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Jura Novit Curia *and the European Court of Human Rights*

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Abstract

This article provides the first in-depth analysis of the European Court of Human Rights' treatment of the jura novit curia *principle. It explains how and why it has been used more frequently over the past 10 years, provides a classification of the case law and critically analyses the existing legal issues and debates that have emerged from the jurisprudence and doctrine. In particular, the 2018 Grand Chamber judgment* Radomilja v. Croatia *has brought* jura novit curia *and its potentially controversial role in the interpretation of the European Convention on Human Rights to light. Overall, this article demonstrates that this seemingly anodyne and previously understudied principle reveals conflicting views regarding the functions and purposes of the European Court of Human Rights' human rights jurisprudence. I argue that the Strasbourg judges should be careful to use the principle consistently and refrain from overusing it, especially in the later stages of proceedings and in order to reduce its case docket.*

1 Introduction

For many years now, the European Court of Human Rights (ECtHR) in its interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been stating that it is the 'master of the characterisation to be given in law to the facts of the case'.[1] The Court explained that it is not 'bound by the characterisation given by an applicant, a government or the Commission' and that 'it has, for example, considered of its own motion complaints under articles or paragraphs not relied on by those appearing before it and even under a provision in respect of which the Commission had declared the complaint to be inadmissible while declaring it admissible

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1 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.

under a different one'.[2] In French language judgments, the principle is often referenced in its Latin form, *jura novit curia* (or *iura novit curia*): '[E]n vertu du principe *jura novit curia*, elle n'est pas tenue par les moyens de droit tirés par les requérants de la Convention et de ses Protocoles et elle peut décider de la qualification juridique à donner aux faits d'un grief en examinant celui-ci sur le terrain d'articles ou de dispositions de la Convention autres que ceux invoqués par les requérants.'[3] A lay English-language rendering of the maxim is 'the court knows the law', and it implies that judges are in charge of defining and interpreting the law, including independently from the legal arguments raised by the parties before them, whereas the parties are in charge of providing and proving the facts. The origins of the *jura novit curia* principle can be traced back to Roman law as rediscovered by glossators in the medieval universities of continental Europe.[4] Thus, the principle is often associated with the inquisitorial role of judges and the mode of internal, national (procedural) law in civil law jurisdictions. Common law jurisdictions, with their comparatively adversarial procedure, seem less familiar with it.[5]

How the principle is applied and functions at the international level raises additional issues beyond the common law/civil law divide. At that plane, the most analysed issues are whether and how far judges should 'know' foreign law in private international law cases[6] and the principle's invocation in other international jurisdictions, such as in international arbitration[7] or before the International Court of Justice.[8] However, there is little, if any, doctrinal and/or empirical analysis in the English language on the use of this principle by the ECtHR.[9] This may be surprising for two reasons. First,

2 See, e.g., *mutatis mutandis*, ECtHR, *Guerra and Others v. Italy*, Appl. no. 14967/89, Judgment of 19 February 1998, para. 44. Unless indicated differently in this article, all cases referred to here are judgments and not decisions by the ECtHR. All ECtHR judgments and decisions are available at http://hudoc.echr.coe.int/.

3 See, e.g., ECtHR, *Kravchuk c. Russie*, Appl. no. 10899/12, Judgment of 26 November 2019, para. 23.

4 This may explain why another adage expressing a similar idea – namely, '*da mihi facta, dabo tibi ius*' ('give me the facts and I will give you the law') – is also in Latin.

5 See Shelton, 'Jura novit curia in International Human Rights Tribunals', in N. Boschiero *et al.* (eds), *International Courts and the Development of International Law* (2013) 189, at 189–191. But see the opinion of A.G. Jacobs, who states that a closer look may reveal that the differences between civil law and common law jurisdictions with regards to *jura novit curia* are less stark than often assumed. Joined Cases C-430/93 and C-431/93, *Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (EU:C:1995:441), paras 33–44.

6 See Remien, 'Iura novit curia und die Ermittlung fremden Rechts im europäischen Rechtsraum der Artt. 61ff. EGV – für ein neues Vorabentscheidungsverfahren bei mitgliedstaatlichen Gerichten', in J. Basedow *et al.* (eds), *Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht* (2001) 617.

7 F. Ferrari and G. Cordero-Moss (eds), *Iura Novit Curia in International Arbitration* (2018).

8 Verhoeven, 'Jura Novit Curia et le juge international', in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat – Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006) 635; Sugihara, 'The Principle of Jura Novit Curia in the International Court of Justice: With Reference to Recent Decisions', 55 *Japanese Yearbook of International Law* (2012) 77.

9 See, e.g., Fumagalli, 'Jura Novit Curia', in H. Ruiz Fabri (ed.), *Max Planck Encyclopedia of International Procedural Law* (2018), paras 32–33, available at https://opil.ouplaw.com/page/803#:~:text=The%20Max%20Planck%20Encyclopedia%20of,made%20and%20adjudicated%20in%20practice.&text=At%20launch%2C%20the%20Encyclopedia%20will%20cover%20dispute%20settlement%20and%20adjudication; Shelton, *supra* note 5, at 194–199. Moreover, a commentary to the ECHR by a leading scholar in international (human rights) law only dedicates a short passage to the principle when discussing Article 38 of the ECHR. W.A. Schabas, *The European Convention on Human Rights: A Commentary* (2015), at 815.

as opposed to *jura novit curia*, other instruments in the ECtHR's interpretive toolkit, such as 'margin of appreciation' or 'European consensus', have attracted significant scholarly attention, including entire volumes.[10] *Jura novit curia* may be considered less interesting as it is mostly relevant for questions of admissibility and thus has less direct bearing on the substantial reasoning of a given case. Nevertheless, as discussions in recent years demonstrate, its relevance goes beyond mere trifles of admissibility and, like the margin of appreciation or European consensus, can determine case outcomes. Second, an increase in the Court's use of the *jura novit curia* principle is clearly observable, especially over the past decade. It is therefore important to understand the conditions of its invocation, the theoretical and practical debates around its use and the consequences for the Court and the parties to proceedings before it.

This article sheds light on these issues by proceeding in two steps. In the first step, contained in section 2, I will map the origins of the principle in the Court's case law and some statistical information relating to it – that is, where, when and how it emerged in the Court's case law; how often is it used; is it used in certain types of judgments, such as Chamber or Grand Chamber judgments, or situations, like dissenting or concurring opinions, rather than in others; and how, if at all, can one classify these cases? In the second step, contained in section 3, I will provide a more qualitative overview of the debates that have been raised in and by the Court's case law and more broadly. This will provide more context to the history and the statistics and thereby a better empirical understanding of the principle's functioning and relevance before the ECtHR in terms of its benefits or downsides for applicants. I conclude that more attention should have been, and should be, paid to the Court's mastery, which is not as anodyne or as little used as previously assumed and is particularly problematic when used as a tool to reduce its case docket.

2 A Descriptive and Numerical Analysis of the Principle

One of the few analyses of the *jura novit curia* principle before the ECtHR – a 2013 chapter by Dinah Shelton – observed how '[i]n practice the European Court rarely makes use of this power'.[11] However, since then, the Court's quantitative and qualitative use of the principle has increased drastically, as will be demonstrated below. A closer look at the origins and the statistics and classification of the Court's use of the principle will set the stage before moving to a qualitative analysis of the debates in section 2 of this article.

[10] See, e.g., Y. Arai-Takahaschi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002); Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 705; A. Legg, *The Margin of Appreciation in International Human Rights Law* (2012).

[11] Shelton, *supra* note 5, at 195.

A *The Origins*

Identifying the principle's origins in the ECtHR's case law is not straightforward. A 1968 German language article by Hannfried Walter points out implicit elements of the principle already present in early rulings of the European Commission of Human Rights (ECommHR) and of the ECtHR.[12] He argues that *jura novit curia* should be considered a common procedural rule for public international law courts and, thus, also for the ECtHR,[13] whose contemporary rulings could be explained only by their tacit acceptance and use of the principle. As examples, he refers to the *Lawless* judgment in which the Court analysed *ex officio* whether the detention of the applicant, who was alleging violations of Article 5 (right to liberty) and Article 6 (right to a fair trial), could be justified under Article 15 of the ECHR (derogation in time of emergency).[14] He also mentions two Austrian cases where the ECommHR and the Court respectively reviewed facts *proprio motu* under Article 6(1),[15] even though this had not been raised by the applicants.[16] Without explicitly naming the principle, the author demonstrates how, presumably, the judges simply assumed that they could apply the principle.

This early use of the *jura novit curia* principle was later made explicit in the 1976 *Handyside v. United Kingdom* judgment.[17] This case dealt with the publication of a Danish primary school textbook in which sexual behaviour was discussed using explicit terminology. The English publisher of the book, Handyside, was convicted for publishing obscene material and challenged the conviction. Whereas the judgment is better known for its application and discussion of the margin of appreciation doctrine,[18] another passage in it has often been overlooked. In fact, the European judges also argued that, as the '*[m]aster of the characterisation to be given in law to these facts*, the Court is empowered to examine them, if it deems it necessary and if need be ex officio, in the light of the Convention and the Protocol as a whole'.[19] Concretely, it proceeded to analyse the facts of the case not only under Article 10 (freedom of expression), Article 18 (limitation on use of restrictions on rights) and Article 1, Protocol no. 1 (right to property) but also under Article 14 (prohibition of discrimination), even though the ECommHR had rejected that claim as manifestly unfounded. Ultimately, however, no violation was found.

For the purposes of this article, one can note that in *Handyside* the Court felt it necessary to refer back to other cases in which it had supposedly already applied the

[12] Walter, 'Der Grundsatz iura novit curia im Europäischen Menschenrechtsverfahren. Zur Teilabweisung von Individualbeschwerden wegen offensichtlicher Unbegründetheit', 28 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1968) 561.

[13] *Ibid.*, at 572.

[14] ECtHR, *Lawless v. Ireland (No. 3)*, Appl. no. 332/57, Judgment of 1 July 1961, paras 20ff.

[15] *Köplinger v. Austria*, Appl. no. 1850/63, Judgment of 1 October 1968; *Neumeister v. Austria*, Appl. no. 1936/63, Judgment of 27 June 1968.

[16] Walter, *supra* note 12, at 571–573, 576.

[17] ECtHR, *Handyside v. United Kingdom*, Appl. no. 5493/72, Judgment of 7 December 1976.

[18] See, e.g., O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights', 4 *Human Rights Quarterly* (1982) 474.

[19] *Handyside*, *supra* note 17, para. 41 (emphasis added).

principle. However, the passages referred to in the *Belgian Linguistic* case[20] and in the *De Wilde, Ooms and Versyp* judgment[21] do not clearly enunciate the *jura novit curia* principle. In the former case, the Court states that, '[w]hile the provisions of the Convention and Protocol must be read as a whole, the Court considers that it is essentially upon the content and scope of these three Articles [Articles 8, 14 and Article 2, Protocol no. 2] that the decision … has to take turns'.[22] In the latter judgment, it provides somewhat less cryptically that '[o]nce a case is duly referred to it… the Court is endowed with full jurisdiction and may thus take cognisance of all questions of fact and of law which may arise in the course of the consideration of the case'.[23] One could argue that the ECtHR did not want to boldly introduce a new principle so instead 'uncovered' it from the depths of their own precedents, where it was waiting to be brought to light.[24]

After *Handyside*, such 'discoveries' were no longer necessary, and the Court thus started referring to the principle explicitly. One example is the previously cited Grand Chamber judgment, *Guerra and Others v. Italy.*[25] Many subsequent cases refer to this judgment when using the *jura novit curia* principle. Dean Spielmann, former judge and president of the ECtHR, even credits it as the point from which the Court started using this principle.[26] The Court had actually explicitly referred to the principle in *Handyside* and in other judgments prior to *Guerra*,[27] but, evidently, in the post-Protocol no. 11 ECtHR system and according to the Court's understanding, *Guerra*, rather than *Handyside*, has become a standard reference for the principle.[28]

[20] ECtHR, *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'*, Appl. no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, Judgment of 23 July 1968.

[21] ECtHR, *De Wilde, Ooms and Versyp ('Vagrancy') v. Belgium* (Plenary), Appl. no. 2832/66, 2835/66 and 2899/66, Judgment of 18 June 1971.

[22] *Use of Languages in Belgium*, *supra* note 20, at point I, B. para. 1.

[23] *De Wilde*, *supra* note 21, para.49.

[24] A similar observation could be made for the second case, which explicitly references the principle. In *König v. Germany*, the Plenary of the ECtHR refers to the two Belgian judgments but also adds a reference to the *Ireland v. United Kingdom* judgment. However, in that last judgment, again, the *jura novit curia* principle is only timidly identifiable, if at all. ECtHR, *König v. Germany*, Appl. no. 6232/73, Judgment of 28 June 1978, para. 96; ECtHR, *Ireland v. United Kingdom*, Appl. no. 5310/71, Judgment of 18 January 1978, para. 157.

[25] *Guerra*, *supra* note 2.

[26] Spielmann, 'Le fait, le juge, et la connaissance: Aux confins de la compétence interprétative de la Cour européenne des droits de l'Homme', in P. d'Argent, B. Bonafé and J. Combacau (eds), *Les limites du droit international. Essais en l'honneur de Joe Verhoeven* (2015) 530.

[27] For cases between *Handyside* and *Guerra*, see, e.g., *König*, *supra* note 24, para. 96; ECtHR, *Guzzardi v. Italy*, Appl. no. 7367/76, Judgment of 6 November 1980, paras 62–63; ECtHR, *Philis v. Greece*, Appl. no. 12750/87, Judgment of 27 August 1991, para. 56; ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996, para. 61.

[28] The centrality of the case for this domain also emerges in a recent study commissioned by the European Court of Human Rights (ECtHR) itself on the principle's use in its case law. ECtHR, Division de la Recherche/Research Division, Articles 34 and 35. The Notion of 'Complaint' and/or 'Subject Matter of a Dispute', and the Application of the Principle Jura Novit Curia in the Case Law of the Court and the Scope of the Grand Chamber's Jurisdiction as to the Admissible Complaints (ECtHR, Articles 34 and 35), March 2017, at 4–6 (on file with the author).

B *The Principle's Statistics and Classification(s)*

Since 2010, the ECtHR has increasingly referred to the *jura novit curia* principle. In fact, searching the 'Judgment' tab of the Court's HUDOC database[29] for the keywords 'novit' and 'master of the characterisation' (to ensure coverage of both the English and French language expressions) locates 421 instances of these expressions in Grand Chamber and Chamber judgments. In absolute numbers, one can note an increase in the Court's use of the principle after 2010, whereas, before that time, it was only used sporadically.[30]

It should be noted that *jura novit curia* is also used in other situations or moments of the proceedings before the Court, such as in Committee judgments by single Chambers[31] and in separate admissibility decisions.[32] Moreover, it is also being employed at even earlier stages – namely, when the Court communicates cases to state parties with questions about violations that the applicants had not raised. While it is difficult to get an overview of this practice – which, moreover, is run by Court personnel and not by judges – sometimes it is mentioned in the judgments themselves. For instance, in a 2015 case against Turkey, the Court stated that:

> [a]t the time of communicating the application, the Court, as the master of the characterisation to be given in law to the facts of the case, also requested the Government, of its own motion, to submit observations as to whether the applicant's right to life as guaranteed under Article 2 of the Convention had been infringed on the facts of the instant case and, in particular, whether necessary measures to protect his life had been taken by the State authorities.[33]

Re-characterization of cases at the communications stage had also been noted rather critically in a Hungarian case, arguing that the suggested questions regarding characterization pushed the parties' arguments in a certain direction, ultimately influencing the case's outcome.[34]

While it is beyond the scope of this article to analyse in detail how often and under which conditions re-characterization occurs in these less visible stages of the proceeding or decisions by the Court, clearly *jura novit curia* permeates the ECtHR's practice at all levels. However, the focus here will be on its use in the most visible situations – namely, in Chamber and Grand Chamber judgments. As to the types of judgments or situations in which the principle appears, in most cases, the principle is mentioned in

[29] HUDOC, Database of the European Court of Human Rights, available at https://hudoc.echr.coe.int/eng#%20.

[30] In reverse chronological order, I could locate 34 cases (2020); 36 cases (2019), 46 cases (2018); 39 cases (2017); 38 cases (2016); 34 cases (2015); 29 cases (2014); 35 cases (2013); 37 cases (2012); 25 cases (2011); 23 cases (2010); and 45 cases in total for all the years prior to that from *Handyside* onward. I did not count those judgments as double where the expressions are both employed in the same case.

[31] As of 29 January 2021, the keywords 'novit' and 'master of the characterisation' appear in a total of respectively 42 and 82 such Committee judgments on HUDOC.

[32] As of 29 January 2021, the keywords 'novit' and 'master of the characterisation' appear in a total of respectively 140 and 221 such decisions on HUDOC.

[33] ECtHR, *Erczan Bozkurt v. Turkey*, Appl. no. 20620/10, Judgment of 23 June 2015, para. 45.

[34] ECtHR, *Erményi v. Hungary*, Appl. no. 22254/14, Judgment of 22 November 2016, para. 10, Dissenting Opinion of Judge Kūris.

Chamber judgments without a specific preponderance of one chamber using it more or less than another.[35] At the Grand Chamber level, *jura novit curia* has appeared in 20 cases so far.[36] The sheer numbers allow, and almost beg, for some sort of classification. I propose to categorize the Chamber and Grand Chamber judgments into four categories, ranging from the least important from a legal perspective to the most important and conceptually more interesting ones.

The first category is where the principle has little to no bearing on the legal reasoning or outcome of the case – that is, when it is mentioned, for example, in reference to domestic courts applying or not applying the principle, in applicants' arguments[37] or in concurring and dissenting opinions.[38] Of course, the separate opinions provide interesting discursive and analytical perspectives on problems with the Court's use of the principle, some of which will be analysed further below.

The second category is when the applicants themselves have not indicated which provision of the ECHR was deemed to be violated or did so generically, leaving the Court to characterize the case for them. Take, for instance, a recent judgment involving the refusal of Ukrainian courts to return the applicant's son to the USA.[39] In the absence of the invocation of a provision that the applicant deemed to be violated, the Court characterized the facts under Article 8.[40] In another case, the applicant had complained that Georgia had been responsible for an ineffective criminal investigation

[35] Given the large number of judgments, I will not list each of them here.

[36] See, e.g., ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996; ECtHR, *Polat v. Turkey*, Appl. no. 23500/94, Judgment of 8 July 1999; ECtHR, *Karatas v. Turkey*, Appl. no. 23168/94, Judgment of 8 July 1999, para. 35; ECtHR, *Scoppola v. Italy (No. 2)*, Appl. no. 10249/03, Judgment of 17 September 2009; ECtHR, *McFarlane v. Ireland*, Appl. no. 31333/06, Judgment of 10 September 2010; ECtHR, *Şerife Yiğit v. Turkey*, Appl. no. 3976/05, Judgment of 2 November 2011; ECtHR, *Aksu v. Turkey*, Appl. no. 4149/04 and 41029/04, Judgment of 15 March 2012, para. 43; ECtHR, *Södermann v. Sweden*, Appl. no. 5786/08, Judgment of 12 November 2013, para. 57; ECtHR, *Tarakhel v. Switzerland*, Appl. no. 29217/12, Judgment of 4 November 2014, para. 55; ECtHR, *Bouyid v. Belgium*, Appl. no.23380/09, Judgment of 28 September 2015, para. 55; ECtHR, *Navalny v. Russia*, Appl. no. 29580/16, Judgment of 6 November 2018; ECtHR, *Molla Sali v. Greece*, Appl. no. 20452/14, Judgment of 19 December 2018; ECtHR, *Fernandes de Oliveira v. Portugal*, Appl. no. 78103/14, Judgment of 31 January 2019; ECtHR, *S.M. v. Croatia*, Appl. no. 60561/14, Judgment of 25 June 2020.

[37] On these first two situations, see, e.g., ECtHR, *Lelas v. Croatia*, Appl. no. 55555/08, Judgment of 20 May 2010, paras. 46, 48; ECtHR, *Klauz v. Croatia*, Appl. no. 28963/10, Judgment of 18 July 2013, paras. 49, 61, 63; ECtHR, *Khodorkovskyi and Lebedev v. Russia*, Appl. no. 11082/06 and 13772/05, Judgment of 25 July 2013, para. 722. See also other examples cited in Shelton, *supra* note 5, at 195, n. 4.

[38] See, e.g., ECtHR, *Drozd and Janousek v. Portugal and Spain*, Appl. no. 12747/87, Judgment of 26 June 1992, Concurring Opinion of Judge Matscher; ECtHR, *Kokkinakis v. Greece*, Appl. no. 14307/88, Judgment of 25 May 1993, para. 7, Partly Dissenting Opinion of Judge Martens; ECtHR, *Hermi v. Italy*, Appl. no. 18114/02, Judgment of 18 October 2006, Dissenting Opinion Judge Zupančič; ECtHR, *Muršić v. Croatia*, Appl. no. 7334/13, Judgment of 20 October 2016, para. 29, Partly Dissenting Opinion Judge Pinto de Albuquerque; ECtHR, *Hiller v. Austria*, Appl. no. 1967/14, Judgment of 22 November 2016, para. 4, Concurring Opinion Judge Sajó; ECtHR, *Bikic v. Croatia*, Appl. no. 50101/12, Judgment of 29 May 2018, n. 4, Joint Dissenting Opinion of Judges Turković and Mourou-Vikström; ECtHR, *Rola v. Slovenia*, Appl. no. 12096/14, Judgment of 4 June 2019, para. 43, Partly Concurring and Partly Dissenting Opinion of Judge Kūris; ECtHR, *A and B v. Croatia*, Appl. no. 7144/15, Judgment of 20 June 2019, para. 6, Concurring Opinion of Judges Koskelo, Eicke and Ilievski.

[39] ECtHR, *Vilenchik v. Ukraine*, Appl. no. 21267/14, Judgment of 3 October 2017.

[40] *Ibid.*, para. 39.

following a fatal road traffic accident involving her son and her sister.[41] The ECtHR, following the usual formula of declaring itself the master of the characterization to be given in law to a given case's facts, considered the application under Article 2 after mentioning that the applicant had cited the infringement of various provisions of the ECHR. It remains unclear from the judgment what those other provisions were.[42] Another case concerned a Russian applicant's complaints about poor detention conditions that lacked health care provision; the Russian authorities had failed to address these grievences domestically. The Court characterized these facts as violations under Articles 3 and 13.[43]

The third category is probably the most common. It is where applicants have claimed that multiple provisions have been violated, but the Court reduces these to one or two. Here, examples abound. I will just refer to those where the reduction was particularly notable. In a judgment involving the conviction of a Portuguese soldier, who had reported the alleged misuse of public money, the applicant brought complaints under Articles 6, 7 (no punishment without law), 10 (freedom of expression) and 13 of the ECHR. The claim was re-characterized under Article 10 only.[44] In a recent case involving the refusal of Hungarian authorities to regularize the situation of a Somali/Nigerian applicant between 2002 and 2017, he brought a claim for violations of Articles 3, 5, 8, 13 and 14 of the ECHR, but the ECtHR re-characterized the claim under Article 8 only.[45] In two related German cases, the applicants complained about violations of Articles 6(1), 8, 9 (freedom of thought, conscience and religion), 14 and Article 2, Protocol no. 1 (right to education). The case concerned the withdrawal of applicants' parental authority by domestic courts, which they claimed had taken too long and was disproportionate, unfair and based on religion.[46] The ECtHR re-characterized the claim, analysing the facts under Article 8 only.[47] This tendency of re-characterizing cases as Article 8 violations alone is also particularly frequent in cases where applicants raise the issue of right to private life in conjunction with procedural Article 6 and/or Article 13 violations.[48]

41 ECtHR, *Sakvarelidze v. Georgia*, Appl. no. 40394/10, Judgment of 6 February 2020.

42 *Ibid.*, para. 40.

43 ECtHR, *Morozov v. Russia*, Appl. no. 38758/05, Judgment of 12 November 2015, para. 42.

44 ECtHR, *Soares v. Portugal*, Appl. no. 79972/12, Judgment of 21 June 2016, para. 26.

45 ECtHR, *Sudita Keita v. Hungary*, Appl. no. 4231/15, Judgment of 12 May 2020, para. 24.

46 ECtHR, *Wetjen v. Germany*, Appl. no. 68125/14 and 72204/14, Judgment of 22 March 2018; ECtHR, *Tlapak v. Germany*, Appl. no. 11308/16 and 11344/16, Judgment of 22 March 2018. In the latter case, the applicants had not raised an Article 14 discrimination claim.

47 *Ibid.*, para. 44 and para. 64 respectively.

48 See, e.g., amongst many, ECtHR, *Ferrari v. Romania*, Appl. no. 1714/10, Judgment of 28 April 2015; ECtHR, *Fourkiotis c. Grèce*, Appl. no. 74758/11, Judgment of 16 June 2016; ECtHR, *M.L. v. Norway*, Appl. no. 43701/14, Judgment of 7 September 2017; ECtHR, *Kryževičius v. Lithuania*, Appl. no. 67816/14, Judgment of 11 December 2018; ECtHR, *A.V. v. Slovenia*, Appl. no. 878/13, Judgment of 9 April 2019; ECtHR, *Adžić v. Croatia (No. 2)*, Appl. no. 19601/16, Judgment of 2 May 2019; ECtHR, *Širvinkas v. Lithuania*, Appl. no. 21243/17, Judgment of 23 July 2019; ECtHR, *Dorož v. Poland*, Appl. no. 71205/11, Judgment of 29 October 2020.

The fourth category is the most complex and interesting. Here, the Court invokes the principle by (i) adding *ex proprio motu* provisions that had not been invoked by the applicants or by (ii) wholly deciding the case under provisions that had not been invoked by the applicants or that had already been eliminated by the Chamber judgment. For example, in a case where violations of Articles 1 (obligation to respect human rights), 3, 6 and 17 (prohibition of abuse of rights) of the ECHR were brought by parents alleging that errors and negligence by Turkish medical personnel had caused the mental and physical deficiencies in their son, the Court re-characterized these claims under Article 8.[49] A similar Turkish case was brought by parents alleging that medical authorities had been responsible for their daughter's neurological damages, suffered after a heart operation, and claiming violations of Articles 2, 6 and 13 of the ECHR. The Court preferred to analyse the facts of the case under Article 8.[50] A completely different fact pattern appeared in a case involving the dismissal of the vice-president of the Hungarian Supreme Court. Although the applicant originally claimed violations of Articles 6, 13 and 14 of the ECHR, and Article 1 of Protocol no. 1, the ECtHR re-characterized the facts under Article 8.[51] Even more recently, in a judgment involving human trafficking and prostitution, the Grand Chamber re-characterized facts that the applicant had alleged were violations of Articles 3 and 8 as an Article 4 (prohibition of slavery) violation.[52] Last but not least, a whole set of cases dealing with claimed violations of Articles 6 and 13 alone, or also together with Articles 2 or 3, were re-characterized as violations of the procedural limb of Articles 2 and/or 3. Such cases will be discussed further below.

These statistics and the proposed classification provide an initial overview and understanding of the principle. If one takes *jura novit curia* as it is defined above by the Court – namely, that it is not 'bound by the characterisation given by an applicant, a government or the Commission' and that 'it has, for example, considered of its own motion complaints under articles or paragraphs not relied on by those appearing before', then the fourth category is part of that logic as the purest expression of the principle. The second category as well would still fall under that definition, in which the Court uses its powers to characterize the facts of a case in the absence of parties doing so, even when they are supposed to. The first category is irrelevant as such, whereas the third category is questionable for reasons that will be discussed further below.

3 A Qualitative Assessment of the Principle

Section 3.A will delve into the Court's judgments and the discussions emerging therefrom and section 3.B will contexualize them with regard to broader observations and comments. This will allow the examination to move from a more descriptive and

[49] ECtHR, *Mehmet Ulusoy c. Turquie*, Appl. no. 54969/09, Judgment of 25 June 2019.
[50] ECtHR, *Erdinç Kurt and Others v. Turkey*, Appl. no. 50772/11, Judgment of 6 June 2017, paras 35–39.
[51] *Erményi*, *supra* note 34.
[52] *S.M.*, *supra* note 36, paras 218, 224.

quantitative consideration to a more qualitative assessment of the ECtHR's use of the *jura novit curia* principle and demonstrate why and how the principle is not as anodyne as it may seem at first sight.

A *The Court's Discussions of* Jura Novit Curia

There are few doubts that most Strasbourg judges accept that the *jura novit curia* can and should be applied by the Court, as the sheer numbers provided above demonstrate. Dissenting opinions that clearly critique the majority's interpretation show this even more clearly. For instance, Judge Luis López Guerra has stated that he does 'not doubt that the principle *iura novit curia* [*sic*] is also applicable, in general terms, to the proceedings before this Court'.[53] Even more recently, Judge Egidijus Kūris has stated that 'no one contests that the Court is a "master of the characterisation to be given in law to the facts of the case". No one doubts the *jura novit curia* principle. It is also true that the Court is "not… bound by the characterisation given by an applicant or a government". And it is no less true that a "complaint is characterised by the matters alleged in it and not merely by the legal grounds or arguments relied on"'.[54] Thus, the issue is rather how the *jura novit curia* principle should be applied and operationalized with regard to the key distinction between the law and the facts.

While, on paper, this distinction may seem straightforward, in practice, the line between the unmodifiable facts of a case and what is deemed to be the law, over which the Court is master of the characterization, is at times blurred.[55] Moreover, that unclear distinction may also determine whether the Court goes beyond the case's object and what the parties asked or, to use another Latin expression, if it went *ultra* or *extra petita*. The International Law Commission has summarized this conundrum by stating that '[t]he line between "fact" and "law" is often obscured' because '[b]ased on *jura novit curia*, the Court can in principle apply any law to any fact, and in theory can evaluate evidence and draw conclusions as it sees appropriate (as long as the Court complies with the *non ultra petita* rule)'.[56]

Concretely, the effects of the principle mostly play out at the level of jurisdiction and admissibility. As to jurisdiction, Article 32 of the ECHR provides that '[t]he jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto' and '[i]n the event of dispute as to whether the Court has jurisdiction, the Court shall decide'.[57] In terms of admissibility, 'the Court may only deal with the matter after all domestic remedies have been exhausted… and within a period of six months from the date on which the final decision was taken' and that '[t]he Court shall not deal with any application… that is

[53] *McFarlane*, *supra* note 36, Dissenting Opinion of López Guerra.

[54] *Erményi*, *supra* note 34, para. 7, Dissenting Opinion of Judge Kūris.

[55] See also the attempt at clarification in the Court's commissioned study: ECtHR, Articles 34 and 35, *supra* note 28.

[56] International Law Commission, Report of the International Law Commission: Seventieth Session, 30 April–1 June and 2 July–10 August 2018, UN Doc. A/73/10 (2018), at 200, n. 991.

[57] ECHR, *supra* note 1, Art. 32.

substantially the same as a matter that has already been examined by the Court'.[58] Moreover, the Rules of Court also specify that an application form shall, *inter alia*, set out:

> 1. (e) a concise and legible statement of the facts; (f) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and (g) a concise and legible statement confirming the applicant's compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention' and that '2. (a) [a]ll of the information referred to in paragraph 1 (e) to (g) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document. (b) The applicant may however supplement the information by appending to the application form further details on the facts, alleged violations of the Convention and the relevant arguments. Such information shall not exceed 20 pages.[59]

In practical terms, *jura novit curia* may have a direct effect on all these matters, as emerges from the leading 2018 Grand Chamber judgment in this domain, *Radomilja and Others v. Croatia*.[60] The facts arose in two different cases dealing with similar legal issues.[61] The Grand Chamber joined the two cases and reversed the Chamber judgments that had found a violation of the ECHR.[62] *Jura novit curia* played an important role in this reversal.

As to the facts, these cases dealt with the Croatian courts' refusal to recognize the applicants' land ownership over 'socially owned' land that they claimed to have acquired by adverse possession. The applicants claimed a violation of their property rights under Article 1, Protocol no. 1. One legal issue became whether, in calculating the duration of adverse possession, the applicants had, or had not, relied on the Socialist period between 6 April 1941 and 8 October 1991 when socially owned land was excluded from such mode of acquisition of property. Moreover, the question also concerned the applicability of another case relating to a similar situation, *Trgo v. Croatia*,[63] in which the ECtHR had found that such a refusal to recognize land ownership during this Socialist time as counting towards acquisition via adverse possession constituted a violation of the right to property. Put differently, the actual scope of the complaints was at stake between the applicants, the respondent government, the Chambers and the Grand Chamber. The applicants rejected the Croatian government's argument that they had not relied explicitly on those 50 years in their complaints and that they had also distinguished their situation from the *Trgo* case. They further argued that, even if they had not considered that time period in their complaints and waived the *Trgo* precedent, the Court was nevertheless not bound by the applicants' arguments due to the principle

58 *Ibid.*, Art. 35(2)(b).

59 Rules of Court, 17 March 2022, Art. 47, para. 1 (e)–(g), para. 2 (a), (b), available at https://www.echr.coe.int/documents/rules_court_eng.pdf.

60 ECtHR, *Radomilja and Others v. Croatia*, Appl. no. 37685/10 and 22768/12, Judgment of 20 March 2018.

61 ECtHR, *Radomilja and Others v. Croatia*, Appl. no. 37685/10, Judgment of 28 June 2016; ECtHR, *Jakeljić v. Croatia*, Appl. no. 22768/12, Judgment of 28 June 2016.

62 *Radomilja*, *supra* note 60.

63 ECtHR, *Trgo v. Croatia*, Appl. no. 35298/04, Judgment of 11 June 2009.

of *jura novit curia*.[64] The Chamber judgments followed the applicants' reasoning, but the Grand Chamber followed the Croatian government's reasoning and overruled the Chamber judgments.

It is worth looking more closely at the Grand Chamber's reasoning because of the link between the scope of the case and the application of *jura novit curia*, which the applicants had explicitly raised, thus 'asking' the Grand Chamber to address it. Discussing how to define a case's scope, the Grand Chamber reviewed its own case law invoking *jura novit curia* and proceeded with its own classification of the cases in which the principle had been operationalized; the first group of cases includes those where the Court has determined the scope of a case referred to it either by the ECommHR or by a Chamber to the Grand Chamber; the second group includes those cases where the Court has applied the principle *tout court*; the third group includes those cases where the Court has determined the application of the requirement under Article 35 of the ECHR and whether the complaint had been lodged within the six months from the date on which the final decision was taken; and the fourth group includes those cases where the Court has examined whether an application or a complaint is substantially the same within the meaning of Article 35. Separately, the Grand Chamber discussed a final group of cases where the question arose whether the applicant had exhausted all domestic remedies.[65]

After this lengthy classification, the Grand Chamber determined that 'the Court has jurisdiction to review circumstances complained of in the light of the entirety of the Convention',[66] that an applicant can clarify or elaborate on his or her initial submissions and that the Court can clarify such facts *ex officio*.[67] However, the 'scope of a case before the Court remains circumscribed by the facts as presented by the applicant', and '[i]f the Court were to base its decision on facts not covered by the complaint, it would rule beyond the scope of the case'.[68] With respect to *jura novit curia*, the Court also indicated that, on the contrary, it 'would not be deciding outside the scope of a case if it were, by applying the *jura novit curia* principle, to recharacterize in law the facts being complained of by basing its decision on an Article or provision of the Convention not relied on by the applicants'.[69]

In applying these statements to the concrete case, the Grand Chamber held that the Chamber's decisions had gone beyond (*ultra petita*), or outside (*extra petita*), the scope of the complaint. By applying the *Trgo* jurisprudence and thus considering the 50 years as being legally relevant for the case analysis in *Radomilja*, this amounted to a new/different complaint that, by consequence, had been made outside of the six-month time limit imposed by Article 35 of the ECHR.[70] Strictly speaking, one can see

64 *Radomilja*, *supra* note 60, paras 89–97.
65 *Ibid.*, paras 115–116.
66 *Ibid.*, para. 121.
67 *Ibid.*, para. 122.
68 *Ibid.*, para. 123.
69 *Ibid.*, para. 124.
70 *Ibid.*, paras 131–139.

that the issue was not directly one of re-characterization of the law as applied to the facts of the case because the legal provision deemed to be violated was, and remained, the right to property under Article 1, Protocol no. 1. Nevertheless, the lengthy discussion of the principle by the Grand Chamber and the separate opinion show how intimately the question of a case's scope and the distinction between facts and law are intertwined.

Before analysing the separate opinion in *Radomilja*, it should be mentioned that *jura novit curia* had already raised judicial controversies outside of this Grand Chamber judgment. As examples, one could mention the *Erményi* case, cited earlier, in which Judge Kūris disagreed with his colleagues because he considered the re-characterization of the dismissal of a judge under Article 8 as inflating the notion of private life, extending it to infinity.[71] In a different judgment, the same judge re-characterized a case dealing with the removal of a Romanian chief prosecutor due to a press release as an Article 8 violation rather than an Article 10 one. He observed that '[s]ince *Radomilja and Others v. Croatia* this does not seem to be a big problem. *Jura novit curia*. This principle (among other things) validates the requalification of applications, which has become a widespread practice'.[72] Or consider Judge Krzysztof Wojtyczek's dissent in *Alexe c. Roumanie*.[73] In this case, the applicant complained about a violation of her right to defence under Article 6 of the ECHR because – due to a change in legislation that took place during her trial and against which she alleged she had not had the possibility to defend herself in Romanian courts – she had been forced to pay a certain sum to the former renter of a property that she had owned before her expropriation under Communism. Judge Wojtyczek would have characterized the case as a violation of Article 1, Protocol no. 1, rather than a procedural violation of Article 6. Last but not least, in *Aldeguer Tomás v. Spain*, where the applicant had raised Article 8 and Article 14 claims, the Court also added Article 1, Protocol no. 1.[74] Judge Helen Keller dissented, mentioning that such a re-characterization, although possible under the Court's case law, 'should be the exception rather than the rule, as it causes problems with regard to the exhaustion of domestic remedies on an almost regular basis.... In the light of the principle of subsidiarity, it is always most unfortunate if the national courts have not been given the opportunity to deal with a particular legal issue before it is examined by the Court'.[75] These cases can be seen as a 'normal' legal disagreement about how one judge reads and characterizes the same facts of a case and what this entails procedurally for the parties.

Nevertheless, the discussions and critiques in *Radomilja* go further because they raise a broader concern regarding the consistency and timing of the Court's invocations of the *jura novit curia* principle. A closer look at the partly dissenting and partly concurring opinion in *Radomilja* by Judges Ganna Yuriyivna Yudkivska, Faris

71 *Erményi*, *supra* note 34, paras 1, 14.

72 ECtHR, *Brisc v. Romania*, Appl. no. 26238/10, Judgment of 11 December 2018, paras 35–36, Dissenting Opinion of Judge Kūris, joined by Judge Yudkivska (internal references omitted).

73 ECtHR, *Alexe c. Roumanie*, Appl. no. 66522/09, Judgment of 3 May 2016, Dissenting Opinion of Judge Wojtyczek.

74 ECtHR, *Aldeguer Tomás v. Spain*, Appl. no. 35215/09, Judgment of 14 June 2016, para. 57.

75 *Ibid.*, para. 3, Dissenting Opinion of Judge Keller.

Vehabović and Kūris points precisely in this direction. After having accepted that the Court can, of course, use the principle, they critiqued that:

> it is striking that the majority, so overly scrupulous when confronted with the applicants' arguments in deploying all efforts not to overstep the limits which they have interpreted as being set by the tenets of *ultra* or *extra petita*, have shown no hesitation whatsoever in going beyond similar limits when confronted with the arguments of the Government. True, some substantiation for that can be drawn from the Court's case-law. The judgment, namely its sub-section 'The scope of the case', is well furnished with useful citations.... [C]omfortable citations can always be found and employed to support one methodology over another, thus, even if inadvertently, pouring water on the mill of the **extreme realist doctrine whereby judges first decide the cases and only then search for proper substantiation**. The choice of supporting citations must not, however, depend on whether the Court is inclined to keep strictly to the parties' arguments (including the explicit mentioning or non-mentioning of certain facts) or to go beyond and outside them (which may mean dealing solely with the Government's objections or finding *proprio motu* other grounds on which to dismiss the applicants' claims).... What raises concerns (in particular, but not only, in the instant case) is that this may be seen as a *carte blanche*. It should not be. In order to attain legitimacy, the Court's 'mastering' must be *consistent* in choosing a narrower or broader, a stricter or more lenient approach. In order to come to a *correct* and *just* outcome, judges should look at the facts of the case (as well as the applicable law) through a magnifying glass – but it should not be so that each of their eyes uses its own magnifying glass, only for one to be pink and the other grimy.[76]

Put differently, the debate here does not (only) concern the technical legal questions on the facts and scope of a case and whether or not *jura novit curia* applies, but it becomes primarily one about a 'political' legal realist discussion and judges using the principle selectively and arbitrarily in order to reach a wished-for and pre-established result/outcome in a given case.

This is linked to the long-existing debate over judicial activism of the ECtHR[77] and progressive (that is, more favourable to the applicants in finding a human rights violation) versus conservative (that is, more favourable to governments by finding no violation) interpretations of the ECHR. And, indeed, critiques against certain (ab)uses of *jura novit curia* have been raised by judges such as Judge Wojtyczek, who had already warned against the Court's judicial activism in various dissenting or concurring opinions,[78] emphasizing that '[t]he Court should be the servant, not the master, of the Convention'.[79] He is not alone in such critiques.[80]

[76] *Radomilja*, *supra* note 60, para. 3, Partly Dissenting and Partly Concurring Opinion of Judges Yudkivska, Vehabović and Kūris (italic emphasis in the original, bold emphasis added).

[77] On this, see Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', 11 *Human Rights Law Journal* (1990) 57; Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights', 42 *Creighton Law Review* (2009) 361.

[78] ECtHR, *X v. Former Yugoslav Republic of Macedonia*, Appl. no. 29683/16, Judgment of 17 January 2019, para. 8, Dissenting Opinion of Judge Pejchal; ECtHR, *Mocanu and Others v. Romania*, Appl. no. 10865/09, 45886/07 and 32431/08, Judgment of 17 September 2014, para. 7, Dissenting Opinion; ECtHR, *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, Appl. no. 31045/10, Judgment of 8 April 2014, paras 4, 10, Concurring Opinion.

[79] ECtHR, *Orlandi and Others v. Italy*, Appl. no. 26431/12, 26742/12, 44057/12 and 60088/12, Judgment of 14 December 2017, para. 2, Dissenting Opinion of Judge Pejchal.

[80] See, e.g., ECtHR, *Liga Portuguesa de Futebol Profisionnal c. Portugal*, Appl. no. 4687/11, Judgment of 17 May 2016, paras 1, 4, French language Dissenting Opinion of Judge Motoc.

However, *jura novit curia* can potentially go both ways, depending on which vision of the Court's role in a given case judges take. For instance, in *Radomilja*, the Chamber judgments used it for progressive purposes and found a violation. But we will see further below that, in recent years, the principle has (mostly) been used to speed up decision-making by reducing the number of claimed human rights violations, thus potentially offering less protection to applicants and reducing states' liabilities under the ECHR. In this sense, whether the judges decide to apply or not to apply the principle does not say a lot about whether they have a progressive or conservative vision of the ECtHR's role. This may explain why no judge contests the principle itself but only specific applications that do not fit with his or her idea of what the interpretation or outcome in a case should be. When it leads to the finding of human rights violations, it may serve a vision of judicial activism, but it does not have to do so automatically. Rather, the question becomes when judges decide to see or use the principle and when they do not. And, here, the question of consistency and legal realism comes into play. *Radomilja* has certainly turned a spotlight on the principle of *jura novit curia* playing a role in such a context with the potential of determining a case all the way up to the ECtHR's Grand Chamber. In this way, *jura novit curia* can be identified as a new interpretive tool – like 'margin of appreciation' or 'European consensus' – which can sway a decision in one way or another, depending on judges' understandings of the case or the Court's role.[81]

B *Assessing the Court's Use of the Principle*

In order to fully understand the implications of the *jura novit curia* principle and its emerging role before the ECtHR, it makes sense to look beyond the case law and into the broader debates surrounding the principle so as to assess the Court's use. The difficulties in distinguishing between law and facts at the international level have (also) been raised by former ECtHR Judge Dean Spielmann. He has noted that the Court is, in principle, not obliged to 'know' and interpret national law because that is considered to be the national courts' task, and national law is usually treated as part of the fact pattern. However, when certain provisions of the ECHR, such as Articles 5 or 7, refer directly to national law, the lines between facts provided by the applicant(s) and law to be known by the ECtHR become blurred. Indeed, in such cases, there is an obligation of the Court to interpret these national provisions in the light of the convention, thus potentially subjecting national law to re-characterization.[82]

Beyond the technical details of the distinction between law and facts, there are broader policy and strategic considerations that the principle raises for human rights bodies. A number of factors that can all be gleaned – to a larger or lesser extent – from the Court's case law may thus favour or disfavour the use of the *jura novit curia* principle and provide

[81] A separate discussion – beyond the scope of this article – is whether the ECtHR should or could refer to *jura novit curia* as an 'autonomous concept'. On this notion and the related discussions, see Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *European Journal of International Law* (2004) 279.

[82] Spielmann, *supra* note 26, at 529–534.

some hypotheses, if not explanations, on why it is used in one particular case in a certain way and not in another. The first one depends on whether judges see the Court's role as that of providing broader protection to a public interest in human rights that goes beyond a specific case and the individual interest(s) involved in the litigation before them. If they do, then resorting to the *jura novit curia* principle is more likely. Indeed, references to this broader role of the Court protecting the ECHR as a whole appear in *Handyside*. Here, the ECtHR provided that 'the provisions of the Convention and of the Protocol form a whole [and] once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of the proceedings and concerning facts submitted to its examination'.[83]

A second factor is legal certainty, in the sense that similar cases should not be decided differently merely due to the different submissions made by applicants and their lawyers. This guarantee of certainty and equity amongst similar cases is particularly important when the Court has been shifting its own jurisprudence and case law in a specific area to ensure that subsequent cases are decided under the new jurisprudential approach.[84] One example is the (not so recent) shift in the Court's approach towards Articles 2 and 3. Indeed, for both provisions, the ECtHR has held that they encompass a substantial and a procedural aspect – that is, a state is not only substantively responsible for violations of these provisions but also procedurally if the investigations and prosecutions into those cases are inexistent or insufficient.[85] Since then, there has been a whole range of cases where applicants alleging Article 6 or Article 13 violations, alone or combined with Article 2 or Article 3 violations, have had their claims re-charaterized under the procedural limb of Articles 2 or 3, thus dropping the other procedural claims.[86]

Another example in the Court's jurisprudence has taken place in cases involving domestic violence or violence against women more broadly (for example, rape, human trafficking), which also entail re-characterizations via the *jura novit curia* principle. Indeed, in the early years, such cases were rather decided as procedural complaints under Articles 6 and 13 alone or combined with more limited substantive claims under Article 8.[87] Certainly since the landmark case *Opuz v. Turkey*,[88] the

[83] *Handyside*, *supra* note 16, para. 41.

[84] On this, see also Shelton, *supra* note 5, at 197.

[85] For Article 2, this principle was introduced for the first time in ECtHR, *McCann and Others v. United Kingdom*, Appl. no. 18984/91, Judgment of 27 September 1995. It was extended to Article 3 a few years later in ECtHR, *Assenov and Others v. Bulgaria*, Appl. no. 24760/94, Judgment of 28 October 1998.

[86] For the many cases in this domain, see, e.g., ECtHR, *Lazăr c. Roumanie*, Appl. no. 32146/05, Judgment of 16 February 2010; ECtHR, *Anusca v. Moldova*, Appl. no. 24034/07, Judgment of 18 May 2010; ECtHR, *Baldovin v. Romania*, Appl. no. 11385/05, Judgment of 7 June 2011; ECtHR, *Şerban c. Roumanie*, Appl. no. 11014/05, Judgment of 10 January 2012; ECtHR, *Bouyid v. Belgium*, Appl. no. 23380/09, Judgment of 21 November 2013; ECtHR, *Mučibabić v. Serbia*, Appl. no 34661/07, Judgment of 12 July 2016; ECtHR, *Boacă and Others v. Romania*, Appl. no. 40355/11, Judgment of 12 January 2016; ECtHR, *Kraulaidis v. Lithuania*, Appl. no. 76805/11, Judgment of 8 November 2016; *Mazukna v. Lithuania*, Appl. no. 72092/12, Judgment of 11 April 2017; ECtHR, *Kosteckas v. Lithuania*, Appl. no. 960/13, Judgment of 13 June 2017; ECtHR, *Ebru Dincer v. Turkey*, Appl. no. 43347/09, Judgment of 29 January 2019.

[87] See, e.g., ECtHR, *X and Y v. The Netherlands*, Appl. no. 8978/80, Judgment of 26 March 1985 (in which the rape of a disabled girl was analysed under Article 8 only, despite Articles 3 and 14 also having been raised in the complaints); ECtHR, *Janković v. Croatia*, Appl. no. 38478/05, Judgment of 5 March 2009 (in which the attacks and threats by the flatmates of a female applicant were analysed under Article 8 only despite the applicant having raised an Article 3 violation in her complaints as well).

[88] ECtHR, *Opuz v. Turkey*, Appl. no. 33401/02, Judgment of 9 June 2009.

Court's jurisprudence has shifted, re-characterizing limited procedural complaints as substantive, conceptually coherent and gender-sensitive claims of gender-based violence cases under Articles 2 (right to life), 3 (prohibition of inhuman and degrading treatment) and/or 14 (prohibition of discrimination). Examples of this trend include *Valiulienė v. Lithuania*,[89] *Talpis v. Italy*,[90] *M.G. c. Turquie*,[91] *Bălşan v. Romania*[92] and *Buturugă v. Romania*.[93]

A last example of how the ECtHR clarifies, harmonizes or equalizes its case law via the mechanism of *jura novit curia* is in the conceptual relation of cases claiming Article 10 (freedom of expression) and/or Article 11 (freedom of assembly) violations. Here, the ECtHR holds that freedom of assembly is a special case, *lex specialis*, compared to the general case, *lex generalis*, of freedom of expression, and implicitly or explicitly re-characterizes such claims as Article 11 ones wherever the facts of the case are related to the context of a demonstration.[94]

A third factor is that *jura novit curia* offers a certain degree of protection to inexperienced applicants in the sense that, at least in theory, they would need to describe the facts only and the judges will then identify the correct law applicable to those facts. This aspect is possibly less present in the Court's case law because the Rules of Court (in theory) require a concise and legible statement of the alleged violation(s) of the ECHR.[95] Additionally, the ECtHR has indicated that applicants' pleas to domestic courts must be substantively similar to the complaints later presented in Strasbourg.[96] Nevertheless, we have seen a few cases where the Court does provide its own view of the law when the parties fail to do so.[97] It is probable that this happens mainly at the less visible level of communication of cases to the parties. Similarly, it may be that, in some extraordinary cases, the Court feels that *jura novit curia* offers more protection to applicants, even experienced ones. Take, for example, the judgment *Hiller v. Austria*, a case involving the suicide of the applicant's son, who had escaped from an open ward after being under a court order of involuntary placement.[98] The Court found no violation under Article 2, which was the only violation that the applicant had claimed. In his concurring opinion, Judge András Sajó, invoking *jura novit curia*, indicated that the case could have been re-characterized under Articles 3 or 8, which bear lower standards, and under which the ECtHR may have found violations.[99]

89 ECtHR, *Valiulienė v. Lithuania*, Appl. no. 33234/07, Judgment of 26 March 2013, paras 42–43.

90 ECtHR, *Talpis v. Italy*, Appl. no. 41237/14, Judgment of 2 March 2017, paras 76–77.

91 ECtHR, *M.G. c. Turquie*, Appl. no. 646/10, Judgment of 22 March 2016.

92 ECtHR, *Bălşan v. Romania*, Appl. no. 49645/09, Judgment of 23 May 2017.

93 ECtHR, *Buturugă c. Roumanie*, Appl. no. 56867/15, 11 February 2020, para. 44.

94 See, e.g., ECtHR, *Gülcü v. Turkey*, Appl. no. 17526/10, Judgment of 19 January 2016, para. 74; ECtHR, *Işikirik v. Turkey*, Appl. no. 41226/09, Judgment of 14 November 2017, para. 41; ECtHR, *Zülküf Murat Kahraman v. Turkey*, Appl. no. 65808/10, Judgment of 16 July 2019, para. 33.

95 Rules of Court, *supra* note 59, Art. 47, para. 1(f).

96 See, e.g., ECtHR, *Cardot v. France*, Appl. no. 11096/84, Judgment of 19 March 1991.

97 See notes 39, 41 and 43 above.

98 *Hiller*, *supra* note 38.

99 *Ibid.*, paras 1, 4, Concurring Opinion of Judge Sajó.

The fourth factor is that *jura novit curia* is used more frequently when international courts have a negative view of the judicial system of the relevant jurisdictions.[100] This distrust of certain countries' national judicial authorities is perhaps less visible overall before the ECtHR.

A fifth factor, which possibly best hypothesizes the ECtHR's increasingly frequent invocation of *jura novit curia* in recent years is the desire to reduce its docket. In fact, the rise in the principle's use corresponds to the time that the Court was overwhelmed with cases; in 2011, the pending applications had reached a peak of almost 152,000,[101] which later waned to 79,750 in 2016[102] and 56,250 in 2018.[103] One explanation for this reduction in pending applications can certainly be found in the institutional reforms, such as Protocol no. 14. Another one is that the Court also regularly refuses to analyse certain claims, especially with regard to Article 14,[104] when it believes that they have already been addressed with regard to a different provision. At times, it does so without resorting to *jura novit curia*.[105] One can thus see the principle's use as the Court's explicit contribution to addressing a structural issue – namely, the reduction of case backlog by limiting the number of articles and violations that need to be analysed and by shifting the alleged violations to articles that the judges are most familiar with, allowing quicker and more efficient administration of justice.

The fact that the backlog of cases is related to the *jura novit curia* principle can be deduced from a dissenting opinion, referred to earlier, in which Judges Kūris and Yudkivska mused that 'the case had been pending before the Court for too long. It was too old (the application dates back to 2010). But the backlog of pending cases is a problem of a different nature, and it cannot be solved in a satisfactory way by deciding cases under the "wrong" Articles, when there is new case-law making it clear under what Article they should be examined'.[106] The judges thus admitted implicitly that the mechanism was or could be used to reduce the Court's case load. Similarly, in another earlier Grand Chamber judgment, not dealing with *jura novit curia*, in which the Court had accepted to decide a case both under Article 6 and Article 13 claims, Judge

[100] On these factors, see Walter, *supra* note 12, at 569–570. On explanations for the Inter-american system's more extensive use of the principle, see Shelton, *supra* note 5, at 200–202.

[101] ECtHR, *Analysis of Statistics of 2011*, at 6, available at www.echr.coe.int/Documents/Stats_analysis_2011_ENG.pdf.

[102] ECtHR, *Analysis of Statistics of 2016*, at 6, available at www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf.

[103] ECtHR, *Analysis of Statistics of 2018*, at 6, available at www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf.

[104] The elimination of Article 14 via *jura novit curia* also emerges in a set of cases by Serbians claiming that the violence taking place against them in Croatia during the Yugoslav wars was directed against them due to their ethnicity. See, e.g., ECtHR, *Treskavica v. Croatia*, Appl. no. 32036/13, Judgment of 12 January 2016, para. 31; ECtHR, *M. and Others v. Croatia*, Appl. no. 50175/12, Judgment of 2 May 2017, para. 52; ECtHR, *Trivkanovic v. Croatia*, Appl. no. 12986/13, Judgment of 6 July 2017, para. 43; ECtHR, *Milić and Others v. Croatia*, Appl. no. 38766/15, Judgment of 25 January 2018, para. 22.

[105] It would probably require another analysis to better understand when and why the ECtHR explicitly reduces the provisions it deems to be violated via *jura novit curia* or simply does so by deeming it unnecessary to analyse the facts of a case under a different provision that the applicants had also raised.

[106] *Brisc*, *supra* note 72, para. 37, Dissenting Opinion of Judge Kūris, joined by Judge Yudkivska.

Josep Casadevall indicated that the additional violation of Article 13 would not solve structural endemic problems and would also not facilitate the reduction of the Court's caseload.[107]

Nevertheless, these explanations or favourable readings of the principle's use should not conceal the problems that may be caused by its excessive invocation, especially if it is invoked only to address a formidable backlog of cases. First, the question is whether one can speak about *jura novit curia* at all, given that the Court here 'simply' refuses to analyse certain articles raised by the applicants. More than *jura novit curia* and (re-)characterizing the law, the issue seems to be whether the Court can or must address all claims brought forward by applicants or whether it can disregard some, without adequately addressing them. Second, expediency and efficiency can lead to claims not being analysed sufficiently and/or being quickly subsumed under other violations for which the Court has more established case law and thus can apply the law more 'mechanically' and in a safer manner. This comes at the price of not only fully addressing all claims raised but also foregoing new developments. Indeed, one can observe that, in earlier years, the ECtHR more frequently added provisions that applicants had not raised in their initial pleadings.[108] Recently, the trend is the opposite. From a comparative perspective, the Court's practice of using *jura novit curia* to reduce the types or numbers of violations differs from that of the Inter-American institutions where the mechanism is used, more often than not, to increase the numbers of provisions deemed to be violated, compared to those raised by the parties.[109]

Beyond the five factors that may explain the Court's use of *jura novit curia* over the past years, other dangers or drawbacks have been mentioned in Shelton's comparative analysis of the European and Inter-American human rights systems and her critique of how the latter system has been overusing the principle. She has found the practice particularly problematic when the principle is used at later stages of proceedings, where it potentially creates inequalities of arms and reduces rights of defence for parties against whom the new argument is raised. Applicants may perceive a reformulation of their claims as reducing their right of access to justice because the Court's interests or concerns are being placed above theirs and because it ultimately may undermine a court's legitimacy where a point of law is introduced that permits one party to succeed on the basis of a claim that would otherwise not have been part of the case.[110]

[107] ECtHR, *Kudla v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000, para. 4, Partly Dissenting Opinion of Judge Casadevall. Reasoning *a contrario*, reducing possible violations would indeed facilitate such a reduction.

[108] See, e.g., *Guzzardi*, *supra* note 27 (Article 5 and Article 6 claims added *ex officio* during the whole procedure to Article 3, 8 and 9 claims raised initially by the applicant); *Guerra*, *supra* note 2 (adding Article 2 and 8 claims to Article 10 claims raised initially by the applicants); ECtHR, *Sultan Öner et autres c. Turquie*, Appl. no. 73792/01, Judgment of 17 October 2006 (adding Article 5, para. 1 claims *ex officio* to Article 3, 8 and 13 claims raised initially by the applicants); ECtHR, *B.B. c. France*, Appl. no. 5335/06, Judgment of 17 December 2009; ECtHR, *Gardel v. France*, Appl. no. 16428/05, Judgment of 17 December 2009 (both essentially adding Article 8 to Article 7 claims raised initially by the applicant).

[109] See Shelton, *supra* note 5, at 201, n. 54, 55.

[110] *Ibid.*, at 210–211.

The argument of inequalities of arms as a limit to the principle's use is an interesting one, which has some traction in more adversarial understandings about trials and procedures, especially in common law jurisdictions and non-criminal law trials. Nevertheless, it seems that this critique can be tempered for international human rights courts where disputes are normally between individuals and the state and thereby characterized by an inherent inequality of arms and where *jura novit curia* could actually equal the playing field in favour of applicants and potential victims of human rights violations.

Overall, some of Shelton's misgivings can be extended to the ECtHR as well. It may thus be wiser for the Court to confine the use of the principle to the initial levels of procedure, ideally when communicating a case to the parties and/or at the Chamber judgment level to correct for blatant errors of legal characterization or where not doing so creates the potential for an outrageous injustice or inequality between similar cases, and to use it when a case reaches the Grand Chamber only very exceptionally. Keeping the use of the principle to a minimum and to the earlier moments of a procedure before the Court would also limit the criticisms of inconsistency that have emerged from case law analysis or at least make such inconsistency less visible or consequential. Last but not least, it would also be advisable to avoid using the principle as a mere way of speeding up and/or reducing the Court's case load.

4 Conclusion

Over the past 10 years, the ECtHR's use of the *jura novit curia* principle has been on the rise in terms of the total number of cases. From its origins as an implicit and marginal phenomenon, it has developed into a fully-fledged instrument in the Court's interpretive toolbox. This has certain advantages that can be explained by a number of factors emerging from the case law and the literature, though there may be a certain price to pay. Besides procedural issues related to the rights of defence, using the principle as a means of efficient reduction of the case docket may actually diminish protection against human rights violations. Moreover, recent case law demonstrates that some judges are worried about the consequences of such an increased use of the principle, which beyond technical legal aspects may, if it is deployed in an unprincipled manner, undermine the Court's legitimacy. Ultimately, this article demonstrates how this seemingly anodyne and rather under-analysed procedural principle may in practice be indicative of diverging conceptions of the Court's role as a protector of human rights.