

Judicial impartiality, decorative comparative law and the Human Rights Court

Maastricht Journal of European and
Comparative Law
2020, Vol. 27(3) 387–396
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DOI: 10.1177/1023263X20943125
maastrichtjournal.sagepub.com



ECtHR, *Alexandru Marian Iancu v. Romania*,
Application No. 60858/15

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Abstract

This case-note analyses the case of *Alexandru Marian Iancu v. Romania*, decided by the European Court of Human Rights in February 2020. The comment addresses two essential issues involved. The first issue concerns potential partiality of a judge who has been involved in overlapping proceedings. The second issue concerns the judicial method the Court uses in its reasoning. The note explains the background to the judgment, summarizing the facts leading to the judgment and the human rights issues before the Court. Then the proceedings before the Court and the Court's decision are reviewed, before commenting on the judgment's key points of significance for human rights law and use of comparative law as a part of human rights reasoning. The critical focus is on the comparative approach deployed by the Court.

Keywords

ECHR Article 6, impartial tribunal, right to a fair trial, comparative law

I. Introduction

In February 2020, the European Court of Human Rights ('the Court') delivered its judgment in the case of *Alexandru Marian Iancu v. Romania*. The case features at least two matters of particular

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interest worthy of comment. First, the substantive dimension concerns Article 6 § 1 of the European Convention on Human Rights on the right to a fair trial.¹ The relevant limb of the Article has to do with the right to a fair hearing requiring that an ‘impartial tribunal’ must hear the case.² In this decision, the key human rights question concerns alleged lack of judicial impartiality based on the fact that a judge had been involved in convicting the applicant in two sets of connected proceedings. The second, methodological point concerns the Court’s reasoning, which was based, at least ostensibly, on a comparative approach. The Court conducted a comparative study of the legislation of 28 contracting states of the Council of Europe and presented it as a part of its judgment.³

As for the impartiality issue, the Court argues quite convincingly that there was no violation of Article 6 § 1 ECHR. Here, the Court follows its earlier case law that has given judicially interpreted meaning to the Article. Nevertheless, the manner in which the Court purportedly uses a comparative approach as a part of its reasoning leaves room for criticism. Accordingly, it is argued that a substantively well-reasoned judgment fails to genuinely benefit from comparative law. From there it follows that the judgment suffers from a legitimacy problem caused by deficient application of the comparative approach. To that end, the main bulk of this case note is driven by a critically flavoured methodological analysis of a judgment that could be labelled as an everyday case, that is, a normal human rights case decided in a single Chamber.⁴

2. The factual background

The applicant, Alexandru Marian Iancu, is a Romanian national who was convicted of financial crimes in 2014 and 2015. His trials concerned continuous tax evasion and conspiracy to commit money laundering.⁵ These are two separate cases but, because certain evidence was common to both proceedings, the cases were linked by the facts. In addition, some of the defendants were the same. The fact that the cases were connected caused later procedural issues concerning the human right to a fair trial. The outcome of the first proceedings was that the applicant was convicted by a panel of the Bucharest Court of appeal consisting of two judges (C.B. and M.A.M.).⁶

The conviction was connected to a second set of criminal proceedings in which one of the other defendants challenged the appeal panel. The main reason for the challenge was that one of the

1. ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ A similar provision can be found in Article 47 § 2 Charter of Fundamental Rights of the European Union: ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.’

2. The notion of an impartial tribunal in European human rights law explained, see *Guide on Article 6 of the European Convention on Human Rights* (Council of Europe, 2019), p. 48–52.

3. ECtHR, *Alexandru Marian Iancu v. Romania*, Judgment of 4 February 2020, Application No. 60858/15, para. 40–43.

4. Substantially, the main reason to use comparative law materials is to find out whether there is a European consensus in the question or not. This determines the relation of margin of appreciation of the States and the so-called European supervision. Along these lines, such ECtHR cases like *Lautsi v. Italy*, Judgment of 18 March 2011, Application No. 30814/06, *Paradiso and Campanelli v. Italy*, Judgment of 24 January 2017, Application No. 25358/12 and *Bărbulescu v. Romania*, Judgment of 5 September 2017, Application No. 61496/08 illustrate the Grand Chamber use of comparative law (the dissenting opinions included).

5. ECtHR, *Alexandru Marian Iancu v. Romania*, para. 6 and 7.

6. *Ibid.*, para. 10 and 14.

judges (C.B.) had previously taken a decision in the first set of proceedings. Moreover, the other defendant claimed that judge D.D. had already expressed an opinion on the defendants' guilt.⁷ The court of appeal, taking these procedural allegations seriously, deemed that there were justified doubts concerning the potential partiality of the judges.⁸ The core argument against the judges was the manner in which the proceedings had been conducted by these two judges during the first two appeal hearings.⁹ Consequently, because of the potential partiality, the second case was randomly distributed to another appeal panel.¹⁰ This panel consisted of two judges, of which M.A.M. was one.

The impartiality issue before the Strasbourg Court was caused because M.A.M., who was a member of the panel in which the second case was distributed (to take a decision not on the case itself but on potential partiality), had been a judge in the first set of proceedings. In other words, M.A.M. had a judicial role in two proceedings that were factually overlapping. Now, M.A.M. expressly recognized the potential partiality problem because he was a member of the first panel (that had convicted the applicant) and of the randomly distributed panel examining the potential partiality in the second set of proceedings. As a result, M.A.M. dutifully requested to be allowed to withdraw because of having earlier delivered a judgment in the first set of proceedings concerning Iancu.

Eventually, a third two-judge panel judge dismissed M.A.M.'s withdrawal request, arguing that there were no reasons for doubting his impartiality.¹¹ The panel examining M.A.M.'s request held that 'no proof was found to support the idea that judge M.A.M. had expressed, in the first case, an opinion on the guilt of any of the accused of the case currently on trial'.¹²

Recognizing the potential procedural risk during the appeal proceedings in the second case against Iancu, Judge M.A.M. sought to withdraw in order to eliminate any suspicion concerning a possible lack of impartiality. His request was, nevertheless, rejected by a third panel of two judges, who found that the mere fact that he had taken part in the first case in the capacity of judge could not raise a reasonable suspicion as to his partiality concerning the second case. According to this view, there was simply no proof to substantiate that, in the first set of proceedings, M.A.M. had expressed an opinion on the guilt of the accused (i.e. Iancu) beforehand concerning the second set of proceedings. Consequently, the appeal proceedings resumed before the original panel of two judges D.D. and C.B. In practice, this procedural decision resulted in the applicant's lawyer further challenging the appeal proceedings panel for bias in the continuing proceedings.¹³ In other words, Iancu still held that the appellate panel in the second case was partial and the panel examining this partiality was also partial.

In view of these circumstances, it is no surprise that that the defendants – seeking a more favourable judgment in their criminal case – lodged a request before the supreme court on the ground of alleged lack of impartiality. In any case, the High Court of Cassation and Justice

7. According to the claim against D.D., he had 'adopted the opinion of the lower court on the application of the statute of limitations', *ibid.*, para. 17.

8. *Ibid.*, para. 15–16.

9. *Ibid.*, para. 17.

10. *Ibid.*, para. 19.

11. *Ibid.*, para. 21–22.

12. *Ibid.*, para. 25. The judgment by C.B. and M.A.M. was an extensively reasoned judgment of 275 pages.

13. *Ibid.*, para. 26–27.

examined and rejected the allegations as to lack of M.A.M.'s impartiality.¹⁴ Moreover, in its decision the supreme court found that the final convicting judgment (in the first case) of the applicant had been thoroughly reasoned. In other words, there were no legal grounds for changing the venue of appeals.¹⁵

As one can anticipate, the applicant also lodged yet another complaint before the Superior Council of Magistracy, which is a disciplinary body within the judiciary. Nonetheless, the outcome was similar as in the Supreme Court.¹⁶ It was noted by the disciplinary body that the 'argument concerning the participation of judge M.A.M. in previous proceedings, in which he had convicted the applicant, had been thoroughly examined and rejected in accordance with the law'.¹⁷ Importantly, the claims of lack of impartiality were taken seriously and decisions concerning this matter were examined in a manner that appeared to be nothing but thorough.

Accordingly, the core of the case before the Strasbourg Court concerned possible lack of impartiality in a situation where the claims were specifically examined and rejected by an appellate court panel, the High Court of Cassation and Justice, and the Superior Council of Magistracy. The applicant also appealed against his detention conditions but since the Court of Human Rights rather bluntly rejected this on a factual basis, it is left out of this analysis altogether.¹⁸

3. The proceedings before the Court

From the human rights point of view, the interesting part of the case circles around the key argument according to which the appeal panel dealing with the criminal case of the appellant had not been impartial in the way Article 6 § 1 of the Convention requires. Hence, the substantive human rights issue concerned the right to a fair trial.

First, the Court reviewed relevant Romanian law and practice.¹⁹ The key focus was on the Romanian Code of Criminal Procedure and the rules on disqualification of judges on incompatibility grounds, withdrawal, and recusal. The conclusion on Romanian law was that a judge's position becomes incompatible with an impartial examination on certain conditions. In essence, this happens if a judge has expressed an opinion beforehand concerning the outcome of the proceedings. Domestic law does not seem to have a specific rule directly applicable to the impartiality question involved. At this point, the Court brought in comparative law material. We will look at this material in the following section, which concentrates on the substantive part of the

14. This court (Înalta Curte de Casație și Justiție) is the supreme court of Romania. As the name indicates, it is a court of cassation ensuring uniform interpretation and application of the law by lower courts. It does not deal with questions concerning the constitutionality of laws because constitutional issues are referred to the Constitutional Court. See Constitution of Romania Article 126.3 (courts of law) and Article 146 (on the powers of the constitutional court).

15. ECtHR, *Alexandru Marian Iancu v. Romania*, para. 31–32.

16. According to the Romanian Constitution (Article 134.2), the Superior Council of Magistracy (*Consiliul Superior al Magistraturii*) performs the role of a court of law 'as regards the disciplinary liability of judges and public prosecutors'.

17. ECtHR, *Alexandru Marian Iancu v. Romania*, para. 34. The Council 'found that the legal provisions and the internal regulations concerning the random distribution of files and the formation of the trial benches had been respected. All requests for recusal or withdrawal had been examined and resolved in accordance with the law, in thoroughly reasoned decisions.'

18. In *ibid.*, para. 51 the Court argues that it 'is not convinced that the treatment the applicant was subjected to on 4 June 2015 had reached the minimum threshold of severity required to constitute inhuman and degrading treatment'.

19. *Ibid.*, para. 38–39.

judgment and where, importantly, comparative law material plays a surprisingly small role in the Court's human rights reasoning.

Besides comparative law material, the Court briefly refers to international materials on the impartiality of judges by a cursory mention of its earlier judgment in the case of *Harabin v. Slovakia* decided in 2012.²⁰ This case is merely referred to – but without exploring or explaining it.²¹ In any case, *Harabin v. Slovakia* points out how crucial it is to give convincing arguments as to why challenges cannot be accepted in disciplinary proceedings of judges. In *Iancu v. Romania*, we can see how the obligation to give convincing arguments is met satisfactorily.

First, the Court noted that Iancu's complaint was not manifestly ill-founded or inadmissible on any other grounds; thus, the complaint was admissible.²² When going through the merits of the case, the Court reiterated the parties' submissions in a condensed manner. The applicant claimed that M.A.M. could not be seen as impartial for the reasons explained above.²³ The Government noted that the judge in question had actually not admitted any actual reason for his request to withdraw on the basis of his disqualification; in fact, this had been merely a precautionary measure. Moreover, the Government argued that Iancu's case had been thoroughly examined and the decision was extensively reasoned, so that there were no relevant grounds to raise suspicions concerning the judge's impartiality.²⁴

The Court's reasoning on general human rights principles focused on explaining two tests or approaches that it uses when deciding on the impartiality of a judge. The subjective approach concerns the personal impartiality of a judge, which is to be presumed, absent contrary proof. The Court continued that in the great majority of cases concerning impartiality issues, the Court focuses on the objective approach although there actually is no watertight distinction between these two forms of impartiality.²⁵ The Court explained that the objective test is, in most cases, about hierarchical or other kinds of link between the judge and other protagonists in the proceedings. From there it follows that whether the link indicates a lack of impartiality on the part of the tribunal can be decided only in each individual case.²⁶ In deciding on impartiality, the point of view of the litigant is important but not decisive. What is decisive is whether doubts as to impartiality can be seen as objectively justified. Accordingly, even though appearances may be of a certain importance, the Court held that possible doubts need to be objectively justified. Moreover, the Court pointed out that questions of internal organization of the judiciary must also be taken into account when deciding on impartiality.²⁷

Before applying the principles explained to the case at hand, the Court made clear that 'the mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in

20. One can, of course, ask whether referring to the Court's own case law is 'international' in the sense that it refers to itself.

21. *Ibid.*, para. 44 refers specifically to ECtHR, *Harabin v. Slovakia*, Judgment of 20 November 2012, Application no. 58688/11, para. 104–110. This case was about the imposition of a disciplinary sanction on the President of the Slovak Supreme Court for having prevented an audit at that court. In particular, it concerned the President's complaint that several of the judges who decided his case were biased.

22. *Ibid.*, para. 54.

23. *Ibid.*, para. 55.

24. *Ibid.*, para. 45.

25. *Ibid.*, para. 57–58.

26. *Ibid.*, para. 60.

27. *Ibid.*, para. 60–62.

itself justifying fears as to his partiality.²⁸ The crucial piece of reasoning on applying the principles is that: ‘The Court is not persuaded that there is evidence that judge M.A.M. (or the other member of the panel) displayed personal bias against the applicant in the framework of the second set of criminal proceedings.’²⁹

From the above it follows that the Court used the objective approach. When using this test, the Court noted that M.A.M.’s application to withdraw was taken seriously and examined by a panel of two judges. Importantly, the panel delivered a reasoned decision addressing all arguments raised by the applicant. What is more, there was no proof supporting the suspicion that M.A.M. would have expressed an opinion on the guilt of any of the accused concerning the second set of proceedings.³⁰ In the end, the Court held that ‘judge M.A.M.’s behaviour both in the first and second set of proceedings was not such as to objectively justify the applicant’s fears as to his impartiality’.³¹ Consequently, the Court concluded that the applicant’s misgivings on the impartiality of the judge presiding over the trial panel examining his case were not objectively justified. In other words, there was no violation of the right to a fair trial as protected in Article 6 § 1 of the Convention.

The outcome was expected and it underlines three crucial dimensions about judicial impartiality in the context of the human right to a fair trial. First, when deciding on impartiality the litigant’s standpoint is important but it is not decisive. Second, a litigant’s doubts as to impartiality must be objectively justified. Third, the mere fact that a trial judge has made previous decisions concerning the same offence does not as such justify fears of partiality. Overall, the three limbs of the case make up the key dimensions of the Court’s procedural impartiality test. The outcome of the case makes sense, it is well reasoned, and appears to be balanced as it highlights the notion of a fair trial and judicial impartiality. However, the specific manner in which the Court used comparative law raises questions.

4. Use of comparative law

The Court conducted a comparative study of the legislation of 28 contracting states of the Council of Europe.³² This study suggests that in the criminal justice systems of all of these states there are four common grounds requiring the withdrawal of judges. First, if the judge is a victim of the offence at issue. Second, if the judge has had a relationship (as a spouse or relative) with the

28. The Court refers here extensively to its earlier case law: ‘(see *Hauschildt v. Denmark*, 24 May 1989, § 50, Series A no. 154, and *Romero Martin v. Spain* (dec.), no. 32045/03, 12 June 2006 concerning pre-trial decisions; *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13; *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A; and *Vaillant v. France*, no. 30609/04, §§ 29–35, 18 December 2008, concerning the situation of judges to whom a case was remitted after a decision had been set aside or quashed by a higher court; *Thomann v. Switzerland*, 10 June 1996, §§ 35–36, Reports of Judgments and Decisions 1996-III, concerning the retrial of an accused convicted in absentia; and *Craxi III v. Italy* (dec.), no. 63226/00, 14 June 2001, and *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 59, Reports 1996-III, concerning the situation of judges who had participated in proceedings against co-offenders)’.

29. *Ibid.*, para. 66.

30. *Ibid.*, para. 68–70.

31. *Ibid.*, para. 72. Here the Court contrasts this case to ECtHR, *Otegi Mondragon v. Spain*, Judgment of 6 November 2018, Application No. 4184/15, 4317/15, 4323/15, 5028/15, and 5053/15, in which the Court found partiality.

32. The countries are Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, North Macedonia, Norway, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom.

accused, the victim or any person participating in the proceedings. Third, if the judge has previously been involved in the case in a different capacity (e.g. prosecutor, police officer, legal representative, witness). Fourth, if the judge has previously participated in examination of the case in the capacity of judge – for example, having issued a ruling concerning arrest or detention as a first-phase investigation judge.³³

The Court found that in 17 contracting States the relevant criminal legislation laid down a general clause requiring a judge to withdraw in all other circumstances casting potential doubt on impartiality. The French system, which resembles the Romanian, was explained as specifically requiring a judge to withdraw if there have been other legal proceedings between them or close relatives, and one of the participants in the proceedings or one of his or her close relatives. The French model also requires a judge to withdraw in case of being involved in proceedings in a court where one of the participants is a judge. Moreover, the Court pointed out that in Italy a judge must withdraw in the case of having a financial interest in the proceedings either directly or indirectly through relatives.³⁴

Continuing its comparative law survey, the Court noted that in most states an application for withdrawal lodged by a member of a panel of judges is examined in chambers by another panel that does not include the judge in question. However, in some states the withdrawal application is examined by the president of the court.³⁵ In terms of the obligation to give reasons for dismissal of a withdrawal application, eight states require it.³⁶ In 13 states, there is no such obligation, albeit this kind of obligation can actually be deduced from the relevant legal framework.³⁷ In five states, there is no distinguishable legal obligation to give reasons for dismissal of a withdrawal application.³⁸ What is more, the Court did not make any comparisons with the case law of its sister court, namely the European Court of Justice.³⁹

The Court presented its comparative study under the heading ‘Comparative Law Material’. As such, comparative law material describes different approaches in certain contracting States of the Council of Europe. No explanation is given as to why these States are chosen or how the study is actually conducted. The wording of the Court’s judgment, however, makes it clear that the study is not comparative law research taking into account the contexts of law but ‘a comparative study of the legislation’. In practice, this ‘study’ is a superficial descriptive investigation of legislation in 28 states out of 47 contracting states. Crucially, the choice of states is neither explained nor justified in any way. In effect, the comparative law section III of the judgment does not seem to have any particular function in the judgment as it stands there as a kind of swollen *obiter dicta* in the shape of a collection of insignificant judicial remarks.⁴⁰ These critical observations on the use of comparative law call for analysis that is more detailed.

33. Ibid., para. 40.

34. Ibid., para. 41.

35. Ibid., para. 42. Austria, Norway and Estonia are States in which the president examines the withdrawal application.

36. Azerbaijan, Croatia, Estonia, Finland, Norway, Poland, Slovenia and Sweden.

37. Austria, Bosnia and Herzegovina, Czech Republic, Germany, Greece, Hungary, Iceland, North Macedonia, Portugal, Russian Federation, Spain, Turkey and the United Kingdom.

38. Belgium, Bulgaria, France, Italy and Lithuania.

39. See, e.g., Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302, para. 52 (objective impartiality) and Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez*, EU:C:2017:126, para. 37–38 (external and internal dimensions of judicial impartiality).

40. The Court does not use the heading ‘Comparative Law Materials’ consistently. Sometimes it presents a broad comparative survey under different headings, as for example ‘The Situation in Other European States’ in ECtHR, *S.A.S. v France*, Judgment of 1 July 2014, Application No. 43835/11, para. 40–52.

5. Comment on the reasoning

The question concerning use of comparative law by the Court does not have to do only with this case. In a more general view, we may say that use of comparative law in human rights adjudication has been on the rise and the field of comparative human rights law has developed during this millennium. Despite this development, we may say that ‘Comparative human rights law is en vogue, but its boundaries, methods, and authority are still in flux.’⁴¹

Now, why the Court tries to use at least some kind of comparison is easy to understand.⁴² Ideally, the Court could use comparison among contracting states’ legal systems in order to ascertain the meaning and scope of the Convention provisions. This kind of comparison could be something more than a mere technicality (‘Comparative Law Materials’) because it has the potential to legitimize the exercise of judicial discretion. For instance, if the Court could hold that there is a sufficient degree of commonality in some of the contracting states’ legal systems it could then undertake evolution of the Convention’s norms in a situation not encountered previously. Using comparisons, the Court could demonstrate linkages between European human rights law and contracting state legal systems by arguing that the Court’s decision is, in fact, derived from the domestic jurisdictions of (some of) the contracting states. In other words, the Court’s reasoning could gain legitimacy indirectly through domestic jurisdictions. Unfortunately, as is well known, the manner in which the Court uses comparison is not without problems.⁴³ In other words, fleshing out the content and scope of the Convention by deploying comparative analysis has taken place even though it has been methodologically far from well grounded.⁴⁴ The judgment commented on in this case-note confirms once again that apparent methodological problems are troubling the manner in which the Court uses comparative law.

It is possible to discern at least four different ways in which comparative law comes into play as a part of the reasoning of the Court. These can be labelled as cognitive, decorative, directional and decisive.⁴⁵ The first way is about using comparative points as a part of the preliminary fact-finding stage, but without further reference in later parts of the judgment. This kind of comparative law usage is merely about making the decision-making legal landscape understandable. The second way is decorative in the sense that comparative law material is simply referred to – in an obiter dicta manner – without going any deeper into comparative arguments. The third way is to let comparative law points steer the interpretation. This technique entails that comparative material is openly referred to in the reasoning and, moreover, that there is a clear link between the comparative material and the chosen interpretation. The further and last argumentative technique is to let the comparative material play a decisive role in the Court’s assessment. The commented-on case represents decorative usage of comparative law, making these materials and the accompanying

41. F. Mégret, ‘International Human Rights Law’, in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011), p. 199.

42. There is scholarship on human rights comparativism. See, e.g. E. Özücü (ed.), *Judicial Comparativism in Human Rights Cases* (Institute of International and Comparative Law, 2003) and C. McCrudden, ‘Judicial Comparativism and Human Rights’, in E. Özücü and D. Nelken (eds.), *Comparative Law: A Handbook* (Hart Publishing, 2007), p. 371.

43. P. G. Carozza, ‘Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights’, 73 *Notre Dame Law Review* (1997–1998), p. 1217–1237.

44. Cf. G. Letsas, ‘The Truth in Autonomous Concepts: How to Interpret the ECHR’, 15 *European Journal of International Law* (2004), p. 279.

45. M. Dahlberg, ‘“The Lack of Such a Common Approach” – Comparative Argumentation by the European Court of Human Rights’, 23 *Finnish Yearbook of International Law* (2012–2013), p. 73–111.

study mere judicial window dressing. Comparative law materials stand there, having actually nothing else to do than just stand there.

6. Conclusion

This case has two core dimensions, as discussed above. The substantive part on the impartiality of a judge makes a convincing judgment in the sense that the reasoning behind the decision is balanced and believable. The three limbs of the judgment show the key dimensions of the Court's procedural impartiality test: the litigants' standpoint is important but not decisive; doubts as to impartiality must be objectively justified; and the mere fact that a trial judge has made previous decisions concerning the same offence does not automatically mean partiality. The problem in this case is how the Court used comparative law as judicial window dressing as it includes comparative law materials but makes no use of those materials in the argumentation leading to the decision.

The judgment contains a 500-word comparative law section III (paragraphs 40–43) placed under the heading 'Comparative Law Materials'. This section explains the legal situation on judges' impartiality in 28 contracting states. The methodological problem is that section III performs a merely decorative function for the judgment as it is said in passing and as an incidental or perhaps almost an anecdotal statement. To that end, comparative law materials end up as an entertaining passage that is not genuinely necessary for the decision in the case before the Court. The unavoidable question is clear: why include comparative law materials at all, if and when they have no argumentative role in the reasoning?⁴⁶

As a comparative law scholar, I can see two possible solutions to the methodological problem. First, and the preferable one, is to incorporate comparative law materials in the actual decision by way of explicit references. Second, and less preferable, is to completely leave comparative materials out if they have no more significance than window dressing. Because the Court has the capacity to perform comparative studies of the contracting States' legal systems, it would make perfect sense to take one step further and actually use comparative law based arguments in the operative parts of the judgment.⁴⁷ This would not mean anything dramatic for the Court's modus operandi; yet at the same time it would require openly giving slightly more pronounced weight to something that is already a part of how the Court writes its judgments.⁴⁸ Importantly, this would not mean giving more weight for the contracting states' systems but utilizing comparative arguments in order to flesh out human rights law in a manner that can be perceived as a legitimate tool at the service of judicial protection of human rights. Having said that, it needs to be pointed out that using comparative law in the service of judicial interpretation means transforming the Court's

46. One could, of course, describe this kind of use amicably as 'comparative law for informational purposes', K. Dzehtsiarou, 'What is Law for the European Court of Human Rights?', 49 *Georgetown Journal of International Law* (2017), p. 89–134.


47. Yet, as noted by Mónika Ambrus 'the most complicated aspect of the comparative law method is the identification and conceptual clarification of the particular aims of comparison', M. Ambrus, 'Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law', 3 *Erasmus Law Review* (2009), p. 353–371.

48. This would not be complicated because it would only require small adjustments in the reasoning, as for example, 'As the comparative law materials (see paragraph 42 above) also indicate . . . '.

work into a practice that can be labelled as comparative international law.⁴⁹ These conclusions need to be interpreted with caution because the Chamber judgments more rarely refer to the comparative law material than the Grand Chamber judgments. On the other hand, the Chamber judgments tell us about the judicial everyday of the Court and how comparative law is conceived in normal cases.⁵⁰

To conclude, as a proverb has it ‘do it well or not at all’ – surely not too much to ask for such a court as the European Court of Human Rights with its extraordinary capacities and resources for performing comparative surveys and incorporating them in decisions. The present situation reminds one of the dialogue between Neo and the Oracle in the first Matrix movie, where the Oracle says to Neo: ‘You got the gift, but it looks like you’re waiting for something.’ The Court certainly has what it takes, if it only were willing to use what it already has.

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49. See A. Roberts et al., ‘Comparative International Law: Framing the Field’, 109 *American Journal of International Law* (2015), p. 467–474 (‘comparative international law entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law’).

50. Yet it is a contested question whether one should attach particular weight to the Grand Chamber judgments in comparison to the Chamber judgments. See M. Breuer, ‘“Principled Resistance” to ECtHR Judgments: An Appraisal’, in Martin Breuer (ed.), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer, 2019), p. 342.