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References to the US Supreme Court Decisions in the Judgments of the European Court of Human Rights

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Abstract

The paper shows the ECtHR's practice of making references to judicial decisions made by the US Supreme Court. This issue is part of the problem of taking, by the courts in the decision-making process, foreign law into account as well as the wider phenomenon of the so-called judicial globalization. The quantitative study of the Strasbourg case law made it possible to draw a number of conclusions. First, although the ECtHR's judgments which contain references to decisions of the highest court of the United States constitute a proportionally small fraction of all judgments, the absolute number of cases where the Strasbourg Court has made references to American case law is far from being small. Secondly, over the past decades, the process of making use of the US Supreme Court decisions by the Strasbourg Court has been noticeably intensified. Thirdly, statistically twice as often, the US Supreme Court decisions are referred to by individual ECtHR judges as authors of separate (dissenting or concurring) opinions than the Court itself. Fourth, the composition of the Court, i.e. whether it sits as a Chamber or as a Grand Chamber, does not have an impact on the operationalization of the issue in question. Fifthly, the read-

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filled by the American Civil Liberties Union (ACLU) on behalf of the Wikimedia Foundation and several other organizations against the National Security Agency (NSA), the US Department of Justice (DOJ) and others, alleging mass surveillance of Wikipedia users carried out by the NSA. The lawsuit states that the upstream surveillance system violates the first amendment to the United States Constitution, which protects freedom of speech, and the fourth amendment to the United States Constitution, which prohibits unjustified searches and seizures. The ACLU lawsuit was filled on behalf of almost a dozen educational, legal, human rights-related and media organizations which jointly engage in trillions of confidential online communications and have been harmed by upstream supervision. Pre-surveillance procedures hinder the plaintiffs' ability to ensure basic confidentiality of their communications with key contacts abroad – including journalists, co-workers, clients, victims of human rights abuses, and tens of millions of people who read and edit Wikipedia pages. Pre-surveillance procedures, which, as the government claims, are authorized by the Section 702 of the FISA Amendment Act, aim to trap all the international communications of Americans, including emails, web browsing content and search engine queries. With the help of companies such as Verizon and AT&T, the NSA has installed monitoring devices on the Internet – a backbone network, a network of high-capacity cables, switches and routers allowing the flow of the Internet traffic. These goals, chosen by intelligence analysts, are never approved by any court, and the existing restrictions are weak and full of exceptions. According to Section 702, the NSA may attack any foreigner who is outside the United States and may provide "intelligence from abroad". The number of people under surveillance is huge and includes journalists, academic researchers, corporations, social workers, entrepreneurs and other people who are not suspected of any misconduct. After the victory of Wikimedia in the fourth circuit in May 2017, the case returned to the district court where Wikimedia was looking for documents and testimonies submitted by the Supreme Administrative Court. The government refused to comply with many requests for a disclosure of Wikimedia, citing the "privilege of state secrecy" to hide the basic facts of both Wikimedia as well as the court. Wikimedia contested the government's unjustified use of confidentiality in order to protect its supervision from surveillance, but in August 2018 the District Court upheld it. Their work is necessary for the functioning

of democracy. When their sensitive and privileged communication is being monitored by the US government, they cannot work freely and their effectiveness is limited – to the detriment of Americans and others around the world.

Therefore, mass surveillance leads to social self-control, but in the most undesirable form which means restriction in exercising one's own rights, including freedom of expression, for fear of sanctions on the part of public authorities. In this way, the measures known from totalitarian regimes are introduced into a democratic state. At the same time, this process happens in a secret way, because formally, the individual still has the same rights and freedoms. In this way, mass surveillance causes damage not only to single individuals, but to the entire state as it undermines the foundations of its system.

Not without reason, according to the well-established jurisprudence of the ECtHR, the primary purpose of the legal safeguards established for the secret surveillance programs conducted by states is to reduce the risk of abuse of power. However, is it possible to establish such safeguards in the case of mass surveillance programs? In accordance with the standards introduced by the ECtHR, statutory provisions should specify at least the category of offences that may involve authorization of the use of surveillance measures, as well as a limitation on the maximum duration of their application.

In the case of mass surveillance, it is no longer possible to fulfil the first of the indicated safeguards, because the essence of the use of this type of measures is to intercept all communications, and not only communications concerning persons suspected of committing specific crimes.

However, the reasons for the repeated belief that non-offenders should not be afraid of surveillance are also worth of detailed analysis. In fact, the supporters of this point of view believe that information which can be obtained about them does not reveal secrets they would not like to share with others. This belief completely overlooks one of the most important features of mass surveillance which is acquisition of data from various sources and their aggregation and correlation, and in the final stage – drawing new conclusions. As a rule, these conclusions go beyond the original scope of information, thus they create new knowledge about the persons subject to surveillance. It can be the knowledge about their preferences (not only shopping, but also e.g. political or sexual), expected behavior, profile of decision-making, but also the circle of friends or existing social relations. The process of acquiring new

iness of the ECtHR's judge to cite a decision of the US Supreme Court is independent of his/her nationality and the type of legal culture of his/her home country. On the other hand, the distinction between judges from the West and East of Europe is of some significance. Finally, the communication between the European Court of Human Rights and the US Supreme Court is characterized by a clear asymmetry, in the sense that the judgments of the Strasbourg Court were referred to in just a few decisions of the American court. In the author's view, the American case law may only play a subsidiary role in the comparative analysis of the ECtHR. The primary reference point for the Strasbourg Court should be the European Convention on Human Rights, case-law developed by that Court and the law of the Member States of the Council of Europe.

Streszczenie

Odwołania do wyroków Sądu Najwyższego Stanów Zjednoczonych w orzeczeniach Europejskiego Trybunału Praw Człowieka

W artykule przedstawiono praktykę odwoływania się w orzecznictwie Europejskiego Trybunału Praw Człowieka do wyroków Sądu Najwyższego Stanów Zjednoczonych. Zagadnienie to wpisuje się w problematykę komparatystycznego uwzględniania przez sądy prawa obcego w procesie orzeczniczym oraz w szersze zjawisko tzw. sądowej globalizacji. Kwantytatywne studium orzecznictwa strasburskiego pozwoliło na sformułowanie kilku głównych wniosków. Po pierwsze, jakkolwiek orzeczenia ETPC zawierające odniesienia do wyroków amerykańskiego Sądu Najwyższego stanowią proporcjonalnie niewielki ułamek wszystkich orzeczeń, to jednocześnie mierząc w liczbach bezwzględnych przypadki powoływania się przez trybunał strasburski na amerykańskie case law nie są marginalne czy sporadyczne. Po drugie, na przestrzeni ostatnich dekad można zaobserwować wyraźną intensyfikację sięgania w orzecznictwie strasburskim do wyroków Sądu Najwyższego USA. Po trzecie, statystycznie dwukrotnie częściej amerykańskie orzecznictwo przywołują poszczególni sędziowie ETPC jako autorzy zdań odrębnych lub zbieżnych niż sam Trybunał. Po czwarte wpływu na operacjonalizację tytułowego zagadnienia nie posiada skład, w jakim orzeka Trybunał, tj. izba lub wielka izba. Po piąte, gotowość sięgnięcia przez sędziego ETPC do wyroków amerykańskiego Sądu Najwyższego jest niezależna od jego narodowości i typu kultury prawnej jego państwa macierzystego. Pewne znaczenie posiada natomiast w tym względzie podział na sędziów z państw Europy Zachodniej i Wschodniej. W końcu dyskurs na linii ETPC a Sąd Najwyższy USA znamionuje wyraźna asymetria, w tym sensie że wyroki trybunału strasburskiego przywołano w zaledwie kilku orzeczeniach amerykańskiego sądu. W ocenie autora amerykańskie case law może pełnić rolę jedynie subsydiarną w komparatystycznej analizie ETPC. Pierwszorzędnym punktem odniesienia dla trybunału strasburskiego musi po-

zostać Europejska Konwencja Praw Człowieka, jego dotychczasowe własne orzecznictwo oraz prawo państw członkowskich Rady Europy.

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I. Introduction

The application of comparative method in giving reasons for judicial decisions by national (especially constitutional) and international courts is gaining significance among legal scholars[2]. The jurisprudential exploration of the topic of making references to foreign law in judgments has intensified especially in the last two decades. Academics react to perceptible changes in the practice of judicial decision-making. While it has long been the case that the courts, in giving reasons for judgments, made use of foreign laws and decisions handed down by courts other than the court which rendered the judgment, it has never occurred on such a large scale as it happens today. Making references to foreign law is part of a broader legal phenomenon of modern times known as 'judicial globalization'[3].

Among numerous courts which have applied comparative method in the decision-making process is the European Court of Human Rights (ECtHR)[4].

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[2] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford 2016; M. Bobek, *Comparative Reasoning in European Supreme Courts*, Oxford 2013; *The Use of Foreign Precedents by Constitutional Judges,* eds. T. Groppi, M-C Ponthoreau, Oxford 2013.

[3] A-M Slaughter, *Judicial Globalization*, „Virginia Journal of International Law" 2000, vol. 40, pp. 1103–1124; J. Allard, A. Garapon, *Les juges dans la mondialisation,* Seuil 2005; G. Halmai, *Perspectives on Global Constitutionalism: The Use of Foreign and International Law,* The Hague 2014.

[4] See P. Mahoney, R. Kondak, *Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights*, [in:] *Courts and Comparative Law*, eds. M. Andenas, D. Fairgrieve, Oxford 2015, pp. 119–140; C. McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, „Cambridge Yearbook of European Legal Studies" 2012–2013, vol. 15, pp. 383–415; P. Mahoney, *The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law*, [in:] *Comparative Law before the Courts*, eds. G. Canivet, M. Andenas, D. Fairgrieve, London 2004, pp. 135–150.

The prevailing view represented in legal science is that the comparative method is not used by the Strasbourg Court in a subsidiary manner but it currently "is inherent in the application and development of the [European] Convention [of Human Rights]"[5].

Most often, the ECtHR uses this method while determining if there is, in the Council of Europe countries, a 'consensus' ('common foundation') or at least a 'trend' in the approach to legal regulation of certain issues. Thus, as part of the comparative method, the Court usually refers to legislation and case law from those countries which remain parties to the Convention. The operationalization of the comparative method becomes part of a broader problem, i.e. the evolutionary and dynamic interpretation of law and the margin of appreciation doctrine.

As far as 'foreign' law is concerned, it is not only the European Convention on Human Rights or other conventions adopted under the aegis of the Council of Europe, or the law of the Member States of the Council of Europe, that are taken into consideration in the Strasbourg Court's case law. In the judgments there are also references to international jurisdictions (e.g. conventions adopted under the aegis of UN or EU law) or the law of third countries. While the place of international law and international court decisions in the work of the Strasbourg Court has been scholarly researched[6], the practice of making references to national law of countries outside the Council of Europe has been mentioned in legal literature but it has not been subjected to in-depth examination[7]. Meanwhile, it seems to arouse the greatest number of questions and doubts. Whereas national law of Member States is, in a way, internal in relation to the Council of Europe legal order, national law of other countries is typical foreign law located outside that legal order.

The purpose behind this paper is to approximate the practice of making references to the US Supreme Court decisions in the ECtHR's judgments. De-

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[5] P. Mahoney, R. Kondak, op.cit., p. 119.

[6] M. Forowicz, *The Reception of International Law in the European Court of Human* Rights, Oxford 2010; Research Report: References to the Inter -American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights, https://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (15.09.2019).

[7] P. Mahoney, R. Kondak, op.cit., pp. 136–137.

cisions made by the US Supreme Court constitute 'foreign' law which is referred to by the ECtHR most often, much more frequently than the law of other democratic states outside the Council of Europe, such as Australia, Canada, South Africa. It may be surprising that the practice of the Strasbourg Court to refer to American law has been treated marginally in jurisprudence[8]. In contrast, it is worth mentioning that a number of papers has been dedicated to the practice of using American case law in the opinions of Advocates General of the European Court of Justice[9].

This article presents the outcomes of the research on the Strasbourg case law which has been carried out to examine references to the US Supreme Court decisions made by the ECtHR. The character of this paper remains mainly, *although not exclusively,* quantitative. The purpose of the research was, in particular, to answer the following questions:

- What is the scale of making references by the ECtHR to the US Supreme Court decisions?
- How was the above practice used chronologically?
- Is it the ECtHR itself that refers to the US Supreme Court decisions or individual judges as those who make separate opinions?
- Is the operationalization of the examined practice affected by such factors as the nationality of the ECtHR's judges, type of a legal culture represented in home countries of individual judges or possibly the fact that those judges come from European states of a former 'Western' or 'Eastern' bloc?
- Is the frequency of references to the US Supreme Court decisions dependent on the composition of the ECtHR (i.e. whether the ECtHR sits as a chamber or a Grand Chamber)?
- Can one see any regularities in the catalog of decisions of the US Su-

[8] E. Voeten, *Borrowing and Nonborrowing among International Courts*, „The Journal of Legal Studies" 2010, vol. 39, No. 2, pp. 559–562.

[9] P. Herzog, *United States Supreme Court Cases in the Court of Justice of the European Communities*, „Hasting International and Comparative Law Review" 1998, vol. 21, No. 4, pp. 903–919; C. Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*, „Texas International Law Journal" 2003, vol. 38, No. 3, pp. 505–526; L. Faircloth Peoples, *The Use of Foreign Law by the Advocates General of the Court of Justice of the European Communities*, „Syracuse Journal of International Law and Commerce" 2008, vol. 35, No. 2, pp. 219–273.

preme Court which have been referred to in the Strasbourg case law?

Given the narrow limits of this paper, it was hardly possible to address those issues remaining within the topic of the study, the nature of which is qualitative, rather than quantitative. Nevertheless, one can state that references made to American case law in the ECtHR's judgments perform similar functions, though not necessarily to the same extent, as references to, in general, 'foreign' law. Hence, making use of American law by the Strasbourg Court fits in the process of finding out whether or not there is, in democratic jurisdictions, a consensus on a particular legal issue. Strength of influence of the law of a third country, including American law, on a particular ruling of the Strasbourg Court or on the rationalization of that ruling, may not be equal to the significance – for passing judgments by the ECtHR or giving reasons to those judgments – of the law of the Council of Europe Member States, especially those with established democracy.

First, the paper demonstrates methodological assumptions under which the ECtHR's case law has been investigated. Further, the results of such investigation are being presented as well as the questions asked above are being answered. The study ends with remarks concerning the usefulness potential which the US case law may have for the ECtHR's judgments; it also presents the conditions for optimal use of American law by the Strasbourg Court within comparative method.

II. Methodological assumptions

According to the title of the study, the Strasbourg case law was analyzed for references to the US Supreme Court decisions. Those decisions critically shape the entire American legal order. The provisions of the Constitution of the United States gain its full meaning only after being considered by the Supreme Court. Similarly, the interpretation of statutory law is being affected by how the Supreme Court deciphers the meaning of particular constitutional provisions. Due to this reason, while analyzing the ECtHR's case law, the references to the US legislation made by the Strasbourg Court have been omitted. The ECtHR is aware of the priority role played by the US Supreme Court decisions in the system of American law. This awareness is manifest-

ed in that the Strasbourg Court rarely mentions American legislation without making references to court decisions in which that legislation was subject to operational interpretation.

The ECtHR references to American case law should not be limited to the US Supreme Court decisions. Such references are also made to the decisions of other federal courts, namely district courts and courts of appeals as well as multiple state courts. The fact that the US Supreme Court decisions are mentioned in the ECtHR's judgments more often than decisions of other American courts makes it reasonable to narrow the research to those situations where the Strasbourg Court makes references to the US Supreme Court decisions, while references to the decisions of other American courts have been left aside. Similar methodological assumptions are applied in other scientific papers on using comparative method in case law[10].

This paper does not refer to those cases where the ECtHR reports, in its statement of reasons, those US Supreme Court decisions which have been cited by participants of the proceedings, namely: an applicant[11], a state[12], a third party[13] or a domestic court[14]. Also, in this study, those US Supreme Court decisions have been omitted which had been mentioned in law books or scientific articles and subsequently referred to in the Strasbourg case law[15].

The presented paper discusses the results of the quantitative research on the ECtHR's judgments without referring to the situations where the US Supreme Court decisions were closely related to the subject matter of the case pending before the Strasbourg court, i.e. where making a reference to Amer-

[10] L. Faircloth Peoples, op.cit., p. 264.

[11] *Adami v. Malta*, No. 17209/02 (ECtHR, 20.06.2006) § § 40 and 70; *Cooper v. United Kigdom,* No. 48843/99 (ECtHR, 16.12.2003) § 83; *Shabelnik v. Ukraine (No. 2),* No. 15685/11 (ECtHR, 1.06.2017) § 38.

[12] *James and others v. United Kingdom,* No. 8793/79 (ECtHR, 21.02.1986) § 40; *A and B v. Norway,* No. 24130/11 and 29758/11 (ECtHR, 15.11.2016) § 89.

[13] See e.g. *Kasabova v Bulgaria,* No. 22385/03 (ECtHR, 19.04.2011) § 48; *Sindicatul "Păstorul cel Bun" v. Romania,* No. 2330/09 (ECtHR, 9.07.2013) § 127; *Vo v. France,* No. 53924/00 (ECtHR, 8.07.2004) § 64; *Červenka v. Czech Republic,* No. 62507/12 (ECtHR, 13.10.2016) § 100; *Fernández Martínez v. Spain,* No. 56030/07 (ECtHR, 12.06.2014) § 100; *Naït-Liman v. Switzerland,* No. 51357/07 (ECtHR, 15.03.2018) § 165.

[14] *McFarlane v. Ireland,* No. 31333/06 (ECtHR, 10.09.2010) § 100.

[15] *Al-Dulimi and Montana Management Inc. v. Switzerland,* No. 5809/08 (ECtHR, 26.11.2013, partly dissenting opinion of judge A. Sajó).

ican law was necessary, or at least highly demanded and expected, for the determination of applicable law. Most often, such cases concerned situations where the applicants contested the court decisions in their home countries to extradite them to the United States[16] or applications lodged by persons suspected of terrorism who, in the territory of a Member state, had been tortured by American intelligence agents[17]. In such cases, making a reference to American law, including the US Supreme Court decisions, did not fit the comparative method but was necessary for the determination of underlying facts.

This research does not touch upon divergences and similarities between the US Supreme Court and the ECtHR as well as the judgments passed by those courts. The problem would definitely exceed the limits of this study, not to mention that dealing with this issue would be meaningless bearing in mind the questions this paper seeks to answer. Readers interested in comparison between the two courts should be directed to what has been written so far on the topic[18].

My research covers the ECtHR's judgments passed until 2018. I have identified the US Supreme Court decisions referred to in the ECtHR's case law using the official electronic legal database available on the Internet[19]. Each reference to a decision made by the US Supreme Court was subject to verifi-

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[16] *Čalovskis v. Latvia,* No. 22205/13 (ECtHR, 24.07.2014) § 124; *Babar Ahmad and others v. United Kingdom,* No. 24027/07. (ECtHR, 10.04.2012) § 134–136; *Soering v. United Kingdom,* No. 14038/88 (ECtHR, 7.07.1989) § 48.

[17] *Al Nashiri v. Romania,* No. 33234/12 (ECtHR, 31.05.2018); *Abu Zubaydah v. Lithuania,* No. 46454/11 (ECtHR, 31 May 2018); *Husayn (Abu Zubaydah) v. Poland,* No. 7511/13 (ECtHR, 24.07.2014); *Al Nashiri v. Poland,* No. 28761/11 (ECtHR, 24.07.2014).

[18] Divergences and similarities between the ECtHR and the US Supreme Court have been scholarly discussed, both in respect of institutional or procedural issues and in relation to particular categories of cases. See A. Kolenc, *Putting Faith in Europe: Should the U.S. Supreme Court Learn from the European Court of Human Rights?,* „Georgia Journal of International and Comparative Law" 2016, vol. 45, No. 1, pp. 1–25; K. Dzehtsiarou, C. O'Mahony, *Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court,* „Columbia Human Rights Law Review" 2013, vol. 44, No. 2, pp. 309–365; C. Evans, A. Hood, *Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights,* „Oxford Journal of Law and Religion" 2012, vol. 1, No. 1, pp. 81–107.

[19] https://hudoc.echr.coe.int (15.09.2019).

cation for its compliance with above mentioned methodological assumptions, e.g. I have omitted those cases where a party to the proceedings or a domestic court had made references to American case law and the ECtHR only reported such a reference.

In my study, I have examined the situations where the ECtHR or its judges made use of the US Supreme Court case law both in an explicative and implicative manner. The Strasbourg Court or its judges identify a decision of the US Supreme Court by giving its full title and official place of publication. Far more rarely, the ECtHR makes a reference to a particular reasoning presented by the US Supreme Court without giving details of the case in which such a reasoning have been applied, though in such a way that makes it possible to distinguish the given court decision. It occurs that the ECtHR or one of its judges only generally refers to American case law[20].

The topic does not cover those ECtHR's judgments where views of the US Supreme Court justices have not been included in the text of a court decision or in the text of a separate opinion, but in out-of-court publications or statements[21].

III. An Overview of the ECtHR's case law containing references to the US Supreme Court decisions

The number of the ECtHR's judgments in which I have identified references to the US Supreme Court decisions is 116. Most often, case law pro-

[20] *Dudgeon v. United Kingdom,* No. 7525/76 (ECtHR, 22.10.1981, partly dissenting opinion of judge B. Walsh) § 22; *Selahattin Demirtaş v. Turkey,* No. 15028/09 (ECtHR, 23.06.2015, dissenting opinion of judge E. Kūris).

[21] *Biao v. Denmark,* No. 38590/10 (ECtHR, 25.05.2016, dissenting opinion of judge G. Yudkivska); *Centre For Legal Resources on Behalf of Valentin Câmpeanu v. Romania,* No. 47848/08 (ECtHR, 17.07.2014, concurring opinion of judge P.P. de Albuquerque); *Herrmann v. Germany,* No. 9300/07 (ECtHR, 26.06.2012, partly dissenting and partly concurring opinion of judge P.P. de Albuquerque); *Čeferin v Slovenia,* No. 40975/08 (ECtHR, 16.01.2018, dissenting opinion of ad hoc judge A. Galič). Judge Georgios Serghides had mistakenly attributed the words of Oliver Wendell Holmes, an American writer (1809–1894), to his son, Judge Oliver Wendell Holmes Jr. (1841–1935); see *Simeonovi v. Bulgaria,* No. 21980/04 (ECtHR, 12.05.2017, partly dissenting opinion of judge G. Serghides).

duced by that court has been mentioned in separate opinions. Such references have been made in 83 separate opinions. In a dozen or so ECtHR's judgments the US Supreme Court case law appears simultaneously in two or more separate opinions. The ECtHR's judges found it reasonable to cite the US Supreme Court decisions in 45 concurring opinions, 40 dissenting and partly dissenting opinions as well as in 5 opinions that were simultaneously partly dissenting and partly concurring. References to American case law appear 39 times in statements of reasons of the ECtHR's judgments. In 5 cases such references have been identified both in judgments and in separate opinions.

Where the references to American case law have been made by the ECtHR itself, they usually appeared in the second part of the statement of reasons ("facts"), next to clarifications on applicable national law being in force in the sued country or third countries legislation[22].

One can notice that for decades the trend of making use of the US Supreme Court case law in ECtHR's judgments has been intensified. In the 1980s, references to the US Supreme Court decisions appear in one concurring opinion. In the 1990s such references appeared in 21 judgments or separate opinions. However, the number given is not fully representative of the actual scale of making use of the American case law in that decade since it includes separate opinions by Judge Giovanni Bonello to 13 judgments passed by the Court on 8 July 1999 against Turkey. In the first decade of this century the US Supreme Court decisions were cited in 22 judgments or separate opinions and between 2010 and 2018 they appeared in as many as 72 judgments or separate opinions.

At least 43 judges of the ECtHR, in their separate opinions, have referred to a decision of the US Supreme Court. The number includes joint separate opinions of two or more judges but it does not take into account those judges who have just jointed to a separate opinion given by another judge. Judges who most often refer to the US Supreme Court decisions are Paolo Pinto de Albuquerque (22 separate opinions where 85 decisions of the US Supreme Court were cited), Boštjan Zupančič (14/26), Ganna

[22] I. Kamiński, *Styl orzeczeń Europejskiego Trybunału Praw Człowieka,* [in:] *Uzasadnienia decyzji stosowania prawa,* eds. M. Grochowski, I. Rzucidło-Grochowska, Warsaw 2015, p. 374.

Yudkivska (8/17), Giovanni Bonello (14/6)[23], András Sajó (5/11), Dmitry Dedov (5/8), Iulia Motoc (5/7)[24].

The composition of the ECtHR does not seem to affect the said practice. The US Supreme Court decisions were cited in 53 ECtHR's judgments passed by the Court sitting as a Grand Chamber (including 2 cases where the judgment was passed by the ECtHR sitting in plenary session) and 63 judgments passed by the Court sitting as a chamber.

The practice of referring to the US Supreme Court decisions seems to be irrelevant of the nationality of a judge. The fact that the number of judges coming from many countries is limited to two or three hinders reliable assessment of the influence of nationality factor on judges' inclination to make use of American case law in their dissenting and concurring opinions[25]. For instance, each of the three judges from Slovenia at least once in his/her sepa-

[23] This number comprises identical, as to their contents, separate opinions to 13 judgments passed on the same day in the matters against Turkey where Judge Giovanni Bonello cited the same 4 decisions of the US Supreme Court.

[24] Paolo Pinto de Albuquerque (21/84), Giovanni Bonello (14/6), Marko Bošnjak (1/3), Nicolas Bratza (1/1), Josep Casadevall (1/1), Jean-Paul Costa (1/2), Dmitry Dedov (5/8), Lech Garlicki (1/1), Khanlar Hajiyev (1/1), Lətif *Hüseynov (1/1),* Helena *Jäderblom* (1/1), Peter Jambrek (1/4), Zdravka Kalaydjieva (1/6), Işıl Karakas (1/2), Egidijus *Kūris (1/1),* Julia Laffranque (1/3), Paul Lemmens (1/1), Loukis Loucaides (1/2), Paul Mahoney (1), Marcus-Helmons (1/3), Sibrand Martens (1/1), Jan de Meyer (3/10), Mārtiņš Mits (1/1), José Maria Morenilla (1/3), Iulia Motoc (5/7), Síofra O'Leary (1/1), Péter Paczolay (1/3), Stanislav Pavlovschi (1/3), Aleš Pejchal (1/2), Louis-Edmond Pettiti (2/4), Ann Power (1/1), András Sajó (5/11), Georgios Serghides (1/1), Johannes Silvis (1/1), Ksenija Turković (3/9), Mirjana Lazarova Trajkovska (1/2), Nona Tsotsoria (1/1), Nebojša Vučinić (3/14), Brian Walsh (1/2), Krzysztof Wojtyczek (1/2), Ganna Yudkivska (8/17), Boštjan Zupančič (13/26).

[25] Here is the number of judges from a particular country who sat in the Court between 1959 and 2018 and next to it there is a number of judges who cited a decision of the US Supreme Court in their separate opinion at least once: Albania (/2), Andorra (/2), Armenia (/2), Austria (/5), Azerbaijan (2/2), Belgium (2/5), Bosnia and Herzegovina (/2), Bulgaria (1/4), Croatia (1/2), Cyprus (2/5), Czech Republic (1/2), Denmark (/7), Estonia (1/3), Finland (/4), France (2/5), Georgia (1/3), Germany (/5), Greece (/5), Hungary (2/3), Iceland (/6), Ireland (2/7), Italy (/5), Latvia (1/3), Lichtenstein (/4), Lithuania (1/3), Luxembourg (/7), Malta (1/4), Moldova (1/4), Monaco (/2), Montenegro (1/1), Netherlands (2/9), Norway (/5), Poland (2/3), Portugal (1/4), Romania (1/3), Russia (1/3), San Marino (/4), Serbia (/2), Slovakia (/4), Slovenia (3/3), Spain (/7), Sweden (1/6), Switzerland (/5), North Macedonia (1/3), Turkey (1/6), Ukraine (1/2), United Kingdom (2/7).

rate opinions has made use of a decision of the US Supreme Court. It would be risky though to state solely on this ground that the Slovenian nationality makes for using the American case law in judicial argumentation. The representativeness of such conclusions seems doubtful as they have been drawn after narrowing the number of judges to 3 and also it is worth mentioning that apart from Boštjan Zupančič two other Slovenian judges have referred to American case law only in one separate opinion. Irrelevance of nationality criterion is also proved by the fact that judges Paolo Pinto de Albuquerque and Ganna Yudkivska, being those who most often refer to American law, were the only ECtHR's judges from, respectively, Portugal and Ukraine, who have made use of the US Supreme Court decisions in their reasoning.

The type of legal culture (i.e. civil law culture and common law culture) in the country of origin of the ECtHR's judges remains irrelevant of their willingness to cite American case law. Two out of seven judges from Ireland and the United Kingdom in dissenting and concurring opinions they have authored made references to the US Supreme Court decisions.

There is some relevance of the examined practice if we bear in mind the distinction between judges from the West and East of Europe. Where 15 of 126 judges from the West at least once have referred to a decision of the US Supreme Court in their separate opinions, in the case of East European judges 23 out of 65 did so. The rule that judges from the former 'Soviet bloc' are more willing to cite American law seems confirmed even if we contrast the citation by those judges with references made by West European judges sitting in the ECtHR since 1990s.

The practice of making references to American case law in the ECtHR's judgments has individual character, i.e. it is affected by the style of reasoning represented by a particular judge of the ECtHR. The utilitarian potential of the US Supreme Court decisions is being noted especially by those judges who abstain from argumentative formalism and minimalism in their separate opinions by making use of different legal and extra-legal sources. It is noticeable that Judges Paulo Pinto de Albuquerque and Boštjan Zupančič who cite American case law most often, also make references to philosophers[26].

[26] G. Maroń, *Odwołania do filozofów w orzecznictwie Europejskiego Trybunału Praw Człowieka*, „Przegląd Prawa Publicznego" 2018, No. 12, p. 35.

In 116 judgments of the ECtHR as many as 219 decisions of the US Supreme Court have been cited. Those decisions were passed in various periods, also in the earliest times of the Supreme Court's existence. The earliest decision of the US Supreme Court referred to in the ECtHR's judgments was that rendered in the case of Marbury v. Madison (1803). The judges of the ECtHR refer both to decisions of the Supreme Court and separate opinions of US Supreme Court justices.

The most favoured rulings of the US Supreme Court cited by the Strasbourg Court – taking into account the number of the ECtHR's judgments in which those particular rulings were referred to – were decisions rendered in the case of *Miranda v. Arizona* (5 times), *Texas v. Johnson* (5 times), *New York Times Co. v. Sullivan* (4 times), *Virginia v. Black* (4 times), *Brandenburg v. Ohio* (4 times)[27], *Graham v. Florida* (4 times), *U.S. v. Gonzalez-Lopez* (4 times)[28]. Except for the decisions laid down in the matters of *Miranda v. Arizona* and *Graham v. Florida* which concerned penal law, the remaining rulings related to the freedom of speech.

Judges of the ECtHR make use of landmark rulings rendered by the US Supreme Court as well as those which influence American law in a less significant way. The Strasbourg Court cites 6 of 25 decisions of the US Supreme Court most often referred to in American case law[29] and 8 of 25 decisions of that Court most popular among American legal scholars[30].

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[27] 13 almost identical dissenting (concurring) opinions by Judge Bonello where the judgment was cited have been treated as one reference.

[28] The list does not include decisions in *Abrams v. U.S.; Schenk v U.S.* and *Whitney v. California*, which have been cited, respectively, in 14 and 15 judgments of the ECtHR, nevertheless in 13 cases they have been referred to by Judge Bonello drafting almost identical concurring or dissenting opinions in 13 cases against Turkey decided on July 8, 1999.

[29] Those decisions were: *Strickland v. Washington* (1984); *Miranda v. Arizona* (1966); *McDonnell Douglas Corp. v. Green* (1973); *Terry v. Ohio* (1968); *Estelle v. Gamble* (1976); *Chapman v. California* (1967). The US Supreme Court decisions most often cited in American case law have been presented at: https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii (15.09.2019).

[30] Those decisions were: *Roe v. Wade* (1973); *Miranda v. Arizona* (1966); *New York Times Co. v. Sullivan* (1964); *Mapp v. Ohio* (1961); *Gideon v. Wainwright* (1963); *Katz v. U.S.* (1967); *Terry v. Ohio* (1968); *Olmstead v. U.S.* (1928). The US Supreme Court decisions most often cited by American scholars have been presented at: https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii (15.09.2019).

The earliest recorded reference to a decision of the US Supreme Court in the ECtHR's case law was a concurring opinion of Judge Louis-Edmond Pettiti in the case of *Barthold v. Germany* (1985), while the first reference to a decision of the US Supreme Court in the very judgment itself was in *Fred v. United Kingdom* (1994). Much earlier American case law had been cited in opinions of Advocates General of the European Court of Justice, first in 1966[31].

Mutual references made by the US Supreme Court to the ECtHR's judgments and vice versa are clearly asymmetrical. The latter have been cited only in 5 opinions of the US Supreme Court, to be precise in one decision and 4 separate opinions. The earliest reference to the Strasbourg case law was that to *Nixon v. Shrink* made by Stephen Breyer in his concurring opinion[32]. The only ruling of the US Supreme Court where references to the ECtHR's case law have been made was in *Lawrence v. Texas*[33].

As far as references to foreign law are concerned, American courts show exceptionalism, or even isolationism. Although they more and more often make use of foreign law, including European law[34], they do it much less frequently than the ECtHR, European Court of Justice (Advocates General) or national courts in Europe. Moreover, the practice in question is controversial both among judges and scholars[35]. A reference to the EC-

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[31] *Italian Republic v. Council of the European Economic Community and Commission of the European Economic Community*, C 32/65, EU:C:1966:14 (Opinion of Karl Roemer).

[32] *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 399 (2000).

[33] *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Breyer, J., dissenting); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (Kennedy, J., concurring); *Glossip v. Gross*, 135 S.Ct. 2726 (2015) (Breyer, J., dissenting). In general, judgments of the ECtHR have been referred to in two other decisions of the US Supreme Court, without specifying those judgments, though: *Roper v. Simmons*, 543 U.S. 551, 607 (2005) (Scalia, J. dissenting); *Johnson v. Bredesen*, 130 S.Ct. 541, 545 (2009) (Thomas, J. concurring). The Supreme Court's denials of a petition for a writ of certiorari have been omitted.

[34] E. Engle, *European Law in American Courts: Foreign Law as Evidence of Domestic Law*, „Ohio Northern University Law Review" 2007, vol. 33, No. 1, pp. 99–112; J. Waldron, *'Partly Laws Common to All Mankind': Foreign Law in American Courts*, New Haven 2012.

[35] N. Dorset, *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, „International Journal of Constitutional Law" 2005, vol. 3, No. 4, pp. 519–541; E. Volokh, *Foreign Law in American Courts*, „Oklahoma Law Review" 2017, vol. 66, No. 2, pp. 219–243.

tHR's case law made by the US Supreme Court in *Lawrence v. Texas* was opposed by Justice Antonin Scalia (who authored a dissenting opinion). It also raised a number of comments in American jurisprudence[36]. Meanwhile, references to American law made by the ECtHR usually remain unnoticed and fail to attract considerable scholarly attention, not to mention raise controversy. Discourse between the ECtHR and the US Supreme Court is currently unilateral.

IV. Conclusions

References to American case law in the ECtHR's judgments should be made for clarification and persuasion purposes furtherly developed in more detailed functions mentioned in legal literature[37]. Citing the US Supreme Court decisions is justified, inasmuch as it possesses utilitarian value for judicial argumentation. References to American case law should not be made merely for the sake of showing off erudition or demonstrating personal interest in or fascination with American law. Judges who show a thorough insight into American case law should do so only where it is useful for deciding a particular case *or, speaking more correctly,* to justify judgment. In most situations there is no need to discuss American case law in a detailed and multifaceted manner. References to American case law should be concise and should summarize US courts' view on a particular issue. Unlike academics, judges who employ a comparative method should refrain from doing an insightful and multifaceted study of foreign law. The primary point of reference for those judges should be the European Convention on Human Rights, ECtHR's previous judgments as well as national law of the Member States of the Council of Europe.

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[36] *Lawrence v Texas*, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting); W. Eskridge, *United States: Lawrence v. Texas and the imperative of comparative constitutionalism*, „International Journal of Constitutional Law" 2004, vol. 2, No. 3, pp. 555–560; R. Glensy, *Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, „Virginia Journal of International Law" 2005, vol. 45, No. 2, pp. 357–449.

[37] T. Kadner Graziano, *Is it Legitimate and Beneficial for Judges to Compare?,* [in:] *Courts and Comparative Law...*, pp. 42–51.

Even if making use of national law of a non-member state of the Council of Europe may prove justified or advisable, that law might play a subsidiary role for the ruling itself and for its rationalization. A judge who drafts a separate opinion, and a dissenting opinion in particular, has more freedom in argumentation than the Court itself[38]. Nevertheless, the judge should be expected not to make use of the comparative method in a way that suggests that the all sources of foreign law are equivalent for the Court's decision-making process. A dissenting opinion should not become a review of the contested judgment of the Court on the ground that that judgment is contrary to a 'model' decision of the US Supreme Court.

References to the US Supreme Court case law manifest the discursive style or strategy used in statements of reasons given by the ECtHR. What characterizes this style is the presentation, by the latter Court, of attitudes toward a variety of opposing or concurring views and opinions brought forward by the parties, the legal doctrine as well as other courts. The ECtHR does not refer merely to those arguments that support its own judgment. The Court shows its decision as imposed by the Convention but it does not allege that it is the only possible approach to the nature of the underlying legal issue.

For the ECtHR's judges, the US Supreme Court decisions may be a source of valuable arguments both in favor of or against particular interpretation of individual provisions of the Convention but it should not be treated as equivalent to the case law of the ECtHR itself[39]. Where references to the US Supreme Court decisions are made, there must be awareness of the specificity of the American legal order and its considerable differences in respect of the Council of Europe legal order[40].

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[38] R. White, I. Boussiakou, *Separate opinions in the European Court of Human Rights*, „Human Rights Law Review" 2009, vol. 9, No. 1, pp. 37–60.

[39] There seems to be a disproportion in making use of American case law by Judge P.P. de Albuquerque in *Mouvement v. Switzerland*. He cited there as many as 27 decisions of the US Supreme Court.

[40] Robert Kiska, e.g., points out dramatically different approach of the ECtHR and the US Supreme Court in respect of hate speech, R. Kiska, *Hate Speech: A Comparison Between the European Court of Human Rights and the United States Supreme Court Jurisprudence*, „Regent University Law Review" 2012, vol. 25, No. 1, p. 138.

Appendix: US Supreme Court Decisions referenced in ECtHR's case law

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
1	*Murtazaliyeva v. Russia*, No. 36658/05 (18.12.2018)*[41]	*U.S. v. Gonzalez-Lopez* (2006)	Albuquerque
2	*Beuze v. Belgium*, No. 71409/10 (9.11.2018)*	*McNabb v. U.S.* (1943)	Yudkivska, Vučinić, Turković Hüseynov
3	*Svetina v. Slovenia*, No. 38059/13 (22.05.2018)	*Weeks v. U.S.* (1914) *Silverthorne Lumber Co. v. U.S.* (1920) *Olmstead v. U.S.* (1928) *Nardone v. U.S.* (1939) *Elkins v. U.S.* (1960) *Mapp v. Ohio* (1961) *Wong Sun v. U.S.* (1963) *Massiah v. U.S.* (1964) *Chapman v. California* (1967) *Fitzpatrick v. New York* (1973) *Brown v. Illinois* (1975) *Brewer v. Williams* (1977) *Nix v. Williams* (1984) *Segura v. U.S.* (1984) *U.S. v. Leon* (1984) *Murray v. U.S.* (1988) *Hudson v. Michigan* (2006)	Albuquerque
4	*Benedik v. Slovenia*, No. 62357/14 (24.04.2018)	*Osborn v. U.S.* (1966) *Katz v. U.S.* (1967) *Smith v. Maryland* (1979)	Yudkivska
5	*Ottan v. France*, No. 41841/12 (19.04.2018)	*Peters v. Kiff* (1972) *Batson v. Kentucky* (1986) *Timothy Throne Foster v. Bruce Chatman* (2016)	-
6	*Correia de Matos v. Portugal*, No. 56402/12 (4.04.2018)*	*Faretta v. California* (1975)	Tsotsoria, Motoc, Mits
		Illinois v. Allen (1970) *Faretta v. California* (1975)	Pejchal, Wojtyczek
7	Naït-Liman v. *Switzerland*, No. 51357/07 (15.03.2018)*	*Kiobel v. Royal Dutch Petroleum Co.* (2013)	-
		Dred Scott v. Sandford (1857)	Dedov

[41] * decision by the ECtHR sitting as a Grand Chamber *or in plenary session.*

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
8	*Sinkova v. Ukraine,* No. 39496/11 (27.02.2018)	Virginia v. Black (2003)	-
		Texas v. Johnson (1989)	Yudkivska, Motoc, Paczolay
9	*Orlandi and Others v. Italy,* Nos. 26431/12 et al. (14.12.2017)	*Obergefell v. Hodges* (2015)	-
10	Dragoș *Ioan Rusu v. Romania,* No. 22767/08 (31.10.2017)	*Elkins v. U.S.* (1960) *Mapp v. Ohio* (1961) *U.S. v. Gonzalez-Lopez* (2006)	Albuquerque, Bošnjak
11	*Regner v. Czech Republic,* No. 35289/11 (19.09.2017)*	*Hamilton v. Regents of the University of California* (1934)	Serghides
12	*Carvalho Pinto de Sousa Morais v. Portugal,* No. 17484/15 (25.07.2017)	*Bradwell v. Illinois* (1873) *Price Waterhouse v. Hopkins* (1989) *U.S. v. Virginia* (1996)	Yudkivska
13	Matiošaitis *and Others v. Lithuania,* Nos. 22662/13 et al. (23.05.2017)	*Marbury v. Madison* (1803)	Kūris
14	*Babiarz v. Poland,* No. 1955/10 (10.01.2017)	*Obergefell v. Hodges* (2015)	Sajó
15	Muršić *v. Croatia,* No. 7334/13 (20.10.2016)*	*Missouri v. Holland* (1920) *Trop v. Dulles* (1958)	Albuquerque
16	*Ibrahim and Others v. the United Kingdom,* Nos. 50541/08 et al. (13.09.2016)*	*Miranda v. Arizona* (1966) *New York v. Quarles* (1984)	-
		New York v. Quarles (1984)	Hajiyev, Yudkivska, Lemmens, Mahoney, Silvis, O'Leary
		New York v. Quarles (1984) *Strickland v. Washington* (1984) *U.S.* v. Gonzalez-Lopez (2006)	Sajó, Laffranque
17	*Al-Dulimi and Montana Management Inc. v. Switzerland,* No. 5809/08 (21.06.2016)*	*Marbury v. Madison* (1803)	Albuquerque
18	*Nait-Liman v. Switzerland,* No. 51357/07 (21.06.2016)	*Kiobel v. Royal Dutch Petroleum Co.* (2013)	-
19	Fürst-Pfeifer *v. Austria,* Nos. 33677/10 and 52340/10 (17.05.2016)	*Jaffee v. Redmond* (1996)	Motoc

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
20	*Dungveckis v. Lithuania*, no. 32106/08 (12.04.2016)	*Ashe v. Swenson* (1970) *In re Winship* (1970) *Mullaney v. Wilbur* (1975) *Patterson v. New York* (1977)	Zupančič
21	Bédat v. *Switzerland*, No. 56925/08 (29.03.2016)*	*Bridges v. California* (1941) *Sheppard v. Maxwell* (1966) *Nebraska Press Association v. Stuart* (1976)	Yudkivska
22	*Blokhin v. Russia*, No. 47152/06 (23.03.2016)*	*Francis v. Resweber* (1947) *Robinson v. California* (1962) *Kent v. U.S.* (1966) *In re Winship* (1970)	Zupančič
		Robinson v. California (1962) *Kent v. U.S.* (1966) *In re Gault* (1967)	Motoc
23	*F.G. v. Sweden*, No. 43611/11 (23.03.2016)*	*U.S. v. Seeger* (1965) *Welsh v. U.S* (1970)	-
24	Bărbulescu *v. Romania*, No. 61496/08 (12.01.2016)	*O'Connor v. Ortega* (1983) *San Diego v. Roe* (2004)	Albuquerque
25	*Mironovas and Others v. Lithuania*, Nos. 40828/12 et al. (8.12.2015)	Brown v. Plata (2011)	Albuquerque
26	*Roman Zakharov v. Russia*, no. 47143/06 (4.12.2015)*	Clapper v. Amnesty International (2013)	Dedov
27	*Annen v. Germany*, No. 3690/10 (26.11.2015)	*McCullen v. Coakley* (2014)	Yudkivska, Jäderblom
28	*Dvorski v. Croatia*, No. 25703/11 (20.10.2015)*	*Gideon v. Wainwright* (1963) *Chapman v. California* (1967) *McKaskle v. Wiggins* (1984) *Waller v. Georgia* (1984) *Sullivan v. Louisiana* (1993) *U.S. v. Gonzalez-Lopez* (2006)	Kalaydjieva, Albuquerque, Turković
		Escobedo v. Illinois (1964) *Miranda v. Arizona* (1966)	Zupančič
29	Pentikäinen *v. Finnland*, No. 11882/10 (20.10.2015)*	New York Times *Co.* v. Sullivan (1964)	Motoc
30	*Berland v. France*, No. 42875/10 (3.09.2015)	Robinson v. California (1962)	Zupančič

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
31	*Oliari and Others v. Italy,* Nos. 18766/11 and 36030/11 (21.06.2015)	*Obergefell et al. v. Hodges* (2015)	-
32	*Y. v. Slovenia*, No. 41107/10 (28.05.2015)	*Mattox v. U.S.* (1895) *California v. Green* (1970) *Coy v. Iowa* (1988)	Yudkivska
33	*Vinci Construction et GTM* Génie *Civil et Services v. France*, Nos. 63629/10 and 60567/10 (2.04.2015)	*Henry v. U.S.* (1959) *Draper v. U.S.* (1959) *Terry v. Ohio* (1968)	Zupančič
34	*Hrvatski* Liječnički *Sindikat v. Croatia,* No. 36701/09 (27.11.2014)	*Chas. Wolff Packing Co. v. Court of Ind. Relations* (1923) Lyng v. Automobile Workers (1988)	Albuquerque
35	*Murat Vural v. Turkey,* No. 540/07 (21.102014)	*Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.* (1991) *Texas v. Johnson* (1989)	Sajó
36	*Trabelsi v. Belgium,* No. 140/10 (4.09.2014)	Graham v. Florida (2010)	Yudkivska
37	*Centre for Legal Resources on Behalf of Valentin* Câmpeanu *v. Romania,* No. 47848/08 (17.07.2014)*	*Lochner v. New York* (1905)	Albuquerque
38	*Primov and Others v. Russia,* No. 17391/06 (12.06.2014)	*Whitney v. California* (1927) *De Jonge v. Oregon* (1937) *New York Times Co. v. Sullivan* (1964)	Dedov
39	*Taranenko v. Russia,* No. 19554/05 (15.05.2014)	*Brandenburg v. Ohio* (1969) *Samuels v. Mackell* (1971)	Albuquerque, Turković, Dedov
40	Öcalan v. *Turkey* (No. 2), Nos. 24069/03 et al. (18.03.2014)	*Weems v. U.S.* (1909) *Trop v. Dulles* (1958) *Furman v. Georgia* (1972) *Estelle v. Gamble* (1976) *Collins v. Collins* (1994) *Graham v. Florida* (2010)	Albuquerque
41	*Jones and Others v. the United Kingdom,* Nos. 34356/06 and 40528/06 (14.01.2014)	*Sosa v. Alvarez-Machain* (2004) Samantar v. Yousuf (2010)	-

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
42	Perinçek *v. Switzerland*, No. 27510/08 (17.12.2013)	*Chaplinsky v. New Hampshire* (1942) *Street v. New York* (1969) *Cohen v. California* (1971) *Texas v. Johnson* (1989) *R.A.V. v. City of St. Paul* (1992) *Virginia v. Black* (2003)	Vučinić, Albuquerque
43	*Khmel v. Russia*, No. 20383/04 (12.12.2013)	Wilson v. Layne (1999)	Dedov
44	*X v. Latvia*, No. 27853/09 (26.11.2013)*	*Abbott v. Abbott* (2010)	Albuquerque
45	*Vinter and Others v. the United Kingdom*, Nos. 6069/09 et al. (9.07.2013)*	Graham v. Florida (2010)	-
46	*Vona v. Hungary*, No. 35943/10 (9.07.2013)	*Virginia v. Black* (2003)	-
47–48	*R.Sz. v. Hungary*, No. 41838/11 (2.07.2013); Gáll *v Hungary*, No. 49570/11 (25.06.2013)	*U.S. v. Lovett* (1946) *Armstrong v. U.S.* (1960) *Eastern Enterprises v. Apfel* (1998)	-
49	*Tarantino and Others v. Italy*, Nos. 25851/09 et al. (2.04.2013)	*Trustees of Dartmouth College v. Woodward* (1819) *Sweezy v. New Hampshire* (1957) *Keyishian v. Board of Regents* (1967) *Regents of the University of California v. Bakke* (1978) *Widmar v. Vincent* (1981) *Regents of University of Michigan v. Ewing* (1985) *Board of Regents of University of Wisconsin v. Southworth* (2000) *Grutter v. Bollinger* (2003)	Albuquerque
50	Valiulienė *v. Lithuania*, No. 33234/07 (26.03.2013)	*DeShaney v. Winnebago Cty. DSS* (1989)	Albuquerque
51	*Eweida and Others v. the United Kingdom*, Nos. 8420/10 et al. (15.01.2013)	*Ansonia Board of Education v. Philbrook* (1986)	-
52	*Ahmet Yildrim v. Turkey*, No. 3111/10 (18.12.2012)	*New York Times Co. v. U.S.* (1971) *Banatan Books, Inc. v. Sullivan* (1963)	Albuquerque

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
53	*Hristozov and Others v. Bulgaria,* Nos. 47039/11 and 358/12 (13.11.2012)	*U.S. v. Rutherford* (1979)	-
54	*Peta Deutschland v. Germany,* No. 43481/09 (8.11.2012)	Rochin.v California (1952)	Zupančič
55	Fáber *v. Hungary,* No. (24.07.2012)	*Frisby v. Schultz* (1988) *Virginia v. Black* (2003) Snyder v. Phelps (2011)	-
		Texas v. Johnson (1989) *U.S. v. Eichman* (1990)	Albuquerque
56	*Ketreb v. France,* No. 38447/09 (19.07.2012)	*Jones v. U.S.* (1983)	Zupančič
57	*Mouvement* Raëlien *Suisse v. Switzerland,* No. 16354/06 (13.07.2012)*	*Hague v. C.I.O.* (1939) *Niemotko v. Maryland* (1951) *Shuttlesworth v. City of Birmingham* (1969) *Police Dept. of Chicago v. Mosley* (1972) Virginia *State* Pharmacy Board v. Virginia Citizens Consumer Council (1976) Carey v. Brown (1980) Consolidated Edison *Co. v. Public Service Commission* (1980) *Metromedia, Inc. v. City of San Diego* (1981) *Widmar v. Vincent* (1981)	Sajó, Lazarova, Trajkovska, Vučinić
		Abrams v. U.S. (1919) *Schenk v. U.S.* (1919) *Hague v. CIO* (1939) *New York Times v. Sullivan* (1964) *Adderlewy v. Florida* (1966) *Brandenburg v. Ohio* (1969) *Grayned v. City of Rockford* (1972) *Lehman v. City of Shaker Heights* (1974) *Southeastern Promotions Ltd. V. Conrad* (1975) *City of Madison v. Wisconsin Employment Relations Comm'n* (1976) *Greer v. Spock* (1976) *Heffron v. International society for Krishna Consciousness* (1981) *Metromedia, Inc. v. City of San Diego* (1981) *US Postal Service v Council of Greenburgh Civil Associations* (1981) *Widmar v. Vincent* (1981)	Albuquerque

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
		Perry Education Association v. Perry Local Educators' Association (1983) *U.S. v. Grace* (1983) *Cornelius v. NCAACP Legal Defense and Education Fund* (1985) *Frisby v. Schultz* (1988) *U.S. v. Kokinda* (1990) *International Society for Krishna Consciousness v. Lee* (1992) *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC* (1996) *Reno v. ACLU* (1997) *Arkansas Educational Television Commission v. Forbes* (1998) *U.S. v. American Library Association* (2003) *Ashcroft v. ACLU* (2004)	
58	*Herrmann v. Germany,* No. 9300/07 (26.06.2012)*	*U.S. v. Stevens* (2010)	Albuquerque
59	*Konstantin Markin v. Russia,* No. 30078/06 (22.03.2012)*	*Goldberg v. Kelly* (1970)	Albuquerque
60	*Hirsi Jamaa and Others v. Italy,* No. 27765/09 (23.02.2012)*	*Sale v. Haitian Centers Council* (1993)	Albuquerque
61	*Vejdeland and Others v. Sweden,* No. 1813/07 (9.02.2012)	Rowan v. Post Office Dept. (1970) Connick v. Myers (1983) *Bethel School District v. Fraser* (1986) Rankin v. McPherson (1987) Frisby v. Schultz (1988) *R.A.V. v. St. Paul* (1992) Snyder v. Phelps (2011)	Zupančič
62–63	*Harkins and Edwards v. the United Kingdom,* Nos. 9146/07 and 32650/07 (17.01.2012); *Vinter and Others v the United Kingdom,* Nos. 66069/09 et al. (17.01.2012)	*Coker v. Georgia* (1977) *Rummel v. Estelle* (1980) *Hutto v. Davis* (1982) *Solem v. Helm* (1983) *Harmelin v. Michigan* (1991) *Ewing v. California* (2003) *Roper v. Simmons* (2005) Graham v. Florida (2010)	-

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
64	*Al-Khawaja and Tahery v. the United Kingdom*, Nos. 26766/05 and 22228/06 (15.12.2011)*	*Ohio v. Roberts* (1980) *Crawford v. Washington* (2004) *Davis v. Washington* (2006) *Giles v. California* (2008) Melendez-Diaz v. Massachusetts (2009) Bullcoming v. New Mexico (2011)	-
		Crawford v. Washington (2004) *Davis v. Washington* (2006)	Sajó, Karakas
65	*Al-Jedda v. the United Kingdom*, No. 27021/08 (7.07.2011)*	Munaf v. Geren (2008)	-
66	*Ponomaryovi v. Bulgaria*, No. 5335/05 (21.06.2011)	Plyler v. Doe (1982)	-
67	*A, B and C v. Ireland*, No. 5579/05 (16.12.2010)*	*Roe v. Wade* (1973)	-
68	*Gillberg v. Sweden*, No. 41723/06 (2.11.2010)	Jaffee v. Redmond (1996)	Power
69	*Jehovah's Witnesses of Moscow and Others v. Russia*, No. 302/02 (10.06.2010)	*Cruzan v. Director, MDH* (1990)	-
70	*Kononov v. Latvia*, No. 36376/04 (17.05.2010)*	*Ex parte Milligan* (1866) *Ex parte* Quirin (1942) *Re Yamashita* (1946)	-
71	Gäfgen *v. Germany*, No. 22978/05 (1.06.2010)	*Blackburn v. Alabama* (1960) *Townsend v. Sain* (1963) *Nix v. Williams* (1984) *Segura v. U.S.* (1984) *Herring v. U.S.* (2009)	-
72	*Vera Fernandez-Huidobro v. Spain*, No. 74181/01 (6.01.2010)	*Wong Sun v. U.S.* (1963)	Zupančič
73	*A. and Others v. the United Kingdom*, No. 3455/05 (19.02.2009)	*Hamdi v. Rumsfeld* (2004)	-
74	*Sergey Zolotukhin v. Russia*, No. 14939/03 (10.02.2009)*	*Blockburger v. U.S.* (1932) *Grady v. Corbin* (1990) *U.S. v. Dixon* (1993)	-
75	*Maumoousseau and Washington v. France*, No. 39388/05 (6.12.2007)	*Rochin v. Kalifornia* (1952)	Zupančič

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
76	*D.H. and Others v. Czech Republic*, No. 57325/00 (13.11.2007)*	*Griggs v. Duke Power Co* (1971)	-
77	*O'Halloran and Francis v. the United Kingdom*, Nos. 15809/02 and 25624/02 (29.06.2007)*	*Lisenba v. California* (1941) *Malloy v. Hogan* (1964) *Miranda v. Arizona* (1966)	Pavlowschi
78	*Jalloh v. Germany*, No. 54810/00 (11.07.2006)*	*Rochin v. California* (1952) *Schmerber v. California* (1966)	-
		Rochin v. California (1952)	Bratza
		Rochin v. California (1952)	Zupančič
79	*Dickson v. the United Kingdom*, No. 44362/04 (18.04.2006)	*Skinner v. Oklahoma* (1942)	Casadevall, Garlicki
80	*Achour v. France*, No. 67335/01 (29.03.2006)*	*Robinson v. California* (1962)	Zupančič
81	*Zdanoka v. Latvia*, No. 58278/00 (16.03.2006)*	*Brandenburg v. Ohio* (1969)	Zupančič
82	*Hirst v. the United Kingdom (No. 2)*, No. 74025/01 (6.10.2005)*	*Richardson v. Ramirez* (1974)	-
83	*Vergos v. Greece*, No. 65501/01 (24.06.2004)	*Employment Division, Department of Human Resources v. Smith* (1990) *U.S. v. Lee* (1982) *Braunfeld v. Brown* (1961)	-
84	*G.B. v. Bulgaria*, No. 42346/98 (11.03.2004)	*Knight v. Florida* (1999)	-
85	*Iorgov v. Bulgaria*, No. 40653/98 (11.03.2004)	*Knight v. Florida* (1999)	-
86	*Gorzelik and Others v. Poland*, No. 44158/98 (17.02.2004)*	*In re Primus* (1978) *Roberts v. United States Jaycees* (1984)	Costa, Zupančič
87	*Kyprianou v. Cyprus*, No. 73797/01 (27.01.2004)	Offutt v. *U.S.* (1954)	-
88	*Appleby and Others v. the United Kingdom*, No. 44306/98 (6.05.2003)	*Hague v. C.I.O.* (1939) *Marsh v. Alabama* (1946) *Lloyd Corp. v. Tanner* (1972) *Hudgens v. NLRB* (1976) *Pruneyard Shopping Center v. Robbins* (1980)	-

No.	ECtHR ruling	Referenced US Supreme Court decision	Judge who authored a concurring or dissenting opinion
89	*A. v. the United Kingdom,* No. 35373/97 (17.12.2002)	*Rosenblatt v. Baer* (1966) Philadelphia Newspapers, Inc. v. Hepps (1986)	Loucaides
90	*Aanguelova v. Bulgaria,* No. 38361/97 (13.06.2002)	*Griggs v. Duke Power Co.* (1971) *McDonnell Douglas Corp. v. Green* (1973)	Bonello
91	*McVicar v. the United Kingdom,* No. 46311/99 (7.05.2002)	*New York Times v. Sullivan* (1964)	-
92	*Frette v. France,* No. 36515/97 (26.02.2002)	Palmore v. Sidoti (1984)	-
93	*Al-Adsani v. the United Kingdom,* No. 35763/97 (21.11.2001)*	*Argentine Republic v. Amerada Hess Shipping Corporation* (1989)	-
94	*Cyprus v. Turkey,* No. 25781/94 (10.05.2001)*	*Texas v. White* (1868) *Horn v. Lockhart* (1873) *Williams v. Bruffy* (1878)	Marcus-Helmons
95–107	*Arslan v. Turkey,* No. 23462/94 (8.06.1999)*; Başkaya *and* Okçuoglu *v. Turkey,* No. 23536/94 and 24408/94*; *Ceylan v. Turkey,* no 23556/94*; *Erdogdu and Others v. Turkey* No. 25067/94 and 25068/94*; *Gerger v. Turkey,* No. 24919/94*; Okçuoglu *v. Turkey,* No. 24246/94*; *Karatas v. Turkey,* No. 23168/94*; *Polat v. Turkey,* No. 23500/94*; Sürek *and* Özdemir *v. Turkey,* No. 23927/94 and 24277/94*; Sürek *v. Turkey (No. 1),* No. 26682/95*; Sürek *v. Turkey (No. 2),* No. 24122/94*; Sürek *v. Turkey (No. 3),* No. 24735/94*; Sürek *v. Turkey (No. 4)* No. 24762/94*	*Abrahams v. U.S.* (1919) *Schenck v. U.S.* (1919) *Whitney v. California* (1927) *Brandenburg v. Ohio* (1969)	Bonello
108	*Grigoriades v. Greece,* No. 24348/94 (25.11.1997)*	*Board of Education v. Barnette* (1943) *Street v. New York* (1969) *Texas v. Johnson* (1989) *U.S. v. Eichman* (1990)	Jambrek
109	*Saunders v. the United Kingdom,* No. 19187/91 (17.12.1996)*	*Braswell v. U.S.* (1988)	Martens

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110	*John Murray v. the United Kingdom,* No. 18731/91 (8.02.1996)*	*Miranda v. Arizona* (1966)	Pettiti
		Griffin v. California (1965) *Miranda v. Arizona* (1966)	Walsh
111	*Welch v. the United Kingdom,* No. 17440/90 (9.02.1995)	Austin v. U.S. (1993) Alexander v. U.*S.* (1993)	-
112	*Fayed v. the United Kingdom,* No. 17101/90 (21.09.1994)	*Hannah v. Larche* (1960)	-
113	*Imbrioscia v. Switzerland,* No. 13972/88 (24.11.1993)	Miranda v. Arizona (1966)	de Meyer
114	*Observer and Guardian v. the United Kingdom,* No. 13585/88 (26.11.1991)*	New York Times *Co.* v. U.S. (1971)	de Meyer
		New York Times *Co.* v. U.S. (1971) *Landmark Communications Inc. v. Virginia* (1978) *Nebraska Association v. Stuart* (1976)	Morenilla
115	*Groppera Radio AG and Others v. Switzerland,* No. 10890/84 (28.03.1990)*	*Cox v. New Hampshire* (1941) Red Lion Broadcasting Co. v. FCC (1969) *CBS v. Democratic National Committee* (1973) Virginia State Pharmacy Board v. Virginia Citizens Consumer Council (1976) FCC v. National Citizens Committee (1978) *CBS, Inc. v. FCC* (1981) *FCC v. League of Women Voters* (1984). *Los Angeles v. Preferred Comm, Inc.* (1986)	de Meyer
116	*Barthold v. Germany,* No. 8734/79 (25.03.1985)	Virginia State Pharmacy Board v. Virginia Citizens Consumer Council (1976) *Bates v. State* Bar of Arizona (1977) Central Hudson *Gas & Electric Corp. v. Public Service Commission* (1980)	Pettiti

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