionalization, Professionalization and Adaptation*, Palgrave Macmillan, Basingstoke, 2005.

¹²⁰ Some commentators argue that NGOs' involvement in the decision-making process increases the transparency and accountability of the institutions and allows participation of the civil society in the decision-making process. All this positively affects legitimacy of an international institution. See, Umbricht, *loc.cit.* note 101, at p. 773. For a more detailed discussion of the NGOs' role in international law see, Lindblom, A-K., 'Non-governmental Organisations' in: *International Law*, Cambridge University Press, Cambridge, 2005; Alvarez, J.E., *International Organizations as Law-makers*, Oxford University Press, Oxford, 2005.

¹²¹ Dzehtsiarou, *Interview with Judge of the ECtHR Egbert Myjer*; Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*.

¹²² See, Dzehtsiarou, *Interview with Judge of the ECtHR Françoise Tulkens*. See also, *Z. and Others v. the United Kingdom*, *supra* note 112, at para. 7.

¹²³ Deployment of comparative law in the decision-making process is a recent development. Kiebaev points out that '[c]omparative law for a long time seemed an object of purely scientific research and not directly connected with daily life. Substantial upheavals in the political and legal climate were undoubtedly brought about by the processes of European integration and of globalization.' Kiebaev, D.I., 'Comparative Law: Method, Science or Educational Discipline?', *Electronic Journal of Comparative Law*, available at: www.ejcl.org/73/art73-2.html. Even a few decades ago comparative law was a part of legal theory 'not immediately relevant to the daily life of the law'. Koopmans T., 'Comparative Law and the Courts', *International and Comparative Law Quarterly*, Vol. 45, No. 3, 1996, pp. 545–556, at p. 545. It was not consulted by legal practitioners. See, Kamba W.J., 'Comparative Law: A Theoretical Framework', *International and Comparative Law Quarterly*, Vol. 23, No. 3, 1974, pp. 485–519, at p. 489. Universities were the birthplace of comparative law. It seems therefore logical that at least some of universities have well established traditions of conducting sound comparative research.

free and unrestrained discussion. Moreover, a university willing to handle research requests from the ECtHR could face a complicated balancing task, where it would have to weigh the amount of scarce academic resources to be invested against potential reputational risks (if research does not live up to the highest standards).

Finally, one potential source of comparative information is a Court's ability to request about the state of the law in a particular Contracting Party from the national authorities of the Contracting Party itself. Later, this research could be incorporated in the report on a particular legal matter prepared by the Research Division of the ECtHR. The mechanics of such a scheme would be fundamentally different from the ready-made comparative law reports submitted by NGOs or universities. The authorities of the Contracting Parties would, instead, be asked to present an updated account of the regulation of a specific question in a respective jurisdiction. Within such a scheme, it is still the ECtHR which would be responsible for the comparison and, thus, the risk of undue influence on the Court is mitigated.

An obstacle to this mechanism of collecting comparative data is the absence of a clear legal basis in the Convention for such requests, which were not foreseen by the drafters of the Convention. A potential solution can be found in Article 38 of the Convention, which places a duty on the Contracting Parties concerned to furnish all necessary facilities for the Court to conduct an investigation. Also, other Contracting Parties may have to provide reports on the state of their national law in respect to a particular legal matter. Rule 44A¹ of the Rules of Court provides:

The parties have a duty to cooperate fully in the conduct of the proceedings and, in particular, to take such action within their power as the Court considers necessary for the proper administration of justice. This duty shall also apply to a Contracting Party not party to the proceedings where such cooperation is necessary.¹²⁴

Among the advantages of this way of doing comparative research is that the authorities carrying out the research in the Contracting Party is very well aware of the state of the national law in respect of a particular legal issue.

As it has been demonstrated above, any comparative endeavour of the ECtHR should necessarily comply with the high standards of methodological rigour, consistency, and expertise. In order for the comparative analysis to achieve its intended effect it must not only demonstrate awareness of the diversity of approaches across jurisdictions but be supported by adequate analytical apparatus. A legitimising effect is ultimately only achieved when the stakeholders are convinced both of the decision-makers' knowledge *and* their ability to process and employ it.

¹²⁴ ECtHR, Rules of Court, Strasbourg, 2009, Rule 44A¹. While it seems that requests of the Court to the national authorities fall within the ambit of the mentioned Rule, one can argue that the uncommon nature of these requests requires a specific rule to be added to the Rules of the Court. However, it is hard to foresee any major objections from the Contracting Parties to any such proposed scheme, since it would bring greater transparency to the proceedings within the Court. See, for example, *A., B. and C. v. Ireland*, *supra* note 93, at para. 175.

5. CONCLUSION

The ECtHR often deploys dynamic interpretation of the ECHR. Thus, its openness to the use of comparative data is unsurprising. Indeed, considering the Court's duty to pronounce judgments applicable in 47 national jurisdictions, its recourse to comparison is arguably inevitable. Awareness of the Contracting Parties' respective legal positions allows the judges to make an informed decision. This bolsters the substantive legitimacy of ECtHR judgments.

As may be observed in the case-law, the ECtHR does not limit itself to one mode of using comparative data, namely, persuasion, but sets the European legal background, elaborates on the possible approaches to an issue, and self-reflects, for example by using the data for the informational purpose. All this falls neatly within modern trends of comparative law scholarship. National courts are engaged in a similar endeavour to the extent that they are concerned about their judgments' international recognition.

The generous support for comparative endeavours by the judges of the ECtHR generates a positive environment for the use of comparative data for informational purposes. A number of techniques have been elaborated by the ECtHR to achieve the desired goal of informing itself and/or the public of the positions of the Contracting Parties on the relevant legal issue. Two of these techniques are most visible: 1) re-producing parts of the comparative law reports in a special section of the final judgment without mentioning them in the reasoning; and 2) re-producing parts of these reports in a special section, while rendering such data irrelevant for certain specified reasons.

At the same time, the ECtHR faces a number of challenges if it decides to use the comparative law reports on a systematic basis. To prevent accusations of "cherry-picking" it should convincingly demonstrate the correspondence between the jurisdictions chosen and the aim pursued. The methodology of comparative analysis should be adequately followed and preference should be given to understanding the inner logic and mechanics of a particular solution rather than meticulous examination of the black letter law norms.

Profound comparative analysis is likely to demand significant resources from the Court, which is already strained by an enormous backlog. Outsourcing the burden of comparison to some third-party, such as an NGO, university, or the national authorities, might appear to be among the possible solutions. However, the ECtHR will have to weigh the potential benefits of knowledge, focus and cost-savings, against the risks of bias and damage to perceptions of its status as an impartial adjudicator. In any event, a well-designed and thorough system of quality control would have to be put in place and the necessary reforms pursued.