The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit[1]

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Abstract

In this article, the authors discuss the cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights to re-evaluate the major promises of the Leave Campaign, namely parliamentary sovereignty and immigration control. The authors also analyse the potential of such cross-fertilisation for the development—or regress—of international human rights. In particular, the authors point out that the interplay between the two courts would lead to continued leverage of the Luxembourg Court and EU law on British human rights practices through the binding force of the European Convention on Human Rights and the judgments of the European Court of Human Rights. Meanwhile, the authors also highlight the importance of protecting the Strasbourg Court from attacks on its legitimacy and desirability that fuelled the momentum for Brexit and the challenge to the European Court of Justice's jurisdiction over the United Kingdom.

1. Introduction: is Brexit a crisis for human rights?

In July 2018, the British Prime Minister Theresa May reassured the EU that the UK will not withdraw from the European Convention on Human Rights (ECHR or the Convention).[2] After her advocacy for Britain to leave the Convention entirely, regardless of the outcome of the Brexit vote,[3] the Prime Minister's pledge was very welcome. Her shift in attitude was in large part thanks to pressure from Brussels, which

[1] This text is based on the speech delivered by Professor Pinto de Albuquerque at the annual meeting of the European Society of International Law, at the University of Manchester, on 15 September 2018. The usual caveat applies: the opinion expressed in this text binds only its authors and not the Court.

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[2] UK Government, "The Future Relationship between the United Kingdom and the European Union" (July 2018), p.52, available at: *https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union* [Accessed 10 November 2018] ("The UK is committed to membership of the European Convention on Human Rights").

[3] A. Asthana and R. Mason, "UK must leave European convention on human rights, says Theresa May" (25 April 2016), *Guardian*, *https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum* [Accessed 10 November 2018].

had warned that the UK's exit from the Convention will result in a "guillotine clause" nullifying any security partnership between the country and the EU.[4]

This news triggered a sigh of relief for the international human rights community, which had legitimate concerns for the future of human rights in the UK should Brexit be finalised.[5] For those paying attention to the legal consequences of the EU Withdrawal Act in particular, this reprieve was timely. A potential British exit from the EU does pose a real threat to human rights: the Withdrawal Act would dilute EU legal standards in important areas such as personal privacy, data protection, workers' rights and non-discrimination, allowing them to be amended or reversed by domestic legislation. Moreover, if exit day were to come, the EU Charter would technically lose its status as binding domestic law as the British courts would no longer be obligated to follow the case-law of the Court of Justice of the European Union (CJEU).

Contrary to the belief of some optimists,[6] common law is not a satisfactory alternative. For one, common law is underdeveloped in emerging areas of law like data protection and environmental conservation. Furthermore, especially in the context of the growing popularity of the low-regulation economic model, the undoing of pro-labour and equality-enforcing human rights norms appears likely.[7] In addition, the rights and freedoms guaranteed in the EU Charter of Fundamental Rights (CFR) would lose their supremacy and be at the mercy of a politically charged Parliament. Worse still, the UK government may now be free to amend or repeal legislation with little parliamentary scrutiny, thereby diminishing the accountability of the executive branch.

Meanwhile, Britain's renewed endorsement of the Convention does not mitigate the serious risk to human rights in the UK and beyond.[8] A relatively undiscussed aspect in this analysis is the phenomenon of cross-fertilisation between the CJEU and the Strasbourg Court, which means that Britain's disavowal of the former may have reverberating consequences for the latter.

More specifically, the backlash directed at the CJEU that partly motivated the Brexit referendum needs very little justification to transfer to the European Court of Human Rights.[9] After all, every EU Member State must abide by the requirements of the protection of fundamental rights, which both Courts enforce through their respective mechanisms. Indeed, the European Court of Human Rights has not been a popular institution with the British in recent years. The public outrage at *Hirst v United Kingdom*[10]—although the UK government eventually reached a contestable compromise with the Committee of Ministers[11]—was an early warning that the European Court of Human Rights could very well be the next target of an affront.

In the debates leading up to the Brexit referendum, two strands of criticism had been prominent in the European political Zeitgeist. On the one hand, parochialists insisted that the EU, Council of Europe and

[4] James Crisp, "EU could cancel Brexit security deal if UK Quits European Court of Human Rights" (18 June 2018), *Telegraph*, *https://www.telegraph.co.uk/politics/2018/06/18/eu-could-cancel-brexit-security-deal-uk-quits-european-court/* [Accessed 10 November 2018].

[5] See, e.g. Amnesty International UK, "Brexit Bill: A risk to your human rights" (26 February 2018), *https://www.amnesty.org.uk/annual-report-2017-18-brexit* [Accessed 10 November 2018]; Equality and Human Rights Commission, "Joint statement: the UK's human rights and equality bodies on Brexit" (13 June 2018), *https://www.equalityhumanrights.com/en/our-work/news/joint-statement-uks-human-rights-and-equality-bodies-brexit* [Accessed 10 November 2018].

[6] See, e.g. S. Parsons, "The Brexit Effect" (2018) 168 *New Law Journal* 7795 ("whatever happens to the Convention or the Charter after Brexit the protection of the common law against the power of the state will remain").

[7] See O. Gersemann and I. Grabitz, "Philip Hammond issues threat to EU partners" (15 January 2017), *WELT*, *https://www.welt.de/english-news/article161182946/Philip-Hammond-issues-threat-to-EU-partners.html* [Accessed 10 November 2018]; D.J. Mitchell, "The UK Should Brexit the Singapore Way" (16 October 2017), *Foundation for Economic Education*, *https://fee.org/articles/the-uk-should-brexit-the-singapore-way/* [Accessed 10 November 2018].

[8] See, e.g. K. Boyle and L. Cochrane, "The Complexities of Human Rights and Constitutional Reform in the United Kingdom: Brexit and a Delayed Bill of Rights: Informing (on) the Process" (2018) 16 *Northwestern Journal of Human Rights* 22, 36 (warning that the UK "risks sleepwalking into a legal human rights deficit"); Lauren Fielder, "Is Nationalism the Most Serious Challenge to Human Rights? Warnings from Brexit and Lessons from History" (2018) 53 *Texas International Law Journal* 212 (noting that "the human rights implications of the exit will be staggering").

[9] D. Aronofsky, "Brexit Human Rights Issues: It's Time to Play E.U. Hardball" (2018) 53 *Texas International Law Journal* 178, 181–205.

[10] D. McNulty et al., "Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate" (20 May 2014), *Howard Journal of Crime and Justice*.

[11] O. Bowcott, "Council of Europe accepts UK compromise on prisoner voting rights" (7 December 2014), *Guardian*, *https://www.theguardian.com/politics/2017/dec/07/council-of-europe-accepts-uk-compromise-on-prisoner-voting-rights* [Accessed 10 November 2018].

the European courts' global reach are threats to democracy at home. For them, universal human rights is a foreign concept, imposed by alien judges who lack sensitivity to domestic traditions.[12] On the other hand, cynics claimed that the European courts' application of human rights law exceeded their authority, venturing into the realm of politics. Related to this line of contention are the accusations of judicial activism and mission creep, which allegedly take place in a non-transparent development of the case-law.[13]

Unfortunately, both of these voices became part of the widespread discourse which has hijacked the media with alarmist cries that the government is losing control over its borders, and that Europe may be risking its cultural identity. The misleading image of Europe under constant siege from international organisations became powerful as a populist battle-cry. In other words, the scepticism at international law was not directed solely at Luxembourg, but applied seamlessly to hostility at the Strasbourg Court as well.[14]

This danger is sobering, and raises questions about the sustainability of the relationship between the European Court of Human Rights and the UK. At present, s.2 of the UK Human Rights Act[15] survives, and the European Court of Human Rights case-law will remain as a decisive criterion in adjudicating human rights cases.[16] This means that the rights and principles of EU law insofar as they have been incorporated in the Strasbourg case-law will remain binding for the UK; failure to comply with them may give rise to a right of action. Hence, the European Court of Human Rights could continue to be a thorn for some, who may renew a campaign to target the Convention and the Court. In the face of these possible attacks, the Court would be faced with a choice: to appease the critical voices by issuing more favourable rulings through its margin of appreciation doctrine, or firmly stand its ground to hold the state accountable even after its departure from the EU.

2. Cross-fertilisation between the CJEU and the European Court of Human Rights

In principle, the CJEU and the European Court of Human Rights are separate bodies with no binding force on each other. The autonomy of each court is not an accident: art.52(3) of the CFR, setting out the relationship between the two courts, consciously prevented the European Court of Justice (ECJ) from being subordinate to the Strasbourg Court.[17] While art.52(3) also states that the Charter rights equivalent to those in the ECHR are alike in scope and meaning, there is no other codification of the legal authority of European Court of Human Rights judgments. Nonetheless, respect for the Strasbourg Court's interpretation of overlapping rights is especially strong for "rights on the integrity of the person, the prohibition of torture, inhuman and degrading treatment and punishment, slavery and forced labor".[18] As

[12] Judge Pinto highlighted this contention in a recent article. See P. Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 120.

[13] See Conservative Party, "Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Human Rights Laws" (October 2014), *www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf* [Accessed 10 November 2018]. See also Human Rights Watch, "The UK government's proposals regarding the Human Rights Act and the European Court of Human Rights" (20 May 2015), *https://www.hrw.org/news/2015/05/20/uk-governments-proposals-regarding-human-rights-act-and-european-court-human-rights* [Accessed 10 November 2018] ("[Conservatives] have accused judges at the European Court of Human Rights of engaging in 'mission creep'—expanding the meaning of rights in the Convention beyond what was originally intended").

[14] See, e.g. W. Worley, "Theresa May 'Will Campaign to Leave the European Convention on Human Rights in 2020 Election'" (29 December 2016), *Independent*, *https://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html* [Accessed 10 November 2018].

[15] Section 2(1) of the HRA 1998 requires domestic courts to take into account "any judgment, decision, declaration or advisory opinion of the European Court of Human Rights". Section 3(1) provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

[16] On the legal force of the Strasbourg judgments in the UK legal order, see Judge Pinto de Albuquerque's dissenting opinion in *Hutchinson v United Kingdom* [GC] (App. No.57592/08), judgment of 17 January 2017.

[17] The relevant section reads: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection", EU Charter of Fundamental Rights art.52(3).

[18] D. Shelton, "The Boundaries of Human Rights Jurisdiction in Europe" (2003) 13 *Duke Journal of Comparative and International Law* 95, 117.

of today, there is no momentum to change the "current informal, distant, mutually respectful arrangement between the two courts".[19]

To present, there has been some hesitation to make a formal arrangement to recognise each other's authority. The EU itself is not a party to the Convention, and apparently cannot become a party without amendment of the Treaty on the European Union. The CJEU made this point in *Opinion 2/13*, in which it held that the EU's accession to the ECHR would be incompatible with existing treaties.[20]

A revealing example of such cautious attitude is *Elgafaji*, [21] in which the ECJ discussed the authority of the European Court of Human Rights' interpretation of art.3. Although the ECJ admitted that European Court of Human Rights decisions "form[ed] part of the general principles of Community law … and while the case-law of the [European Court of Human Rights] is taken into consideration in interpreting the scope of that right in the Community legal order",[22] it nonetheless refused to accept the Strasbourg jurisprudence as conclusive in adjudicating art.15(c) of the CFR.

The merely "persuasive" nature of the European Court of Human Rights' case-law was also delineated by Advocate-General Darmon, who stated:

> "… most importantly, I must not fail to remind the Court that, according to its case law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systemically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities."[23]

Nevertheless, the jurisprudential dialogue between the two courts is unmistakable. As this section will demonstrate, there are countless examples of the European Court of Human Rights informing the CJEU's interpretation of the general principles of EU law. In fact, we use the term "cross-fertilisation"[24] precisely because the two courts influence each other even where there is no jurisdictional overlap, or legal necessity to rely on each other. While the exact limits of European Court of Human Rights' status as persuasive authority are not clear, Strasbourg judgments are frequently invoked by the ECJ. This exchange is partly owed to the constitutional traditions common to the EU Member States, who have incorporated the Convention into their domestic legal systems.[25] Consequently, the Luxembourg Court refers to the European Court of Human Rights on a "considerable variety of issues".[26] Direct citations to Strasbourg case-law have been increasingly frequent,[27] an "important development from the earlier conduct of the ECJ, in which it would look at the text of the ECHR but make little reference to the European Court of Human Rights' case[-law]".[28]

[19] G. de Burca, "The Road Not Taken: The European Union as a Global Human Rights Actor" (2011) 105 *American Journal of International Law* 649, 679.

[20] *Opinion 2/13* of the European Court of Justice (Full Court), 18 December 2014.

[21] *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] E.C.R. I-921.

[22] *Meki Elgafaji* (C-465/07) [2009] E.C.R. I-921 at [28].

[23] Opinion Advocate General in *Orkem v Commission of the European Communities* (C-374/87) [1989] E.C.R. 3283 at [139]–[140].

[24] As used by the former Advocate General of the CJEC, Francis G. Jacobs. See F.G. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice" (2003) 38 *Texas International Law Journal* 547.

[25] *Erich Stauder v City of Ulm—Sozialamt* (C-29/69) [1969] E.C.R. 419 at [7]; *Bernard Connolly v Commission of the European Communities* (C-274/99) [2001] E.C.R. I-1611 at [38]; *ASML Netherlands BV v Semiconductor Industry Services GmbH* (C-283/05) [2005] E.C.R. I-0000 at [26].

[26] S. Douglas-Scott, "The ECJ and European Court of Human Rights after Lisbon", in S. Alexander de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishers, 2013), p.157. See also J. Callewaert, "The European Convention on Human Rights and European Union Law: A Long Way to Harmony" [2009] E.H.R.L.R. 768.

[27] A. Balfour, "Eliminating Conflicting Interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: The PDIQ System as a Preventative Solution" (2007) 2 *Intercultural Human Rights Law Review* 183, 193.

[28] Balfour, "Eliminating Conflicting Interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: The PDIQ System as a Preventative Solution" (2007) 2 *Intercultural Human Rights Law Review* 183, 193.

The phenomenon is unsurprising, given that the CJEU has held that the substantive fundamental rights provisions of the Convention reflect existing general principles of EU law. Such overlap could be summarised as follows: "[f]undamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".[29] Moreover, the ECJ has generally been a principled protector of rights and freedoms in Europe, making it aligned with the Strasbourg Court in its vision and values. As Philip Aston said, the ECJ "deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter".[30]

Thus, without citing the European Court of Human Rights as a conclusive judicial authority, the ECJ has ruled in striking likeness with Strasbourg when faced with parallel cases. One example is *NS v Secretary of State for the Home Department*, which addressed the expulsion of non-EU national asylum seekers under the Dublin II Regulation.[31] Here, the ECJ held that the Member States may not transfer an asylum seeker to the "Member State responsible" where there are systemic deficiencies in the asylum application procedure, and grounds for believing that the asylum seeker would face a real risk of inhuman or degrading treatment due to conditions of reception.[32] Earlier that year, the European Court of Human Rights had reached a similar decision in *MSS v Belgium and Greece*, in which the Court found Greece and Belgium to have violated the Convention through its treatment of an Afghan asylum seeker; Greece had serious deficiencies in the asylum procedure that put the applicant at risk of expulsion without proper examination of merits, and Belgium knowingly exposed him to sub-standard detention and living conditions.[33] Thus, the CJEU adopted the European Court of Human Rights' reasoning in holding that states are responsible for knowingly exposing the applicant to danger. For critics, this invoked the argument that by "endorsing the [European Court of Human Rights'] analysis, the ECJ profoundly unsettled the principle of mutual confidence that underlies the CEAS common European asylum system, and by extension, the entire edifice of European integration".[34]

The ECJ more explicitly followed the European Court of Human Rights' interpretation in *MP v Secretary of State for the Home Department*, in which it explained that "in accordance with Article 52(3) of the Charter, in so far as the rights guaranteed by Article 4 thereof correspond to those guaranteed by Article 3 of the ECHR, the meaning and scope of those rights are the same as those laid down by Article 3 of the ECHR".[35] Consequently, the ECJ held that a non-EU national asylum seeker could not be expelled where his medical conditions would put his life at risk. Similarly, the ECJ adopted Strasbourg's approach to the rights of asylum seekers in *Hirsi Jamaa*, quoting the rationale of *Hirsi* in its own judgments of *Moussa Abdida* and *Abdoulaye Amadou Taal*.[36] In sum, the substance of many CJEU decisions resembles much of the European Court of Human Rights' case-law.[37]

The influence is bilateral.[38] The Strasbourg Court "has been deferential to the Community in most of its decisions",[39] respecting the CJEU's competence to protect the rights and freedoms in Member States. For instance, in *Pafitis v Greece*, the European Court of Human Rights ruled in a like manner to the Court

[29] Treaty Establishing a Constitution for Europe art. I-9; Treaty on European Union (Lisbon Treaty), art.6(3).

[30] P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy" (1998) 9 *European Journal of International Law* 658, 709.

[31] *NS v Secretary of State for the Home Department* [GC] (C-411/10) [2012] 2 C.M.L.R. 9.

[32] *NS* (C-411/10) [2012] 2 C.M.L.R. 9 at [94].

[33] *MSS v Belgium and Greece* [GC] (2011) 53 E.H.R.R. 2.

[34] G.de Baere, "The Court of Luxembourg Acting as an Asylum Court" (2013) *Leuven Centre for Global Governance Studies* (2013).

[35] *MP v Secretary of State for the Home Department* [GC] (C-353/16), 24 April 2018 at [37].

[36] Compare *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida* [GC] (C-562/13) [2015] 2 C.M.L.R. 15 and *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy* (C-239/14), 17 December 2015 with *Hirsi Jamaa v Italy* [GC] (2012) 55 E.H.R.R. 21.

[37] See S. O'Leary, "Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU" (2016) 56 *Irish Jurist* 22.

[38] See generally, G. Harpaz, "The European Court of Justice and Its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance Coherence and Legitimacy" (2009) 46 C.M.L.R. 105.

[39] Shelton, "The Boundaries of Human Rights Jurisdiction in Europe" (2003) 13 *Duke Journal of Comparative and International Law* 95, 116.

of Justice of the European Communities, which had faced the same complaint from the applicants.[40] Even in controversies that do not have an overlapping jurisdictional issue, the European Court of Human Rights "increasingly refers to the ECJ's case[-law]",[41] signalling convergence between the two bodies' interpretation of human rights standards. *Pellegrin v France* is an early example of this approach.[42] A more recent example is *Scoppola*,[43] in which the European Court of Human Rights made considerable reference to the ECJ judgment of *Berlusconi* under a section dealing specifically with "the case-law of the court of Justice of the European Communities".[44] In concluding that the retroactive application of the more lenient penalty was part of the constitutional traditions common to the Member States, the Strasbourg Court quoted at length the decision from Luxembourg.[45] Another case in point is *DH v Czech Republic*,[46] in which the European Court of Human Rights cited multiple cases from the CJEU when introducing the concept of indirect discrimination as a violation of art.41.[47]

The borrowing of CJEU case-law has been especially noticeable in cases without precedent in Strasbourg. An early example is *Marckx v Belgium*.[48] Faced with provisions in Belgian law that disadvantaged an unmarried mother in establishing maternity of the child, the European Court of Human Rights made a brief reference to the ECJ's *Defrenne* judgment in striking down the distinction between "legitimate" and "illegitimate" families for the purpose of protecting the right to respect for family life under art.8 of the Convention.[49] Likewise, several innovations in ECJ jurisprudence were cited in European Court of Human Rights' judgments on issues involving self-incrimination, the right to a name, or the right to privacy in one's health status.[50]

Influence from the CJEU has not only been evident in the form of case-law, but through the more general impact of EU law on the Court as well. In *Karacsony*, the CJEU's interpretation of the EU Charter of Fundamental Rights served as one of the guiding comparative principles for the Strasbourg Court.[51] The judges were more explicit in *Magyar Helsinki*, dedicating a section to the CFR and two CJEU Grand Chamber rulings on the protection of personal data vis-à-vis the freedom of expression and information to support the finding of violation of art.10.[52]

Indeed, the Strasbourg Court has adopted EU law in many consequential areas, including the mutual recognition of judicial decisions,[53] procedural rights in criminal proceedings,[54] and data protection.[55] And most importantly for the Brexit debate, EU law on asylum proceedings and family reunification has also had a significant effect on how the European Court of Human Rights treats relevant applications. For example, in *JK*, the Court extensively cited the Council Directive on minimum standards for the qualification and status of third country nationals, as well as three CJEU judgments, before concluding that the non-EU national applicants' deportation would give rise to a violation of ECHR art.3.[56] Similarly, *Biao v Denmark* relied on the European Convention on Nationality in addition to recommendations and reports from the

[40] *Pafitis v Greece* (1999) 27 E.H.R.R. 566.
[41] Douglas-Scott, "The ECJ and European Court of Human Rights after Lisbon", in S. Alexander de Vries et al. (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (2013), p.159.
[42] *Pellegrin v France* [GC] (2001) 31 E.H.R.R. 26. Paragraph 47 cites *European Commission v Grand Duchy of Luxembourg* (C-473/93) [1996] E.C.R. I-3248.
[43] *Scoppola v Italy* [GC] (2013) 56 E.H.R.R. 19; *Berlusconi* [GC] (C-387/02) [2005] E.C.R. I-3565.
[44] *Scoppola* [GC] (2013) 56 E.H.R.R. 19 at [37]–[39].
[45] The European Court of Human Rights cited *Criminal Proceedings against Silvio Berlusconi* (C-391/02 and C-403/02) [2005] E.C.R. I-3565.
[46] *DH v Czech Republic* [GC] (2008) 47 E.H.R.R. 3.
[47] *DH* [GC] (2008) 47 E.H.R.R. 3 at [85]–[91].
[48] *Marckx v Belgium* (1979) 2 E.H.R.R. 330.
[49] *Marckx* (1979) 2 E.H.R.R. 330 at [59].
[50] L. Scheeck, "The Relationship between the European Courts and Integration through Human Rights" (2005) 65 *Heidelberg Journal of International Law* 837, 869 [citing D. Simon, "Les droits du citoyen de l'Union" (2000) 12 *Revue universelle des droits de l'homme* 1.
[51] *Karacsony v Hungary* (2017) 64 E.H.R.R. 10 at [54]–[55].
[52] *Magyar Helsinki Bizottsag v Hungary* (App. No.18030/11), judgment of 8 November 2016 at [58]–[59].
[53] *Avotins v Latvia* (2017) 64 E.H.R.R. 2.
[54] *Ibrahim v United Kingdom* (App. Nos 50541/08, 50571/08, 50573/08 and 40351/09), judgment of 13 September 2016.
[55] *Barbulescu v Romania* (App. No.61496/08), judgment of 5 September 2017.
[56] *JK v Sweden* [GC] (2017) 64 E.H.R.R. 15 at [47]–[51].

Council of Europe Commissioner for Human Rights, Parliamentary Assembly of the Council of Europe, and the Committee of Ministers to rule in favour of the applicants. In *Biao*, the Court also referenced at length the CJEU's *Metock* judgment for the "conditions and limits applicable to the right of residence of spouses of EU citizen".[57] *Jeunesse* is another recent Grand Chamber judgment on the right to family reunification under art.8, in which the CJEU's *Gerardo Ruiz* and *Dereci* played an influential role.[58]

Notably, even after the "disappointment"[59] of Opinion 2/13, European Court of Human Rights' references to the latter's case-law on the Charter and the CFR itself have increased.[60]

3. A double-edged sword: "virtuous" or "vicious" cycle of cross-fertilisation

Commentators studying the "increasingly tight and symbiotic relationship between the European Court of Justice and the European Court of Human Rights" have suggested that this jurisprudential dialogue may be strategic, "with the aim of allowing each other to increase domination of public and private actors who march into judicial arenas".[61] According to such view, judges of the two courts establish an integrative framework in which they "increase each other's voice and power".[62] The convergence has been interpreted by a former President of the European Court of Human Rights as a demonstration of "a clear commitment to ensure harmony between" Luxembourg and Strasbourg.[63]

To be clear, this is not to say that the two Courts are always in agreement with each other. The ECJ has never ruled that the decisions of the European Court of Human Rights are controlling on matters of interpretation of human rights. As a result, they have at times "interpreted the rights outlined in the Convention on Human Rights differently".[64]

However, a "virtuous cycle" of the two courts' mutual reinforcement has been visible in some recent cases. One prominent example is the impact of the European Court of Human Rights' *Bosphorus* judgment on the *Kadi* saga. In *Kadi I*, the ECJ clarified the constitutional order of the EU vis-à-vis other international obligations of Member States, creating a benchmarking effect for the evaluation of any Community or domestic act implementing Security Council resolutions.[65] *Kadi I* affirmed that immunity from European jurisdiction would "appear unjustified, for clearly that re-examination procedure [before the Sanctions Committee] [did] not offer the guarantees of judicial protection".[66] This was essentially an application of the *Bosphorus* test, under which the European Court of Human Rights recognises a presumption that action taken pursuant to an international obligation complies with the ECHR if the organisation provides equivalent human rights protections; but the protection must be both substantive and procedural—the presumption may be rebutted if that protection is deemed manifestly deficient.[67] Applying the *Bosphorus*

[57] *Biao v Denmark* [GC] (2017) 64 E.H.R.R. 1 at [59] [citing *Metock v Minister for Justice, Equality and Law Reform* (C-127/08) [2008] E.C.R. I-6241].

[58] *Jeunesse v Netherlands* (2015) 60 E.H.R.R. 17 at [71]–[72] [citing *Gerardo Ruiz Zambrano v Office national de l'emploi* (C-34/09) [2011] E.C.R. I-1177 and *Dereci v Bundesministerium für Inneres* (C-256/11) [2011] E.C.R. I-11315].

[59] European Court of Human Rights, 2014 Annual Report, Foreword by President Spielmann, p.6.

[60] L.R. Glas and J. Krommendijk, "From Opinion 2/13 to Avotins: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts" (2017) 17 *Human Rights Law Review* 567, 577.

[61] C.P.R. Romano, "Symposium: The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems: Deciphering the Grammar of the International Jurisprudential Dialogue" (2009) 41 *New York University Journal of International Law and Politics* 755, 770.

[62] L. Scheeck, "The Supranational Diplomacy of the European Courts: A Mutually Reinforcing Relationship?", in G. Martinico and F. Fontanelli (eds), *The ECJ Under Siege: New Constitutional Challenges for the European Court* (Icfai University Press, 2009).

[63] L.Wildhaber, "The Coordination of the Protection of Fundamental Rights in Europe" (8 September 2005), *Address by the President of the European Court of Human Rights in Geneva*.

[64] E.F. Defeis, "Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights" (2001) 19 *Dickinson Journal of International Law* 301, 317.

[65] *Kadi and Al Barakaat Int'l Found. v Comm'n (Kadi I)* (C-402 and C-415/05P) [2008] E.C.R. I-6352.

[66] *Kadi I* (C-402 and C-415/05P) [2008] E.C.R. I-6352 at [322].

[67] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [GC] (2005) 42 E.H.R.R. 1 at [45].

test in *Kadi I*, the ECJ found that the protection at the United Nations was manifestly deficient.[68] The *Kadi* cases then fed back into the Strasbourg jurisprudence, inspiring the Court to find for the applicants again in *Al-Dulimi v Switzerland*.[69] Thus, in *Al-Dulimi*, the Swiss courts were found to have failed to provide meaningful judicial review of the applicants' listing by the Sanctions Committee of the Security Council. The Grand Chamber discussed *Kadi I* and *Kadi II* at length as "relevant European case-law", quoting sections of each judgment at length.[70]

Furthermore, there are multiple examples of the ECJ reconsidering its own case-law in light of developments at the European Court of Human Rights. In *Hoechst AG*, the ECJ had refused to follow the European Court of Human Rights' innovative interpretation of art.8 in *Niemietz v Germany*.[71] Rejecting the Strasbourg Court's expansive reading of the word "domicile", the ECJ had concluded that the scope of art.8 is concerned with personal freedoms and cannot encompass business premises.[72] Later, the ECJ reversed this position in *Roquette Freres*,[73] explaining that for the purposes of determining the scope of privacy in relation to business practices, "regard must be had to the case-law of the European Court of Human Rights".[74]

Similarly, ECJ jurisprudence on the right against self-incrimination has been brought in line with that of Strasbourg. In *Orkem*, Luxembourg had limited the scope of the right against self-incrimination only to criminal investigations, not to administrative procedures.[75] Thirteen years later, in *LVM*,[76] the ECJ relied in part on "further developments in the case-law of the European Court of Human Rights" to find in favour of the applicants.[77] Here, the European Court of Human Rights' judgment in *Funke*—which held that the right to remain silent and against self-incrimination applies to any attempt to use pecuniary sanction—was particularly noted.[78] Another example is the ECJ's discussion of the European Court of Human Rights in *Goodwin v United Kingdom* when ruling in favour of the applicants in *KB*.[79] Interestingly, *KB* addressed discrimination in pension eligibility, while *Goodwin* was primarily about a transgender woman's access to marriage.[80] Nonetheless, *Goodwin* was an informative case for the ECJ in concluding that the UK had discriminated against the transsexual applicants in their access to pension; the judgment noted the European Court of Human Rights' earlier finding in a separate paragraph.[81]

Furthermore, it is probable that the spirit of complementarity between the two courts contributed to the gradual rise of importance of human rights in EU law.[82] For one, the EU Charter itself "borrows fundamental rights from the ECHR".[83] In 1997, the revised Treaty of the European Union (Treaty of Amsterdam) included a new objective "to strengthen the protection of the rights and interests of the

[68] J. Malenovsky, "L'enjeu délicat de l'éventuelle adhésion de l'Union européenne à la Convention européenne des droits de l'homme: de graves différences dans l'application du droit international, notamment général, par les juridictions de Luxembourg et Strasbourg" (2009) 113 *Revue Générale de Droit International Public* 753.

[69] *Al-Dulimi and Montana Managment Inc v Switzerland* [GC] (App. No.5809/08), judgment of 21 June 2016.

[70] *Al-Dulimi* [GC] (App. No.5809/08) at [59]–[65].

[71] *Niemietz v Germany* (1992) 16 E.H.R.R. 97.

[72] *Hoechst AG v Commission of the European Communities* (C-46/87 and C-227/88) 21 September 1989.

[73] *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* (C-94/00) [2002] E.C.R. I-9011.

[74] *Roquette Frères* (C-94/00) [2002] E.C.R. I-9011 at [29].

[75] *Orkem* (C-374/87) [1989] E.C.R. 3283.

[76] *Limburgse Vinyl Maatschappij (LVM) v Commission* (C-238/00P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P) [2002] E.C.R. I-8375.

[77] *LVM* (C-238/00P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P) [2002] E.C.R. I-8375 at [274].

[78] *Funke v France* (1993) 16 E.H.R.R. 297.

[79] *KB v The National Health Service and the Secretary of State for Health* (C-117/01) [2004] E.C.R. I-541.

[80] *Goodwin v United Kingdom* [GC] (2002) 35 E.H.R.R. 18. We qualify the characterisation of the case as "primarily" about marriage because there were also allegations of discrimination in employment, social security and pensions.

[81] *KB* (C-117/01) [2004] E.C.R. I-541 at [33].

[82] For a general discussion on how human rights came to be eminent in EU law, see N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff Publishers, 1995); P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999); K. Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union" (2000) 6 *Columbia Journal of European Law* 1.

[83] B. J-Z Fan, "European Pluralism on the Protection of Fundamental Rights: The European Convention on Human Rights vis-à-vis the EU Legal Order" (2016) 11 *National Taiwan University Law Review* 333, 342.

nationals of its Member States through the introduction of a citizenship of the Union" and "to maintain and develop the Union as an area of freedom, security and justice".[84] This objective was reflected in the Treaty of Lisbon art.6(2), which explicitly obligated signatories to respect fundamental rights guaranteed by the ECHR. This requirement has real teeth since states can have their membership rights suspended if they engage in a serious and persistent breach of human rights.

However, the cautionary tale of cross-fertilisation is that it is a double-edged sword. Cross-fertilisation can just as easily lead to a "vicious cycle" of troublesome jurisprudence multiplied through mutual encouragement. For instance, in *Hans Akeberg Fransson*, the Grand Chamber of the CJEU had held that the principle of *ne bis in idem* obligated states not to impose an administrative proceeding against an individual who already faced criminal charges (*Erledigungsprinzip* or "exhaustion-of-procedure principle").[85] Three years later, in *A v Norway*, the European Court of Human Rights ruled differently, holding that duplicate proceedings are permissible if the penalties were proportionate and the proceedings were coordinated (*Anrechnungsprinzip* or "accounting principle").[86] *A* thus represented a regression of the protection against double jeopardy. What is noteworthy is that the ECJ then followed this approach in *Luca Menci*, concluding that deviation from *ne bis in idem* is permissible if it "pursues an objective of general interest …, contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage [for the defendant] …, [and] provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary".[87]

Applying this caution to the present situation, cross-fertilisation could either be a way to shield EU laws on protection of fundamental freedoms from obliteration in the UK, or to diminish the impact of the ECHR. On the one hand, the European Court of Human Rights has the potential to be a mechanism through which the UK is still bound by the CFR and EU norms on human rights. Because Britain remains a party to the ECHR and may not contest European Court of Human Rights' jurisdiction, Strasbourg can continue to hold the UK accountable to the CFR indirectly where there are comparable violations under the Convention. In other words, considering that the two courts are "jointly involved into the program to accelerate European integration and are dedicated to shaping a new European pluralism constitutional order",[88] the European Court of Human Rights could be an enduring leverage of the European legal system.

But from a less optimistic view, the political pressure that led to a Brexit referendum could also be a source of trouble for the European Court of Human Rights. In this regard, it is not irrelevant that the Strasbourg Court has already been criticised for shying away in particularly sensitive or difficult cases.[89] It is unsurprising that politicians play at the very edge of respect for the Convention, or even beyond this limit, and resist the Convention values and the Court's judgments in polemic, if not plainly demagogic, moves to gain political support from this or that constituency. If human rights have a basic purpose, it is precisely to be "trump cards" that protect individuals' fundamental rights against the oppressive actions of ill-advised majorities. This is particularly true in the case of easily discarded minorities, such as prisoners or migrants. Politicians who ae backed by these majorities should comply with international human rights in general and with the Convention in particular, since every state official is bound by human rights law and the Convention contributes to promoting a "joint European development of fundamental rights"

[84] Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (1997) art.2.

[85] *Åklagaren v Hans Åkerberg Fransson* [GC] (C-617/10) [2013] 2 C.M.L.R. 46.

[86] *A v Norway* [GC] (2017) 65 E.H.R.R. 4.

[87] *Luca Menci* [GC] (C-524/15), 20 March 2018 at [65].

[88] B. J-Z Fan, 11 *National Taiwan University Law Review* 333, 338–339.

[89] For instance, Judge O'Leary of Ireland argued in her dissent in *Ireland v United Kingdom* (App. No.5310/71), judgment of 20 March 2018 that the Court sought to "shelter itself" behind the legal certainty principle to avoid ruling on a political sensitive inter-state matter. See also O. Stiansen and E. Voeten, "Backlash and Judicial Restraint: Evidence from the European Court of Human Rights" (17 August 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166110* [Accessed 10 November 2018] (suggesting that the Court may have become more restrained in their rulings in order to maintain the support of traditional allies).

(*gemeineuropäische Grundrechtsentwicklung*).[90] What is truly disheartening is that constitutional and supreme courts all over Europe are also resisting the application of the Convention values and the Court's judgments, shifting their role from guarantors of the rule of law to facilitators of the exercise of power by politicians.[91]

As political scapegoating of the European legal order in recent years has demonstrated, the Convention is not immune from attacks on legitimacy, authority and desirability in a changing Europe.[92] To emerge from these volatile times as a champion of individual freedoms and rights, the Court must brace for the coming attacks and make a renewed commitment to safeguarding the rule of law and human rights in Europe.

4. The future of human rights in the UK and in Europe—where do we go from here?

The preceding section has thus demonstrated that, contrary to the campaign's promises that the UK will be able to control immigration without accountability to EU laws and "make [their] own laws",[93] parliamentary sovereignty in the UK will not be left without external checks even if Brexit is finalised. Since the UK will still be under the jurisdiction of the European Court of Human Rights, national legislation will not be immune from challenges on the basis of incompatibility with the rights and freedoms guaranteed in the ECHR. The Human Rights Act 1998, which incorporated the Convention rights into domestic law, will also endure to keep the UK government accountable. Moreover, because of the influence of the ECJ on the European Court of Human Rights jurisprudence as discussed above, the UK will indirectly be bound by the general principles of European law and the CFR insofar as they have been incorporated in the Strasbourg case-law. Admittedly, the purposive approach adopted by the CJEU in interpreting these standards may not be followed by the British courts after their departure from the EU is complete. However, the philosophy and decisions of the European Court of Human Rights in treating the Convention as a living instrument will still have force, which will facilitate cross-fertilisation between the two courts.

In other words, there will fortunately be no human rights "vacuum" in the UK regardless of the final outcome on Brexit. This means that the two major promises that Brexit proponents had made to the British public—parliamentary "sovereignty" and curtailing immigration[94]—will ring hollow. In particular, as the judgment in *Hirsi Jaama* demonstrates, the European Court of Human Rights is a staunch guardian of human rights for all applicants, including immigrants and refugees.[95] If the xenophobic fears of asylum seekers and migrants motivated any part of the campaign, their supporters should reconsider the value of an EU exit to their objectives.

The ECHR will continue to impose standards for regulations and policies regardless of the political will of the incumbent party in London. Furthermore, regardless of attacks from discontent Member States at times, the European Court of Human Rights will persist in "reject[ing] a self-contained … and sovereigntist convention interpretation".[96] The legal order established in Europe is "not a traditional international accord of juxtaposed national egoisms",[97] leaving no part of the Member States' legal order

[90] The expression was coined by the German Federal Constitutional Court (BVerfG 111, 307, § 62).

[91] The image comes from Michael Bock and Sebastian Sobota, "Sicherungsverwahrung: Das Bundesverfassungsgericht als Erfüllungsgehilfe eines gehetzten Gesetzgebers?" (2012) *Neue Kriminalpolitik* 106.

[92] See M. Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28 *European Journal of International Law* 763 ("[the Conservative Party] accused the European Court of Human Rights of 'mission creep' by expanding the ECHR into new areas beyond what the framers of the Convention had in mind and also of attempting to overrule 'decisions of our democratically elected Parliament and overturn the UK courts'").

[93] Amos, "The Value of the European Court of Human Rights to the United Kingdom" (2017) 28 *European Journal of International Law* 763.

[94] See B.J.W. Eddington, "A Poorly Decided Divorce: Brexit's Effect on the European Union and United Kingdom" (2018) 41 *Suffolk Transnational Law Review* 101, 112 (noting immigration concerns as one of the primary motivations for Brexit supporters).

[95] See *Hirsi Jamaa* [GC] (2012) 55 E.H.R.R. 21.

[96] See Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 125.

[97] See Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 125.

outside of its jurisdictional scrutiny.[98] A Member State is "responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations".[99] In other words, as the Strasbourg Court has repeatedly held in its judgments, the ECHR is not and will not be subordinate to domestic rules; it will remain the supreme law of the European continent.[100] This means that the above-explored complementarity between the Strasbourg and Luxembourg Courts, as well as the former's adoption of EU law, will continue to make the European legal standards relevant in the UK, regardless of its membership in the EU.

5. Conclusion

In short, in the face of any Brexit-like attacks on the European human rights system, the European Court of Human Rights will serve as a "constitutional instrument of European public order"[101] with a "peremptory character".[102] This gives the Court an exceptionally important role to play in Europe, since leaving the EU has proven to be a more feasible political exercise than disavowing the ECHR. In addition, the Strasbourg and the Luxembourg Courts have worked and will continue to work together "in a spirit of complementary" in the protection of human rights[103] and the former will continue to be an open-minded recipient of the case-law of the latter. Under this light, the two main arguments to leave (regaining parliamentary sovereignty and controlling immigration law) are nothing but false trump cards.

While this article primarily discussed the potential implications for human rights in the UK if Brexit is finalised through the lens of cross-fertilisation between the CJEU and the European Court of Human Rights, the lessons or warnings from this analysis are applicable beyond a single nation. Today, European countries have a clear choice: either to endorse the cosmopolitan view of universal human rights as a justifiable and desirable limit on state sovereignty, or to embrace the parochial view of domestic legal supremacy. The Brexit referendum is indeed a proxy fight, and could be the first of many, between supporters and opponents of international law and human rights. And regardless of which side wins, whether the European Court of Human Rights will continue to succeed as a final guardian of individual rights and freedoms in Europe will depend on the collective effort and commitment by the entire European community.

[98] See *Bosphorus* [GC] (2005) 42 E.H.R.R. 1 at [153]; *Nada v Switzerland* [GC] (App. No.10593/08), judgment of 12 September 2012 at [168].
[99] *Anchugov v Russia* (App. Nos 11157/04 and 15162/05), judgment of 4 July 2013 at [108].
[100] See Pinto de Albuquerque, "Plaidoyer for the European Court of Human Rights" [2018] E.H.R.L.R. 119, 125 at fn.26.
[101] *Loizidou v Turkey* (preliminary objections) [GC] (1995) 20 E.H.R.R. 99 at [75].
[102] *Bosphorus* [GC] (2005) 42 E.H.R.R. 1 at [154].
[103] *Avotins* (2017) 64 E.H.R.R. 2 at [116].