Faculteit Rechtsgeleerdheid

Universiteit Gent

Academiejaar 2012-2013

THE ROLE OF EUROPEAN CONSENSUS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Masterproef van de opleiding
'Master in de rechten'

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Academic Year 2012-2013

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Master's dissertation to qualify as
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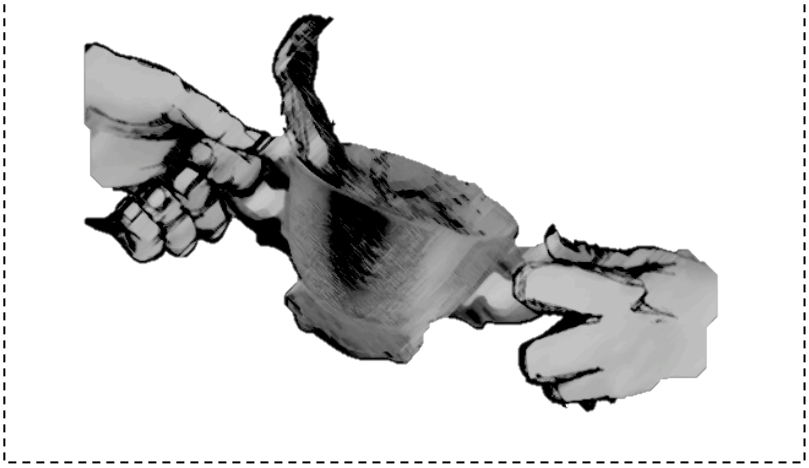

Preface

"Hinderlagen liggen daar, voor hinden klaar"

(Jotie T'Hooft)

"While I'm writing, I'm far away;
and when I come back, I've gone"

(Pablo Neruda)

Choosing to write a Master's dissertation entitled "The role of European consensus in the jurisprudence of the European Court of Human Rights" was a hostage to fortune. I am aware that one could do several years of research and write an entire book on the subject of this dissertation. Therefore, I would like to stress that I have limited my research and text within the bound of what was manageable over a span of two years.

It has been my intention that any reader who has a basic knowledge of European human rights law can read and comprehend this dissertation. Therefore, at the outset, I tried to briefly indicate at which point European consensus plays a role in the European Court of Human Rights' jurisprudence.

This Master's dissertation would not have seen the light of day without the help of several individuals. First of all, I have had the luck to be taught European human rights law by professor dr. Yves Haeck and professor dr. Johan Vande Lanotte, who were able to raise my great interest in human rights law. This interest resulted in contacting professor Haeck and choosing the topic that would haunt my head for the next two academic years. It is with great pleasure that I look back on corresponding with and talking to professor Haeck about this dissertation's topic. Although I spent one of the two years that I was writing this thesis on exchange at the University of Neuchâtel in Switzerland, he offered me the best possible guidance from a distance.

Further, I have had the great pleasure and privilege of interviewing the former Vice-President of the Court, professor dr. Françoise Tulkens. Her comments were invaluable in order for me to understand the use of consensus from the viewpoint of the Court. I would also like to thank Ms. Tulkens' assistant, Ms. Sylvie Ruffenach, who arranged the interview.

I was pleased to talk to and correspond with dr. Kanstantsin Dzehtsiarou, who has written multiple contributions on the subject of this dissertation in the framework of his Ph.D. thesis. He provided me with invaluable sources and was willing to collaborate with regard to the continuation of his statistical research, which was vital for this dissertation.

Ms. Genevieve Woods, the European Court of Human Rights' Deputy of the Library deserves to be mentioned here as well, as she elucidated the comparative law method applied by the Court.

I am also grateful to Lieve Stevens, who has read and commented parts of this dissertation.

I am further lucky to count Len Vandenheede among my oldest friends, as he familiarised me with the general principles of statistics.

I consider this work as the icing on the cake after five years of studying law. I developed myself as a person and as a lawyer. I have explored my interests and can conclude that human rights will always play an important role in redeeming my ambitions. During the course of my legal studies, I have always been able to count on the invaluable support of my mother and father, Carmen De Buysscher and Peter Van Melkebeke, wherefore I will be grateful forever. My most heartfelt thanks finally goes out to Tristan Verminck, who provided me with some critical comments after proofreading this dissertation and who reminded me of my ideals at crucial times.

Writing this preface is where the story of European consensus ends for me, and where it begins for you. I hope you will enjoy it.

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1. Introduction

"The European Convention on Human Rights is the only real and concrete realisation of the Universal Declaration of Human Rights. Let us take new steps to strengthen this system further."

(Thorbjørn Jagland, High-Level Conference on the future of the European Court of Human Rights)

Human rights or fundamental rights and freedoms are universally applicable rights, that all human beings are equally entitled to, regardless of nationality, place of residence, sex, national or ethnic origin, economic background, race, religion, language, or other status.[1]

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "European Convention" or "Convention") aims to achieve "collective enforcement of certain rights stated in the Universal Declaration [of Human Rights][2]".[3] In the preamble to the European Convention reference is made to the aim of the Council of Europe to achieve greater unity between its members. Collective enforcement of human rights and fundamental freedoms is one of the steps towards a common democratic and legal area throughout Europe.

Undoubtedly, one of the most effective ways to ensure the implementation of human rights on an international level is the creation of a single human rights court. The European Court of Human Rights (hereinafter: "the European Court of Human Rights", "the Court" or "Strasbourg") plays a fortifying role in ensuring the protection of human rights throughout Europe. The success-story of the Court is merely due to its strong commitment not to interpret the 63-year-old text of the Convention based on the intention of the initial drafters, but to consider it as a living instrument.[4] Nevertheless, this approach should not lead to arbitrary interpretations of the Convention. Hence, it is the Court's task to strike a balance between an evolutive approach and the necessary stability.[5]

In light of the sovereignty of states, when it comes to applying the Convention, Strasbourg leaves a certain breadth of deference to the Contracting States. This *margin of appreciation*

[1] J. Vande Lanotte and Y. Haeck, *Handboek EVRM,* I (Antwerp, Intersentia 2005) p. 3; Amnesty International, "Human Rights Basics", <www.amnestyusa.org/research/human-rights-basics>; Office of the High Commissioner for Human Rights, "What are human rights?", <www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>.
[2] Universal Declaration of Human Rights, 10 December 1948.
[3] Preamble to the European Convention on Human Rights and Fundamental Freedoms, 4 November 1950.
[4] L. R. Helfer, "Consensus, Coherence and the European Convention on Human Rights", 26 *Cornell International Law Journal* (1993), p. 134.
[5] K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", 12 *German Law Journal* (2011), p. 1730.

allows the Contracting States to live up to the European human rights against their own political, social and economic background. In measuring the scope of the margin of appreciation in a given case, one of the criteria taken into consideration by the Court is the existence of European consensus. The Court applies comparison in order to establish to what extent a certain common standard on the interpretation of a fundamental right exists between the Contracting States or even globally. There is an inverse relation between European consensus and the margin of appreciation: the more the Court is able to identify a European standard, the narrower the margin of appreciation of the Contracting States.[6]

The criticism on the Court being a *'gouvernement des juges'* is as old as the hills. The last years this criticism however reached unprecedented heights.[7] Although a more thorough analysis of the origins would be required to confirm this, the high peaks of criticism can be supposed to have something to do with the increased nationalism on the European continent.[8] This criticism should however be put in perspective, as it only stems from a minority of Contracting States and the media often magnifies the issues.

The criticism culminated in the prospect of the inclusion of the margin of appreciation doctrine in the preamble of the Convention, as decided at the Brighton High-Level Conference in April 2012.[9] This should however be considered a small concession, taking into account the actual aim of the criticising Contracting States of including the doctrine in the Convention. Instead of imposing an obligation on the Court, the inclusion in the preamble only creates a general principle of interpretation.[10]

The reference to consensus and comparative law emerged alongside the criticism on the Court, as they are means for the Court to take into account the Contracting States' law and practice. The call for judicial restraint from different corners of the Council of Europe can at least be expected to herald a more prominent role for Europe consensus in the future case law.

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[6] Y. Haeck, Y. and C. Burbano Herrera, *Procederen voor het Europees Hof voor de Rechten van de Mens* (Antwerp, Intersentia 2011) p. 133 and 138; D. Regan, "European Consensus: A Worthy Endeavour For The European Court of Human Rights?", 14 *Trinity College Law Review* (2011), p. 51-52; A.W. Heringa, "The 'Consensus Principle'. The role of 'common law' in the ECHR case law", 3 *Maastricht Journal of European and comparative law* (1996), p. 109-110.

[7] See for instance: T. Baudet, "Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie", *NRC,* 13 November 2010, <http://vorige.nrc.nl/article2641416.ece> and N. Watt, "David Cameron calls for reform of European Court of Human Rights", *The Guardian*, 25 January 2012, <www.guardian.co.uk/law/2012/jan/25/david-cameron-reform-european-court>.

[8] Interview with Françoise Tulkens in D. Leestmans, "Over fundamentele rechten is er geen onderhandelingsruimte", 267 *Juristenkrant* (2013), p. 8-9.

[9] Brighton Declaration of 20 April 2012, para. 12, b).

[10] Annex "Interview with former Vice-President of the Court Tulkens", p. III.

2. Research: scope and method

2.1 Consensus: a versatile concept

2.1.1 The subsidiarity principle

The Court's process of decision-making is premised by the subsidiarity principle. This principle is based on the presumption that the national representative bodies are better equipped than the Court to determine the right answer to national issues.[11] Hence, "[t]he national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."[12] Consequently, only if the national authorities are incapable of dealing with their function to answer human rights issues that rise in their country, the Court will take up the responsibility to determine right from wrong in terms of the Convention.[13] Although the subsidiarity principle is not literally enshrined in the Convention, the Court confirmed that it forms an inherent part of the human rights protection framework.[14]

2.1.2 The interpretation – application dichotomy

In order to substantiate its decisions regarding the interpretation and application of the Convention, the European Court of Human Rights applies a wide spectrum of principles and doctrines. Although both aspects influence the decision process, a dichotomy between *interpretation* and *application* principles can be identified.

Six *interpretation* principles can be summed up. Firstly, the principle of *effet utile* implies that the Convention should be interpreted in a way that the Convention rights are effective, not illusory. Secondly, the Convention should be interpreted as a *living instrument*, not as a rigid set of rules drawn up by the founding fathers. Thirdly, the principle of *autonomous interpretation* denotes the independent, European meaning of certain Conventional concepts. Fourthly, the *rule of law* guarantees the protection against arbitrariness and legal uncertainty. Fifthly, the Court often refers to the values inherent to *democracy* as a reference for the interpretation of the Convention rights. Finally, the principle of proportionality requires competing interests to be balanced commensurately.

The number of *application* doctrines can be limited to two: the margin of appreciation doctrine and the fourth instance doctrine. The *margin of appreciation* indicates the room of

[11] C. L. Rozakis, "The European Judge as Comparatist", 80 *Tulane Law Review* 2005, p. 272.
[12] ECtHR (Judgment) 23 July 1968, Case No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* v. *Belgium*, para. 10. The decisions and judgments of the European Court of Human Rights are available on <www.echr.coe.int>.
[13] Vande Lanotte and Haeck, *supra* n. 1, p. 179-180.
[14] ECtHR (Judgment) 23 July 1968, Case No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* v. *Belgium*, para. 10.

manoeuvre that is accorded to the Contracting States with respect to the application of the Convention rights. The *fourth instance doctrine* distinguishes the task of the Court as a Convention watchdog from that of an appeal body that reconsiders internal judicial decisions.[15]

2.1.3 Consensus as a pawn in the interpretation and application process

The lion's share of doctrine analyses European consensus in light of the margin of appreciation doctrine.[16] Nevertheless, European consensus is a versatile concept the use whereof is not limited to the identification of the margin of appreciation's ambit. The concept also serves as a helpful tool for the interpretation of vague terms,[17] the assessment of proportionality,[18] the evolutive interpretation of legal concepts[19] and the balancing of public interest.[20]

Accordingly, the Court's analysis of consensus is a *method within methods* that plays a role in both the *interpretation* and the *application* of the Convention rights.

2.1.4 Consensus as a multidimensional method

The appearance of consensus is a phenomenon that can be observed in the behaviour of all human beings, on every level and with respect to an unlimited range of stimuli.

In the past, the Court has analysed consensus among Contracting States, consensus within the Court, consensus outflowing from the Council of Europe's legislative acts, consensus on the international level, consensus within a specific Contracting State, consensus among experts, consensus among scientists, and so on.

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[15] Vande Lanotte and Haeck, *supra* n. 1, p. 179.

[16] E.g.: E. Benvenisti, "Margin of appreciation, consensus, and universal standards", 31 *N.Y.U. Journal of International Law and Politics* (1998-1999), p. 843-854; Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia 2002); A. A. Ostrovsky, "What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals", 1 *Hanse Law Review* (2005), p. 47-64; D. Spielmann, "Allowing the Right Margin - The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver of Subsidiarity of European Review?", February *CELS Working Paper Series* (2012), <www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf>; A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford, Oxford University Press 2012).

[17] E.g.: ECtHR (Judgment) 18 June 1971, Cases No. 2832/66; 2835/66; 2899/66, *De Wilde, Ooms and Versyp ("vagrancy")* v. *Belgium*, para. 90.

[18] E.g.: ECtHR (Judgment) 28 November 1984, Case No. 8777/79, *Rasmussen* v. *Denmark*, para. 41.

[19] E.g.: ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 90.

[20] K. Dzehtsiarou, "European Consensus: a way of reasoning", 11 *CD Working Papers in Law, Criminology & Socio-Legal Studies* (2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411063>, p. 1; E. Brems, *Human rights: universality and diversity* (The Hague, Nijhoff 2001), p. 413-414.

Until the Court identifies the types of consensus it takes into consideration, we can only guess which rabbits the Court is yet to pull out of its hat.

2.2 Delimitation of research

2.2.1 Definition

Most definitions of consensus in legal doctrine are interwoven with the typology of its use. In this dissertation, research was undertaken to identify the independent definition of consensus as applied by the Court.

2.2.2 Impeachment of the comparative approach

The method applied by the Court to identify consensus is often called 'comparative law'. Therefore, it seemed useful to take a closer look at what the Court really undertakes to conclude that consensus is absent or present and whether this qualifies as true comparison.

2.2.3 No typology of applications

A profound analysis of the complete spectrum of applications of consensus by the Court resulting in the identification of a *typology of applications* of the *method within methods* and the appreciation of the legality thereof would be a great topic for a doctoral thesis. It would however be unmanageable to take on such an endeavour within the framework of a Master's dissertation.

This dissertation therefore focuses on the use of consensus within one *interpretation* principle, the Convention as a living instrument, and within the *application* principle of the margin of appreciation.

2.2.4 Typology of dimensions

Creating a comprehensive but non-exhaustive typology of dimensions of consensus as identified and taken into account by the Court was a manageable task to include in a Master's dissertation. Hence, an overview of typologies proposed by influential scholars is followed by a non-inclusive typology based on a study of both jurisprudence and doctrine.

2.2.5 Rationale

This dissertation further sheds light on the fundamental reasons of the Court to include consensus in its reasoning. Again not trying to be inclusive, this dissertation evaluates the reasons for using consensus with an open mind, touching upon not only procedural and legal arguments, but even psychological rationales.

2.2.6 Evolutive interpretation and margin of appreciation

As pointed out above, the evolutive interpretation of the Convention and the margin of appreciation are highlighted as the most relevant interpretation and application method wherein consensus plays a crucial role. Therefore, these methods were profoundly researched and described, before identifying the role of consensus as a *method within these methods*.

2.2.7 Trend analysis

In order to illustrate the topicality and importance of researching consensus, the penultimate chapter includes a trend analysis of the case law in this regard. The Court's HUDOC database served as a starting point for trend research.[21] The trend analysis was carried out based on the classical principles of statistics.

2.2.8 Criticism

As European consensus is a multifaceted concept that has not yet been structurally and lucidly addressed by the Court, it might sometimes serve as a loophole for the Court to broadly interpret its discretionary powers or on the contrary, to hide judicial restraint. Hence, consensus leaves room for the necessary progressivism but also creates the danger of using consensus as a veil for arbitrary judicial restraint or imperialism.

The benefits and drawbacks of consensus as applied today are put in the scale. In order to keep an open mind in appreciating the pros and cons, this dissertation glances at the use of consensus by the U.S. Supreme Court. This balancing exercise results in the creation of a roadmap for the future application of European consensus.

2.3 Method

This dissertation is based on both positive and normative research. The first and most bulky part is based on an empiric analysis of jurisprudence and doctrine. It tries to identify the bigger picture of consensus as it appears in the Court's case law today and tries to reveal the reasons behind the use of such a multifaceted concept. In order to attain that goal, an interview was conducted, jurisprudence was analysed and doctrine was studied, compared and considered. As it is important to look at both the eyes that look at consensus from a distance and the eyes that look at consensus from 'within the palace walls', the opinions of certain judges is referred to in this dissertation. DZEHTSIAROU already conducted several interviews in 2008-2009.[22] These interviews and an interview that took place on 13 May 2013 with

[21] HUDOC can be consulted on <http://hudoc.echr.coe.int/sites/eng/>.
[22] K. Dzehtsiarou, "Consensus from within the Palace Walls", 40 *CD Working Papers in Law, Criminology & Socio-Legal Studies* (2010), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678424>.

former Vice-President of the Court TULKENS allowed the inclusion of an inside-view in this dissertation.[23]

In the second part recommendations are formulated as to the future use of consensus. Although the reasoning behind these recommendations often originates in the positive research undertaken, this part can rather be labelled as based on normative research.

Throughout this dissertation, theory and case law are interwoven. It is therefore appropriate to recall the absence of formal *stare decisis* in the case law of the Court.[24] "However, [the Court] usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so."[25] An example of such a 'cogent' reason is the emergence of consensus.[26] Hence, when judgments are cited, this is to exemplify the application of certain principles to certain matters and to demonstrate the continued practice of such application by the Court.

[23] The interview with Vice-President Tulkens can be consulted in the Annex to this dissertation.
[24] ECtHR (Judgment) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 35; ECtHR (Judgment) 18 January 2001, Case No. 27238/95, *Chapman* v. *the United Kingdom*, para. 70.
[25] ECtHR (Judgment) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 35.
[26] ECtHR (Judgment) 18 January 2001, Case No. 27238/95, *Chapman* v. *the United Kingdom*, para. 70; ECtHR (Judgment) 7 July 2011, Case No. 23459/03, *Bayatyan* v. *Armenia*, paras. 103-109.

3. Defining consensus

The European Convention does not define consensus. The Court in its turn has not defined the concept and has referred to consensus with a broad array of terms such as "common ground"[27], "developments and commonly accepted standards"[28], "great majority of member States of the Council of Europe"[29], "a great number of member States of the Council of Europe"[30], "evolution"[31], "emerging international consensus amongst the Contracting States of the Council of Europe"[32], "any European consensus"[33], "general trend"[34], "most of the Contracting States"[35], "almost all the member States of the Council of Europe"[36], "general consensus of the international community"[37], and so on.

The examples of terminology used by the Court refer to both the definition and typology of consensus. This chapter of this dissertation makes an attempt to provide a general definition of consensus, in order to go on to identify the different types of consensus later on. In that respect, as the title of this dissertation suggests, the focus throughout this dissertation will lay on *European* consensus. Nevertheless, as will become apparent below, the Court's use of the concept is not limited to Europe. The Court often refers to international consensus as well. Hence, the starting point of this dissertation should be to identify a definition of consensus *in general*.

HELFER defines *European* consensus as "a certain measure of uniformity" between "rights-enhancing practices and policies among the Contracting States that affect human rights".[38] HELFER's analysis about European consensus left aside, most scholars writing about consensus in the Court's jurisprudence immediately classify the types of consensus or focus on the different applications of consensus and its rationale without identifying a general definition of consensus first.[39] DZEHTSIAROU listed up relevant criteria for defining consensus but has refrained from pouring those criteria into a single definition.[40] Therefore, it is useful to extract the relevant criteria for defining consensus from the terminology used by the Court,

[27] ECtHR (Judgment) 28 November 1984, Case No. 8777/79, *Rasmussen* v. *Denmark*, para. 40.
[28] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 31.
[29] ECtHR (Judgment) 24 February 1983, Case No. 7525/76, *Dudgeon* v. *the United Kingdom*, para. 60.
[30] ECtHR (Judgment) 18 December 1986, Case No. 9697/82, *Johnston and others* v. *Ireland,* para. 74.
[31] ECtHR (Judgment) 13 June 1979, Case No. 6833/74, *Marckx* v. *Belgium,* para. 57.
[32] ECtHR (Judgment) 18 January 2001, Case No. 25289/94, *Lee* v. *the United Kingdom*, para. 95.
[33] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, para. 90
[34] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, para. 62.
[35] ECtHR (Judgment) 13 February 2003, Case No. 42326/98, *Odièvre* v. *France*, para. 47.
[36] ECtHR (Judgment) 7 July 2011, Case No. 23459/03, *Bayatyan* v. *Armenia*, para. 123.
[37] ECtHR (Judgment) 26 March 2013, Case No. 33234/07, *Valiulienė* v. *Lithuania*, Footnote 6.
[38] Helfer, *supra* n. 4, p. 134.
[39] E.g.: H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Kluwer law international 1995) 224 p.; Legg, *supra* n. 16, p. 25; D. Spielmann, "Consensus et marge d'appréciation nationale", 29 *Journal des tribunaux* (2012), p. 592-593.
[40] Dzehtsiarou, *supra* n. 20, p. 2-3.

in order to evaluate the ordinary and legal meaning of consensus and to mold all general criteria into one definition.

The judges empaneling the Organising Committee of the Dialogue between judges that took place in 2008 in Strasbourg took a "general agreement between the members of one group" as the basic definition of consensus.[41] Judge KOVLER however separately proposed another definition for consensus: consensus indicates an "agreement on the main points and on modern European rules and principles of human rights protection, without precluding differences as to the details and the means of applying those principles and rules, in other words without imposing a mechanistic unanimity."[42]

According to the Oxford English Dictionary[43], consensus can be defined as a "general agreement". This definition clearly served as inspiration for the Dialogue between judges' Discussion paper. Black's Law Dictionary[44] however defines consensus as "the middle ground between agreeing and disagreeing". The purport of these definitions is different: the first requires a much higher degree of agreement than the second. It can however be derived from the Court's practice that, depending on the concrete use of the concept of consensus, both definitions can be in order.

Applying the common definition[45] would imply total unanimity always to be the basis for delimiting the margin of appreciation. As a consequence, the margin of appreciation exercise would rather be a question of verification than of balancing. For instance, if the Contracting States would unanimously consider homosexual intercourse to be equal to heterosexual intercourse, there would be no need to discuss the right to an equal age of consent for homosexual and heterosexual youth under Article 14 and 8 of the Convention.[46] If all Contracting States would unanimously agree on the moment when life commences, there would be no need to discuss the right to protection of the foetus under Article 2 of the Convention.[47] As a result, the consensus-test as a part of delimiting the margin of appreciation's scope would often prove to be superfluous.[48] Although total unanimity may appear from time to time, such cases are rather the rule than the exception. Mostly, the Court needs to consider the required degree of consensus in order to delimit the margin. Consequently, the use of the common definition of consensus in the margin of appreciation context would deny both logic and reality.

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[41] A. Kovler, V. Zagrebelsky, L. Garlicki, R. Jaeger and R. Liddell, Discussion paper prepared by the Organising Committee, Dialogue between judges, European Court of Human Rights, Council of Europe, 2008.
[42] A. Kovler, Dialogue between judges, European Court of Human Rights, Council of Europe, 2008.
[43] The Oxford English Dictionary, <http://oxforddictionaries.com>.
[44] B.A. Garner and H.C. Black, *Black's law dictionary* (St. Paul, West 2009, 9th ed.).
[45] Conveyed by the Oxford English Dictionary.
[46] ECtHR (Judgment) 9 January 2003, Case No. 39392/98 and 39829/98, *L. and V.* v. *Austria*.
[47] ECtHR (Judgment) 8 July 2004, Case No. 53924/00, *Vo.* v. *France.*
[48] See, in the same sense: Dzehtsiarou, *supra* n. 20, p. 2.

At first sight, the legal definition[49] of consensus seems to provide us with a more apposite approach when it comes to the margin of appreciation's ambit. The middle ground between *agreeing* and *disagreeing* basically means that a common denominator can be identified for a certain quantity of *agreeing* and *disagreeing* actors. The quantity of *agreeing* and *disagreeing* actors in support of this common denominator *required* for narrowing the margin will almost never amount to a unanimity requirement, but will fluctuate depending on the context, the type of right invoked and the extent to which the discussed issue has already been on the table at national, European and international fora.

Although the legal definition seems to be the one most closely resembling to the concept of consensus as used for the application of the margin of appreciation doctrine, consensus as used for other purposes such as the interpretation of vague concepts or the evolutive interpretation of the Convention can sometimes be understood in the sense of the common definition as well. For example, when the Court refers to international treaties ratified by all Contracting States in order to interpret vague concepts, it actually refers to consensus in the common sense of the word. In *Soering* v. *the United Kingdom*, the Court interpreted 'torture' as it is defined in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[50] Although consensus is sometimes understood as a 'general agreement', this occasionally required degree of agreement could be squared with the legal definition. The requirement of a general agreement in certain contexts can be considered as a sub-set of the requirement of a certain quantity of *agreeing* and *disagreeing* actors in support of an identified common denominator. *Qui peut le plus peut le moins*.

The literal concept of consensus needs to be distinguished from the concept of trend, which the Court often reverts to because of the lack of true consensus.[51] According to the Oxford English Dictionary, a trend is "a general direction in which something is developing or changing". According to Black's Law Dictionary, a trend is a "pattern showing the gradual change of a condition, process or average moving in one direction over time". These definitions denote a process towards a certain direction, while the definitions of consensus denote a current state. When applying the concept 'trend', the Court looks for gradual convergence among Contracting States. Such use of the concept of trend can be considered legitimate, taking into account that the Convention is a "living instrument"[52].

[49] Conveyed by Black's Law Dictionary.
[50] ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom*, para. 88.
[51] See, for instance: ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 85.
[52] ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom,* para. 102; ECtHR (Judgment) 23 February 2012, Case No. 27765/09, *Hirsi Jamaa and others* v. *Italy*, para. 175.

In *Christine Goodwin v. the United Kingdom*, concerning the legal recognition of a change of gender, the Court took the existence of a general trend into account:

> "The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition […]. In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post- operative transsexuals."[53]

Nevertheless, the existence of a clear trend mostly does not suffice to tilt the Court towards recognising a narrow margin of appreciation. In *S. H. and Others* v. *Austria*, the Court for instance concluded the following:

> "[T]here is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilisation, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State."[54]

However, the idea to replace consensus by trend on a more permanent basis has recently been mooted by several judges of the Court. In *X and Others* v. *Austria*, Judges CASADEVALL, ZIEMELE, KOVLER, JOČIENĖ, ŜIKUTA, DE GAETANO and SICILIANOS argued that consensus is somewhat restrictive and is rarely encountered in real life. They warned for the reductive view of the European situation and pleaded for a general adherence to trend instead of consensus.[55]

Although both concepts have a different meaning, the Court unfortunately does not clearly distinguish trend from consensus. In *Christine Goodwin* v. *the United Kingdom*, as cited above, the Court attached great importance to the existence of an international trend in favour

[53] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 85.
[54] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 96.
[55] ECtHR (Dissenting Opinion Casadevall, Ziemele, Kovler, Jočienė, Ŝikuta, De Gaetano and Sicilianos) 19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, para. 15.

of legal recognition of the new sexual identity of post-operative transsexuals under the heading "The state of any European and international consensus".[56] It is recommendable for the Court to clearly distinguish trend and consensus in the future; as to make it possible for applicants and defendants to identify the standard of review the Court applies with regard to consensus.

Unlike the writings of several scholars,[57] this dissertation will not use consensus as a generic term for consensus and trend. Both concepts will clearly be distinguished, but will both play a role for the analysis of the Court's case law.[58] The reason therefore is clear: when there is a lack of consensus, the Court checks whether there is an emerging trend which can still potentially lead to the narrowing of the margin of appreciation or to a certain interpretation of a legal concept.

In conclusion, from an abstract point of view, consensus can be defined as the required quantity of actors in support of an identified common denominator. The quantity required depends on the purpose of the use of this common denominator. Trend can be defined as the required degree of convergence among the members of a certain group, the intensity of which depends on the purpose of the use of the trend.

[56] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 84 and following.
[57] For example: Dzehtsiarou, *supra* n. 20, p. 2-3.
[58] This is the same approach as the one D. SPIELMANN applies in Spielmann, *supra* n. 16.

4. How the Court detects consensus

4.1 The comparative law flaw

The vast majority of scholars writing about the use of European consensus in the Court assume that there is a causal link between comparative law and the identification of European consensus.[59] Former Vice-President TULKENS however pointed out that this is not the case at this time. She explained that although comparative research is one of the main sources to identify European consensus, it is not always decisive. The Court itself is aware that the comparative research is not always highly qualitative, hence takes into account other factors as well. It looks at soft law and international treaties and the practice of other international or constitutional courts that was not included in the comparative research. According to TULKENS, judges still need to take into consideration the social, political and legal evolution in Europe and in the world – apart from the comparative research results – to decide whether the time is right to accommodate a certain right under the Convention umbrella.[60]

Comparative law surely has the potential of guiding the Court into the right direction. The lack of a causal link between comparative law and the identification of consensus is merely due to the lack of quality of the research results that reach the judges. Accordingly, it seems appropriate to discuss how comparative research takes place in the Court, to consider good and bad examples of reference to comparative law in the Court, to address the problems with regard to the current comparative research and to glance at the future.

4.2 The Strasbourg judge as an allround comparatist

Apart from the lack of a causal link between comparative research and the identification of consensus, the judges of the Court often seem to act as comparatists. It is recalled that consensus is a multifaceted concept. Hence, a wide range of parameters can be the subject of such comparison: the laws of the Contracting States, international or regional treaties, the state of science, the opinion of experts, social trends and so on. Thus, if the judges act as comparatists, they do not only address questions of comparative law, but they also involve comparative science and expertise. This can be encouraged, since, as RABEL properly phrased it:

> "The student of the problems of law must encompass […] everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country's history — war, revolution, colonisation, subjugation — religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes. […] Everything in

[59] I.a. Dzehtsiarou, *supra* n. 20, p. 1; Rozakis, *supra* n. 11, p. 257-279; Regan, *supra* n. 6, p. 55; Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 8; Brems, *supra* n. 20, p. 412.
[60] Annex: "Interview with former vice-president of the Court Tulkens", p. I-II.

the social, economic and legal fields interacts. The law of every developed people is in constant motion, and the whole kaleidoscopic picture is one which no one has ever clearly seen".[61]

4.3 Who's who?

Do the judges have to rely on their general knowledge or their Google skills in order to identify consensus? Or is there a legal department at the Court that specialises in comparison? DZEHTSIAROU identified the dynamics of comparison within the Court's walls through interviews with the judges. Former Vice-President of the Court TULKENS filed off the edges of his conclusions.

When consensus was still taking baby steps, the Court sometimes relied on the readily available knowledge of the judges or the comparative data provided by the parties, non-governmental organisations, amicus curiae and others. Hearing the criticism of many scholars, the Court however delegated the comparative research to the Research Division within the Registry of the Court. Nowadays, comparative surveys are undertaken for almost all Grand Chamber cases, as well as for some Chamber cases.

The Judge-Rapporteur, who examines the application, requests a research report focused on particular questions when necessary. The Research Division, consisting of five to six permanent staff members, then undertakes comparative research. The permanent staff members heavily rely on the help of interns at the Court for this research.

The Division sends its research results per country to the national lawyers working at the Court. These lawyers are required to check whether the Division's findings summarise the law and practice in their respective countries with respect to the issues to be compared. The report is signed by the judge of the Court elected in respect of the country discussed. The national lawyers then send the national reports back to the Division, which bundles the reports into one final report.

The final composite report is sent to the Judge-Rapporteur and the other judges of the Court. The judgments of the Court only contain the information from the report that was taken into consideration for the reasoning. The reports of the Division are confidential and cannot be accessed by the public.[62]

[61] E. Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung", in H. G. Leser (ed.), *Gesammelte Aufsätze*, III (Tübingen, Mohr 1965) p. 28.
[62] K. Dzehtsiarou, "Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights", Jul *Public Law* (2011), p. 548-549; K. Dzehtsiarou and V. Lukashevich, "Informed decision-making: The comparative endeavours of the Strasbourg court", 30 *Netherlands Quarterly of Human Rights* (2012), p. 273-274 and Annex: "Interview with former Vice-President of the Court Tulkens", p. I-II.

4.4 Legal basis for comparison

The legal basis for comparison is twofold. On the one hand it is a justifiable means of interpretation in light of the international principles of interpretation as identified in the Vienna Convention on the Law of Treaties[63] (hereinafter: "the Vienna Convention"). On the other hand, it is a consequence of the interpretation principles developed within the context of the European Convention itself.

According to Article 5 of the Vienna Convention, the Vienna Convention applies to "any treaty adopted within an international organization without prejudice to any relevant rules of the organization". This implies that next to the international interpretation principles, the Court was entitled to develop its own methods of interpretation, which it did. The Vienna Convention does not distinguish *interpretation* from *application* principles. Hence, the Court was rightfully in the position to develop both *interpretation* and *application* principles, like the discovery of consensus through comparative research.

The comparative method can also be situated in the context of Article 31(1) of the Vienna Convention, which provides that *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* Naturally, comparison leads the Court towards the ordinary meaning of legal concepts on a European or international level.

4.5 Spotting consensus in international treaties and regional legislation

At the outset, the question should be asked whether the Court actually *compares* in its search for consensus.

It can be observed that the Court often 'spots' fixed consensus and does not even need to start comparing. When the Court refers to international treaties or regional legislation, the Court does not engage in comparison in order to find consensus, but merely verifies the existence thereof. The comparative work normally has already been done before the international treaty or regional legislation was adopted.

4.6 Comparison and comparative law: trial and error

When the Court cannot revert to international treaties or regional legislation, it takes a look at the situation in the Contracting States, or sometimes even internationally, in order to find consensus.

[63] Vienna Convention on the Law of Treaties of 23 May 1969.

This reflection is often labelled as 'comparison'.[64] It should however be questioned whether this *supposed* comparison qualifies as *actual* comparison.

4.6.1 The comparison formula

To qualify as *actual* comparison, the reflection should be based on *comparable* data. Comparability follows from the presence of three elements. Firstly, there should be a *comparatum*: a given that one wants to compare. Secondly, there should be a *comparandum* or *comparanda*: a given or givens with which one wants to compare the *comparatum*. In order for the *comparatum* and the *comparandum* to be *comparable*, they need to fulfil the same function. This is called the principle of functionality.[65] Thirdly, comparability requires a yardstick in order to identify and evaluate similarities and dissimilarities: the *tertium comparationis*.[66] The process of comparing further implies identifying connections between the compared elements.[67]

As shown below, the identification of correct, comparable variables is of vital importance, as the achievement of the required degree of consensus can only be relevant when the sample of states or practices is relevant for the issue at stake.

4.6.1.1 The Good: X and Others v. Austria

A good example of the difficulty of comparing *comparable* and *correct* elements can be found in *X and Others* v. *Austria*, a case concerning the right for same-sex couples not to be discriminated against with regards to second-parent adoption[68] in light of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention.

In this case, the partner of a child's biological mother wanted to adopt the child. The biological father refused to consent. The Austrian Civil Code allows the court to override refusals without justifiable grounds. Nevertheless, the domestic courts refused the application to override the refusal as this would lead to second-parent adoption by a person of the same sex as the first parent. Article 182(2) of the Austrian Civil Code precludes the latter type of adoption.[69]

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[64] See, for instance: Heringa, *supra* n. 6, p. 109; Rozakis, *supra* n. 11, p. 257-279; Dzehtsiarou, *supra* n. 20, p. 4.
[65] K. Zweigert and H. Kötz, *An introduction to comparative law* (Oxford, Oxford University Press 1992, 2nd ed.) p. 31.
[66] D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek* (Deventer, Kluwer 1988) p. 129 and F. Gorlé, G. Bourgeois, H. Bocken, F. Reyntjens, W. De Bondt and K. Lemmens, *Rechtsvergelijking* (Mechelen, Kluwer 2007, 4th ed.) p. 34.
[67] Gorlé, Bourgeois, Bocken, Reyntjens, De Bondt and Lemmens, *supra* n. 66, p. 35.
[68] The adoption of one partner's biological child by the other partner, without terminating the legal rights of the other biological parent of the child.
[69] ECtHR (Judgment) 19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, paras. 55-57.

The Court found that there was a difference in treatment between the applicants and an unmarried heterosexual couple in which one partner wanted to adopt the other partner's biological child, as the latter would be capable to succeed. However, the Court accepted the legitimate aims raised by the Austrian Government: protecting the traditional family and the interests of the child. With regards to proportionality, the defence implicitly argued that the *comparatum* was the situation in Austria and the *comparandum* was identified as the situation in the other member States of the Council of Europe. The Government further argued that the *tertium comparationis* was the question whether or not second-parent adoption by same-sex couples was allowed. It appeared that second-parent adoption by same-sex couples was only allowed in ten member States of the Council of Europe. Hence, the defence argued that there was no European consensus and that there was a broad margin of appreciation.[70]

Nevertheless, the Court indirectly pointed out that the Government had taken the wrong *comparandum* and *tertium comparationis* as a basis for its 'lack of consensus' argument. The Court stated that the *comparandum* needed to be limited to the situation in ten Council of Europe member States which allow second-parent adoption by unmarried couples. In order to be able to correctly compare situations, the difference in treatment between heterosexual and homosexual couples further needed to be identified as the *tertium comparationis*. Consequently, the Court found that within that group of ten member States, only six states treated heterosexual couples and same-sex couples in the same manner. The Court considered that no conclusions could be drawn from such a narrow sample. Therefore, the Court reaffirmed the narrow margin of appreciation when it comes to issues of discrimination on the grounds of sexual orientation to be examined under Article 14.[71] Based on this narrow margin and other considerations, the Court concluded that the absolute prohibition of second-parent adoption for homosexual couples in Austria was not proportional as it was not necessary. Hence, the Court found that there had been a violation of Article 14 in conjunction with Article 8 of the Convention.[72]

This indirectly technical comparison carried out by the Court was not spared from criticism. Judges CASADEVALL, ZIEMELE, KOVLER, JOČIENĖ, ŠIKUTA, DE GAETANO and SICILIANOS partly dissented, partly based on the 'consensus' issue. They questioned the identification of the *comparandum*:

> "This approach raises above all a methodological issue, regarding the "sample" of member States to be taken into account. Should this have been confined to States whose legal systems lent themselves to a

[70] ECtHR (Judgment) 19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, paras. 55-57, 130, 137-138.
[71] ECtHR (Judgment) 2 March 2010, Case No. 13102/02, *Kozak* v. *Poland*, para. 92 and ECtHR (Judgment) 24 July 2003, Case No. 40016/98, *Karner* v. *Austria,* para. 41.
[72] ECtHR (Judgment)19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, paras. 77, 148-149.

near-automatic comparison with that of the respondent State, or should legislation relating to the wider context of the case also have been taken into consideration?"[73]

The dissenting judges firstly found that a technical comparison of legal systems leads to the risk of losing sight of the major trends in Europe. They pleaded for the use of trends instead of consensus, since the latter is, according to them, rarely encountered in real life. Nevertheless, the dissenting judges limited their own discovery of trends to looking into international legal instruments. Secondly, they criticised the Court's restraint of identifying lack of consensus.[74]

The technical approach to legal comparison with regards to consensus, identifying the situation in ten member States as sole *comparandum*, while there was information on 39 Council of Europe member States available, was also criticised in legal doctrine. SMET found it "puzzling" that the Court took such a narrow sample into account and did not recognise the lack of consensus.[75] Although KOKKINI-IATRIDOU probably would beg to differ with the first argument, one could agree on the second point of criticism put forward by the dissenting judges and SMET. If the Court decides to identify a narrow *comparandum*, for the sake of clarity it should apply the consensus principle to that narrow *comparandum* and thus recognise the lack of consensus when the balance is four to six. However, it can be supposed that the reticence of the Court in this respect was motivated by its refusal to set aside the established inverse relation between the margin of appreciation and consensus.[76] Probably the Court neither wanted to depart from the narrow margin of appreciation normally granted with respect to issues of discrimination on the grounds of sexual orientation.[77]

This case can be considered a milestone as the majority of the Court labelled the family as an asexual concept. Moreover, by confirming that "same-sex couples could in principle be as suitable or unsuitable for adoption" as heterosexual couples, the Court recognised the comparable situation of homosexual and heterosexual couples wanting to start a family.[78] With regards to the technicalities of legal comparison, this judgment can be labelled as 'the good example'. Nevertheless, as the Court did not draw conclusions from the apparent lack of

[73] ECtHR (Dissenting Opinion Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos) 19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, para. 13.
[74] ECtHR (Dissenting Opinion Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano and Sicilianos)19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, paras. 14-22.
[75] S. Smet, "X. and Others v. Austria (Part II): A Narrow Ruling on a Narrow Issue", 6 March *Strasbourg Observers* (2013), <http://strasbourgobservers.com/2013/03/06/x-and-others-v-austria-part-ii-a-narrow-ruling-on-a-narrow-issue/>.
[76] The inverse relation between the margin of appreciation and consensus will be elaborated on below.
[77] The narrow margin of appreciation with respect to issues of discrimination on the grounds of sexual orientation was confirmed in for instance ECtHR (Judgment) 2 March 2010, Case No. 13102/02, *Kozak* v. *Poland*, para. 92 and ECtHR (Judgment) 24 July 2003, Case No. 40016/98, *Karner* v. *Austria,* para. 41.
[78] See also in that sense: G. Puppinck, "X. and Others v. Austria (Part I): Had the Woman Been a Man…" 4 March *Strasbourg Observers* (2013), < http://strasbourgobservers.com/2013/03/04/x-and-others-v-austria-part-i-had-the-woman-been-a-man/>.

consensus, it seems to have used consensus as an *a posteriori* argument to underpin its judgment. Hence, the outcome could have appeared more reasonable if the Court would have declared European consensus as irrelevant for the finding of discrimination.[79] Nevertheless, the Court's judicial activism with regards to the non-discrimination of same-sex couples can only be supported. *X and others* v. *Austria* can thus be labelled not only as an example of good *technical* comparison, but also as an example of ornamental *post hoc* use of the consensus argument to justify judicial activism.

4.6.1.2 The Bad: Leyla Şahin v. Turkey

In *X and others* v. *Austria*, the Court was clearly aware of the need to identify the correct variables to be able to conduct a valuable comparison in order to discover the existence of European consensus. Unfortunately, this is not always the case. The Court sometimes identifies *comparanda* that are too broad for the comparison required for determining consensus on a specific issue.

In *Leyla Şahin* v. *Turkey*, a student was suspended from school after wearing an Islamic headscarf to class, contrary to Istanbul University's rules. As to the interference with Miss Şahin's freedom of religion as guaranteed by Article 9 of the Convention, the Grand Chamber endorsed the Chamber's finding. Wearing an Islamic headscarf was inspired by Miss Şahin's belief and regulations that restricted the possibility to do so interfered with her freedom to manifest her religion. The Court went on to check whether the escape clause's requirements could be met. As the Court found a legal basis for the restriction and acknowledged the protection of public order and the rights and freedoms of others as a legitimate aim for the restriction, the only thing left to assess was the necessity of the restriction in a democratic society.[80]

With regards to the necessity of the prohibition to wear headscarves to courses and exams, the Court took recourse to comparison. The prohibition at Istanbul University was implicitly identified as *comparatum.* The legal situations in twenty European countries were identified as *comparanda*. The *tertium comparationis* was the regulation of wearing religious symbols in educational institutions. The Court did neither distinguish university education from primary and secondary education nor explain the choice for the twenty countries mentioned. The Court concluded that the diversity of approaches of the compared countries implied a broad margin of appreciation. In light of that broad margin and the need to protect public order as well as the rights and freedoms of others and secularism, the Court decided that there had been no breach of Article 9 of the Convention.[81]

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[79] See, in the same sense: Smet, *supra* n. 75.
[80] ECtHR (Judgment) 10 November 2005, Case No. 44774/98, *Leyla Şahin* v. *Turkey*, paras. 14-28, 76, 98-99.
[81] ECtHR (Judgment) 10 November 2005, Case No. 44774/98, *Leyla Şahin* v. *Turkey*, paras. 55-65, 109-110, 122.

Judge TULKENS was the sole dissenter in this case. Among other disagreements, she argued that the Court should have taken the regulation with regards to wearing religious symbols at universities as *tertium comparationis* instead of wearing religious symbols in educational institutions. She further implicitly argued that the regulations of all Council of Europe member States needed to be identified as *comparanda.* Applying these variables, she reached the conclusion that none of the member States extended the ban on wearing religious symbols to university institutions. She stressed that children at primary and secondary schools cannot be compared to university students, since the latter are young adults who are less amenable to pressure. For lack of necessity in a democratic society, Judge TULKENS found that there was no violation of Article 9 of the Convention.[82]

Judge TULKENS' reasoning can be fully supported for two reasons. Firstly, the majority seems not to have considered thoroughly which *tertium comparationis* was appropriate for the issue at hand. The case considered the wearing of religious symbols at universities. One cannot compare the amenability of young children that have not reached the age of discernment to that of teenagers and certainly not to that of young adults who are able to resist external pressure. Secondly, the Court committed a 'cherry picking' fallacy by pointing at only twenty member States that seemed to confirm the great diversity in Europe and thus the lack of consensus. It should be stressed however that an argument against the conclusion of lack of consensus cannot be built based on this fallacy. The conclusion of lack of European consensus could as well be reached if all member States were included in the comparison.

4.6.1.3 And the Ugly: Cossey v. the United Kingdom

In *Cossey* v. *the United Kingdom*, the Court was confronted with the situation of Barry Kenneth Cossey, who was born as a boy but psychologically was of the female sex. Barry underwent surgery and changed her name into Caroline. She became a successful fashion model and married a mister X. The relationship of mister X and Caroline Cossey came to an end a couple of months later. Miss Cossey was aware that she was not recognised as a woman in her birth certificate and that a marriage between two men by birth was void under English law. As she sought financial relief after the break-up, Miss Cossey seized this opportunity to have the marriage pronounced void. Nonetheless, Miss Cossey alleged before the Court that the impossibility for her to claim full recognition of her changed status and to enter into a valid marriage with a man violated Articles 8 (right to respect for private and family life) and 12 (right to marry) of the Convention.[83]

In assessing the alleged violation of both Article 8 and 12, the majority of the Court took recourse to the continued existence of little common ground, which was earlier pointed out in

[82] ECtHR (Dissenting Opinion Tulkens) 10 November 2005, Case No. 44774/98, *Leyla Şahin* v. *Turkey*, paras. 55-65, 109-110, 122.
[83] ECtHR (Judgment) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, paras. 9-14, 27.

Rees v. *the United Kingdom*[84]. The Court concluded that the states enjoyed a wide margin of appreciation with regards to the legal recognition of transsexuals' new status and their ability to marry a man or woman who has the same sex as the post-operative transsexual's previous one. Moreover, the Court saw no reason to adapt the interpretation of Articles 8 and 12 as it was of the opinion that the present-day conditions had not changed since *Rees* v. *the United Kingdom*. Hence, the Court did not depart from the *Rees* judgment and concluded that Articles 8 and 12 were not violated by the non-recognition of a post-operative transsexual's new status.[85]

The "little common ground" as put forward by the Court was based solely on "the reports accompanying the resolution adopted by the European parliament on 12 September 1989 […] and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989".[86] The problem in *Cossey* v. *the United Kingdom* from a technical comparative point of view was that the Court did neither clearly identify the *tertium comparationis* nor identify the connections between the compared situations. The Court limited itself to referring to documents of the Council of Europe, not clarifying the national developments on which it based its conclusion. This even though the majority of judges in *Rees* v. *the United Kingdom* had explicitly reserved its right to reconsider its opinion on the lack of legal recognition for post-operative transsexuals in the light of societal developments.[87]

> "That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. However, the Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances […]. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments." [88]

Thus, the *tertium comparationis* in *Cossey* needed to be identified as the societal views (as externalised in laws, judgments and tolerance in general) with regard to the legal recognition for post-operative transsexuals and the *comparanda* needed to be the situation in the Council of Europe member States.

Dissenting Judge MARTENS found in that respect that there were "cogent reasons" to overrule the earlier decision in *Rees* v. *the United Kingdom*. He argued that the present-day conditions had changed since the latter case, and that the conclusion of "little common ground" did not correspond with reality at the time of Cossey's application. Judge MARTENS implicitly

[84] ECtHR (Judgment) 17 October 1986, Case No. 9532/81, *Rees* v. *the United* Kingdom.
[85] ECtHR (Judgment) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, paras. 40, 46.
[86] ECtHR (Judgment) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 40.
[87] This was also stressed by dissenting Judges Palm, Foighel and Pekkanen: ECtHR (Dissenting Opinion Palm, Foighel and Pekkanen) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 2.
[88] ECtHR (Judgment) 17 October 1986, Case No. 9532/81, *Rees* v. *the United* Kingdom, para. 47.

compared the non-recognition of the post-operative status of transsexuals in the United Kingdom to the societal views in that respect in other Council of Europe member States. Accordingly, he found that fourteen member States made available gender reassignment. Although he agreed that there still needed to be a margin of appreciation for the States to deal with the issue at hand, he concluded that this margin should not be too broad as legal recognition was made possible in a considerable number of States.[89]

In *Cossey* v. *the United Kingdom*, the majority of the Court provided an example of inaccurate comparative analysis. The reason for this could be the wish of the Court to use consensus as an ornamental argument to justify its reasoning, passing of a hidden agenda.

> "One cannot but conclude that the reasons given for the Court's refusal to accept the societal developments as material are based on a distortion of the real state of affairs and are therefore far from convincing.
>
> The explanation may be that behind these explicit arguments lie hidden policy arguments. From judgments such as those in the Marckx case, the Dudgeon case, the Rees case, the case of F.v. Switzerland and the Cossey case [49] one gets the impression that the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In such cases the Court's policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas."[90]

In conclusion, it can be argued that for the sake of predictability, justness and clarity, the Court should try to avoid using bad comparative analysis as a veil for quasi-inertia with respect to particular issues. Reflecting the comparison itself and the outcome thereof at least to some extent in detail in the judgment can be recommended as a basic dyke against the temptation to use the veil of consensus based on bad comparison.[91]

4.7 Comparative law vs. descriptive comparative law

The next question that is worth considering is whether the Court at this time truly applies *comparative law* in its search for consensus.

The cases described above demonstrated the difficulty for the Court to identify *comparable* variables and thus to carry out true comparison. The difficulty of the Court to live up to the comparison formula is however not the only argument against qualifying the Court's technique as *comparative law*.

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[89] ECtHR (Dissenting Opinion Martens) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, paras. 1.1, 5.5-5.6.
[90] ECtHR (Dissenting Opinion Martens) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 5.6.3.
[91] See in the same sense: Heringa, *supra* n. 6, p. 133.

At first sight, what the Court does – comparison of the solutions offered for specific legal problems – can be qualified as *microcomparison*. Of course, the Court also needs to bear in mind the spirit and style of the legal systems compared and thus sometimes needs to engage in *macrocomparison*.[92]

ZWEIGERT and KÖTZ pointed out that "one can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted. […] [T]his is best done if the author first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt which may involve a reinterpretation of his own system."[93]

The Court however most of the time merely limits itself to juxtaposing the solutions with regard to certain issues in the Contracting Parties. It directly draws conclusions with regards to consensus, without linking a value judgment to the solutions found in the studied countries.[94] This is what ZWEIGERT and KÖTZ label as "descriptive comparative law".[95]

The only situation in which the Court really, yet implicitly, draws conclusions from comparative law is when it engages in judicial activism. Then, the Court accepts a small degree of consensus as sufficient or a large degree of consensus as insufficient in order to interpret the Convention in one way or another or in order to delimit the margin of appreciation to a certain extent. Sometimes, the Court even disregards the (lack of) consensus that is apparent from the comparative description, as this would lead to an undesirable outcome according to the majority.[96] Hence, when the Court *actually* applies comparative law, it can be argued that it is not looking for consensus, but for the 'best' solution to a human rights issue.

4.8 Glancing at the future

To unleash the potential of comparative law as a source for the identification of European consensus, its quality should be increased. To that end, the Court is considering the establishment of collaboration with universities, who are capable of conducting scientifically correct research. Another possibility is to attach more weight to the comparative research presented by the third party interveners.[97] As the third party interveners with regard to a particular human rights issue mostly are experts on the topic, their research is very valuable to

[92] Zweigert and Kötz, *supra* n. 65, p. 4-5.
[93] Zweigert and Kötz, *supra* n. 65, p. 6.
[94] See, for instance: ECtHR (Judgment) 10 November 2005, Case No. 44774/98, *Leyla Şahin* v. *Turkey*, paras. 55-65, 109-110.
[95] Zweigert and Kötz, *supra* n. 65, p. 6.
[96] ECtHR (Judgment)19 February 2013, Application No, 19010/07, *X and Others* v. *Austria*, paras. 77, 148-149.
[97] Annex: "Interview with former Vice-President of the Court Tulkens", p. I.

the Court at this time. Nevertheless, as third party interveners might keep their own interests in mind while conducting research, the first option might be a better option for the future.

5. Typology of consensus

5.1 Doctrinal evolution

Many scholars have drawn up a typology of consensus by undertaking comprehensive surveys of the Court's case law.

In 1993, HELFER identified three types of consensus: (i) legal consensus as demonstrated by European domestic statutes, international treaties, and regional legislation; (ii) expert consensus and (iii) European public consensus.[98]

In 2008, Judge KOVLER distinguished three different groups of consensus: (i) consensus among the forty-six judges of the Court; (ii) consensus among the legal community and (iii) consensus demonstrated by the public opinion in the broad sense.[99]

By 2011, DZEHTSIAROU enumerated four types of consensus: (i) consensus amongst the majority of member States of the Council of Europe regarding certain values and moral principles identified through comparative analysis, (ii) international consensus identified through international treaties, (iii) internal consensus in the state in question and (iv) expert consensus.[100]

Hereinafter, this dissertation provides a comprehensive list of consensus types, without trying to be inclusive. Every type of consensus is illustrated with several cases wherein that type was applied. As the list of cases with reference to consensus is endless, an attempt was made to select several striking examples that demonstrate the constant appearance of all consensus types in the Court's case law. The typology of consensus and trend is assumed to be identical as, although the concepts imply a different meaning and often trigger a different outcome, their discovery and functionality is similar. Therefore, reference will be made to cases both referring to consensus and trend to illustrate each type.

5.2 Presence and absence of consensus

At the outset, it should be stressed that the influence of consensus on the Court's reasoning is not limited to its presence. Like the existence of consensus can trigger evolutive interpretation or narrowing the margin, the absence of consensus can stagnate interpretation and cause judicial restraint by allowing a broad margin to the Contracting States.

[98] Helfer, *supra* n. 4, p. 139.
[99] Kovler, *supra* n. 42.
[100] Dzehtsiarou, *supra* n. 20, p. 10. and Dzehtsiarou, *supra* n. 62, p. 534-535.

5.2.1 Odièvre v. France

In *Odièvre* v. *France*, the Court was confronted with the right of abandoned children to obtain information about their origins. Pascale Odièvre's mother abandoned her child and requested secrecy from the authorities in 1965. Years later, Pascale Odièvre wished to obtain identifying information regarding her origins, which was refused by the authorities.[101]

In France, a woman can give birth and abandon her child anonymously. Identity disclosure can only take place in case of the express consent of both mother and child. The Court sought refuge in comparative law and found that the possibility to give birth anonymously was rare in Europe. However, the Court also found that there was a trend towards discreet delivery in certain countries.[102]

The diversity of approaches to be found in the legal systems of the Contracting States prompted the court to affording a wide margin of appreciation to the States. It concluded that the States must be allowed the freedom to determine the means they assume best suited to protect the interests of both mother and child. In that respect, the Court found that France had not outstepped the margin of appreciation. Accordingly, it stated that there had been no violation of Article 8 (right to respect for private and family life) of the Convention.[103]

5.2.2 Evans v. the United Kingdom

In *Evans* v. *the United Kingdom*, the Court had to deal with the allegation of Ms. Evans that the United Kingdom's domestic laws concerning required consent for the use of embryos violated Article 2, (right to life), Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) in conjunction with Article 8 of the Convention. Ms. Evans had eggs fertilised by Mr. J. frozen in with the prospect of having them implanted later on, as she was the victim of ovary cancer. The relevant legislation in the United Kingdom requires the consent of both gamete providers and makes it possible for either of them to withdraw this consent at any time before the implementation in the uterus of the woman. Half a year after the fertilisation of the eggs and the removal of Ms. Evans' ovaries, the relation broke down and J. withdrew his consent. He requested that the embryos would be destroyed. Ms. Evans started judicial proceedings but was not heard.[104]

The Court compared the legislation and practice in the Council of Europe member States. It also looked at the situation in the U.S. and Israel at the request of the defendant. [105]

[101] ECtHR (Judgment) 13 February 2003, Case No. 42326/98, *Odièvre* v. *France*, paras. 10-14.
[102] ECtHR (Judgment) 13 February 2003, Case No. 42326/98, *Odièvre* v. *France*, paras. 15, 17, 19.
[103] ECtHR (Judgment) 13 February 2003, Case No. 42326/98, *Odièvre* v. *France*, paras. 47-49.
[104] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, paras. 14-28.
[105] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, paras. 39-49.

Regarding the alleged violation of Article 2, the Grand Chamber confirmed the finding of the Chamber that for lack of European consensus, the moment life begins can be decided by the states in light of their margin of appreciation. As English law does not afford independent rights to an embryo, it does not have a right to life under Article 2 of the Convention. Hence, the Court found that there had been no violation of that article.[106]

It further appeared that only eight Council of Europe member States allowed withdrawal of consent up to the moment of implementation of the fertilised embryo.[107] The Court accordingly stated:

> "[T]here is no uniform European approach in this field. Certain States have enacted primary or secondary legislation to control the use of IVF treatment, whereas in others this is a matter left to medical practice and guidelines. While the United Kingdom is not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices are applied elsewhere in Europe. It cannot be said that there is any consensus as to the stage in IVF treatment when the gamete providers' consent becomes irrevocable".[108]

The Court then went on to ascertain that there was no consensus on the question whether the Article 8 rights of the (future) infertile gamete provider should take precedence of those of the fertile gamete provider.[109]

The Court accordingly concluded that the margin of appreciation afforded to the respondent State was a wide one. It further found that the domestic legislation struck a fair balance between competing interests as the rules were clear and were brought to the attention of Ms. Evans. Hence, the Court found that there had been no violation of Article 8 and 14 of the Convention either. [110]

5.3 Typology

5.3.1 Consensus between the Contracting States

Consensus between the Contracting States is generally perceived as the 'classic' consensus type. It is identified by comparison of the legal practice in the Contracting States, as described above.[111]

[106] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, paras. 54-56.
[107] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, paras. 39-49.
[108] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, para. 79.
[109] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, para. 80.
[110] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, paras. 81,
[111] See Chapter 4: "How the Court detects consensus".

5.3.1.1 The Sunday Times v. the United Kingdom

The Sunday Times v. *the United Kingdom* was one of the earliest cases wherein the Court deployed the consensus criterion. This case concerned the drug thalidomide[112], the intake whereof by pregnant women led to severely deformed children from 1961 on. In order to raise awareness and to help parents obtaining higher settlement sums, the Sunday Times started publishing reports and articles on the deformed children. The paper announced that it would publish an article on the production, tests, and marketing of the medicine in a future article. The Attorney-General dealing with the case however received an injunction for restraining publication of that article for reason that it would constitute contempt of court. The injunction was discharged by the Court of Appeal but reinstated by the House of Lords. Accordingly, the Sunday Times alleged that the injunction to publish an article dealing with thalidomide children and their compensation claims *inter alia* violated Article 10 (freedom of expression) of the Convention.[113]

The Court referred to the concept of consensus when dealing with the necessity of the injunction in a democratic society to protect the authority of the judiciary.

> "The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area [i.e. the area of authority of the judiciary]. This is reflected in a number of provisions of the Convention, including Article 6 (art. 6), which have no equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation."[114]

This finding implied a narrow margin of appreciation for the United Kingdom. Consequently, the Court found that lacking pressing social need caused a lack of necessity in a democratic society. Accordingly, there had been a violation of the freedom of expression.[115]

5.3.1.2 Zaunegger v. Germany

More recently, in *Zaunegger* v. *Germany*, the Court referred to consensus among the Contracting States in light of a father wishing to obtain joint custody of a child born out of wedlock. As the father and the mother of the child had not made a joint custody declaration, the mother obtained sole custody after their separation. The national authorities dismissed Mr. Zaunegger's request. Mr. Zaunegger complained that his rights under Article 14 (prohibition of discrimination) of the Convention taken in conjunction with Article 8 (right to respect for private and family life) of the Convention had been violated. He alleged that he was treated differently in comparison with the mother, as he had no opportunity to obtain joint custody

[112] Publicly known better under its brand name 'softenon' in Belgium.
[113] ECtHR (Judgment) 26 April 1979, Case No. 6538/74, *The Sunday Times* v. *the United Kingdom*, paras. 8-37, 42.
[114] ECtHR (Judgment) 26 April 1979, Case No. 6538/74, *The Sunday Times* v. *the United Kingdom*, para. 59.
[115] ECtHR (Judgment) 26 April 1979, Case No. 6538/74, *The Sunday Times* v. *the United Kingdom*, paras. 58-68.

without the mother's consent. He further claimed that he was treated differently in comparison with married or divorced fathers, for whom joint custody is possible after divorce or separation.[116]

The Research Division carried out comparative legal research and reached the following conclusion:

> "[T]he survey confirms that while different approaches exist in the Member States, the majority provide for paternal participation in custody if the parents were not married to each other, either irrespective of the mother's will or at least by court order following an evaluation of the child's interests."[117]

After the Court found that there had been a difference in treatment from both perspectives, it went on to consider whether this difference could be reasonably justified. The existing European consensus contributed to the Court's finding that a *prima facie* assumption that joint custody against the will of the mother is not in the child's best interest could not serve as a reasonable justification.[118]

> "While having regard to the wide margin of appreciation of the authorities, in particular when deciding on custody-related matters (see Sommerfeld v. Germany, cited above, § 63), the Court also considers the evolving European context in this sphere and the growing number of unmarried parents. The Court reiterates in this connection that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, among other authorities, Marckx v. Belgium, 13 June 1979, § 41, Series A no. 31, and Johnston and Others v. Ireland, 18 December 1986, § 53, Series A no. 112). The Court observes in this context that although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interest and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts."[119]

Subsequently, the Court found that the discrimination at issue could not be justified, as there was no reasonable relationship of proportionality between the total exclusion of judicial review of the mother's sole custody and the aim to protect the best interest of a child born out of wedlock. Hence, the Court found that there had been a violation of Article 14 in conjunction with Article 8 of the Convention.[120]

5.3.2 Consensus deducted from international treaties and regional legislation

After a thorough analysis of the text of the Convention and the Contracting States' domestic law, the judges might still disagree on the degree of development of a certain human rights

[116] ECtHR (Judgment) 3 December 2009, Case No. 22028/04, *Zaunegger* v. *Germany*, paras. 7-12, 28.
[117] ECtHR (Judgment) 3 December 2009, Case No. 22028/04, *Zaunegger* v. *Germany*, paras. 22-27.
[118] ECtHR (Judgment) 3 December 2009, Case No. 22028/04, *Zaunegger* v. *Germany*, paras. 48, 59.
[119] ECtHR (Judgment) 3 December 2009, Case No. 22028/04, *Zaunegger* v. *Germany*, para. 60.
[120] ECtHR (Judgment) 3 December 2009, Case No. 22028/04, *Zaunegger* v. *Germany*, paras. 63-64.

norm. In such cases, international treaties or regional legislation might offer guidance for the identification of consensus. Moreover, international or regional norms often indicate an *a priori existing* consensus among the member States of the Council of Europe. More in particular if treaties have been opened for signature exclusively to the Council of Europe's member States and have been signed by a large number of states, they serve as good indicia of a European common ground.[121]

The Court does not only revert to binding or operative treaties. For instance, it has in the past referred to treaties that had not yet entered into force and states practice.[122]

5.3.2.1 Golder v. the United Kingdom

In *Golder* v. *the United Kingdom*, a case concerning the right to a fair trial (Article 6) and the right to respect for correspondence (Article 8), the Court mentioned the Vienna Convention on the Law of Treaties for the first time. This reference was made in order to ascertain a method of interpretation for the Convention articles that was justifiable on the basis of consensus. Even though the Vienna Convention had not yet entered into force at the time of the judgment, the Court already considered Articles 31 to 33 of the Vienna Convention as generally accepted principles.[123]

5.3.2.2 Marckx v. Belgium

In *Marckx* v. *Belgium*, the Court dealt with the legal issues surrounding the creation of a legal bond between a mother and an "illegitimate child". Mother Paula and daughter Alexandra Marckx alleged that their rights under Articles 8 (right to respect for private and family life), 12 (right to marry) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 1 (protection of property) were violated by the Belgian requirements to establish maternal affiliation and the limited familial and patrimonial consequences of such establishment. In this regard, the Court made reference to several international instruments.

The Court firstly referred to Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children for the interpretation of "respect for private and family life", as applying to a single woman and her child, as they form a family no less than others. It further referred to the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children, a treaty that Belgium had not ratified at the time of the judgment. It also made reference to the Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock, a convention that had neither been signed nor ratified by Belgium. Both treaties are based on the *mater semper certa est* principle. The Court relied

[121] Helfer, *supra* n. 4, p. 161-162.
[122] For example: ECtHR (Judgment) 21 February 1975, Case No. 4451/70, *Golder* v. *the United Kingdom*, para. 29.
[123] ECtHR (Judgment) 21 February 1975, Case No. 4451/70, *Golder* v. *the United Kingdom*, para. 29.

on these treaties to support its view that there was a clear measure of common ground with regards to the recognition of equality of 'legitimate' and 'illegitimate' children. This common ground and the clear trend of recognition of the *mater certa semper est* magnum supported the Court's finding that the manner of establishing Alexandra Marckx' maternal affiliation violated Article 14 taken in conjunction with Article 8, with respect to both applicants.[124]

5.3.2.3 Autronic AG v. Switzerland

In *Autronic AG* v. *Switzerland*, the company Autronic alleged that the Swiss Post and Telecommunications Authority caused a violation of its right to freedom of expression under Article 10 of the Convention. The latter had made reception of television programmes from the Soviet telecommunications satellite G-Horizont by means of a dish aerial subject to the consent of the broadcasting state. In this case, the International Communication Convention, the European Convention on Transfrontier Television and the trends in other member States came into play after the Court had already found that the interference with Article 10 was prescribed by law and served legitimate aims. The Court implicitly found that the trend towards allowing the reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities of the country in which the station transmitting to the satellite is situated indicated the incorrect interpretation of the International Communication Convention by the Swiss government. This trend together with the finding that the special characteristics of telecommunications satellites could not justify the interference led to the conclusion that the interference was not necessary in a democratic society and that there had accordingly been a breach of Article 10 of the Convention.[125]

5.3.2.4 X and Others v. Austria

In *X and Others* v. *Austria,* regarding the prohibition of second-parent adoption for homosexual couples in Austria, [126] the Court examined several possible consensus types, by looking at international treaties such as the Convention on the Rights of the Child and the European Convention on the Adoption of Children, regional legislation and comparative studies.[127] The Court considered that no conclusions could be drawn from the narrow sample used in the comparative studies.[128] It went on to state that:

> "In the Court's view, the same holds true for the 2008 Convention on the Adoption of Children. Firstly, it notes that this Convention has not been ratified by Austria. Secondly, given the low number of ratifications so far, it may be open to doubt whether the Convention reflects common ground among European States at present. In any event, the Court notes that Article 7 § 1 of the 2008 Convention on the Adoption of Children provides that States are to permit adoption by two persons of different sex (who

[124] ECtHR (Judgment) 13 June 1979, Case No. 6833/77, *Marckx* v. *Belgium*, paras. 20, 31, 41, 43.
[125] ECtHR (Judgment) 22 May 1990, Case No. 12726/87, *Autronic AG* v. *Switzerland*, paras. 43, 53-63.
[126] This case was discussed above as an example of good technical comparison. See Chapter 4: "How the Court detects consensus".
[127] ECtHR (Judgment)19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, paras. 49-57.
[128] ECtHR (Judgment)19 February 2013, Case No, 19010/07, *X and Others* v. *Austria*, para. 149.

> are married or, where that institution exists, are registered partners) or by one person. Under Article 7 § 2, States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as "to different-sex couples and same-sex couples who are living together in a stable relationship". This indicates that Article 7 § 2 does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently. The Committee of Ministers' Recommendation of 31 March 2010 (CM/Rec (2010)5) appears to point in the same direction: paragraph 23 calls on member States to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples. In any event, even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, § 128, ECHR 2010 (extracts))."[129]

Although the Court had a wide range of comparative results at its disposal, it limited itself to stating that the samples used were too narrow. Hence, the Court refrained from arguing on the basis of (lack of) consensus and reaffirmed the narrow margin of appreciation when it comes to issues of discrimination on the grounds of sexual orientation to be examined under Article 14. Most probably, the Court side-tracked the comparative results because of the majority's desire to denounce the discriminatory absolute prohibition of second-parent adoptions.[130]

5.3.3 Internal consensus

The Court may consider internal consensus when there is an internal agreement in the respondent state regarding the issue on the table. The use of internal consensus will probably only seem justified to the citizens of the responding State if such consensus is deducted from the existence of a majority opinion. The Court should further be assured that there actually *is* consensus before it takes into account such criterion, as it is not desirable to simply take into account societal debated values as protected Convention values. [131]

As the emergence of internal consensus takes place on a different level (national) than the emergence of all other types of consensus (European), it can be argued that less value can be attached to its legitimising function. Such a criterion can namely appear to be a 'democratic legitimiser' to the defending States' nationals, but an arbitrary factor to other Contracting States' citizens.

The reference to the criterion of internal consensus will be further criticised in chapter 10.

[129] ECtHR (Judgment) 19 February 2013, Application No, 19010/07, *X and Others* v. *Austria*, para. 150.
[130] ECtHR (Judgment) 19 February 2013, Application No, 19010/07, *X and Others* v. *Austria*, paras. 149-153.
[131] Dzehtsiarou, *supra* n. 62, p. 550-552.

5.3.3.1 Tyrer v. the United Kingdom

In *Tyrer* v. *the United Kingdom*, a case concerning corporal punishment,[132] the Attorney-General for the Isle of Man relied on the existence of internal consensus. This was however not accepted as a *relevant* criterion by the Court, which stated:

> "The Attorney-General for the Isle of Man argued that the judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion in the Island. However, even assuming that local public opinion can have an incidence on the interpretation of the concept of "degrading punishment" appearing in Article 3 (art. 3), the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves. As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3 (art. 3), whatever their deterrent effect may be."[133]

5.3.3.2 Stafford v. the United Kingdom

In *Stafford* v. *the United Kingdom*, a case concerning the English 'tariff' system[134] for prisoners sentenced to lifelong imprisonment, the Court did take into account internal consensus based on the following reasoning:

> "While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, […]the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved […]
>
> Similar considerations apply as regards the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State. […] having regard to the significant developments in the domestic sphere, the Court proposes to reassess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention".[135]

The internal developments in the United Kingdom in this case contributed to the finding of the Court that a life sentence did not impose imprisonment for life as a punishment. Hence, it found that the detention of Mr. Stafford, who had already exhausted the punishment for his murder offence, could not be continued for reason of later fraud. Accordingly, the Court found that there had been a violation of Article 5 (right to liberty and security) of the Convention. [136]

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[132] See also below in Chapter 7: "Consensus as a tool for evolutive interpretation".
[133] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 31.
[134] The tariff system refers to the number of years a prisoner convicted to a lifelong sentence should be imprisoned.
[135] ECtHR (Judgment) 28 May 2002, Case No. 46295/99, *Stafford* v. *the United Kingdom*, paras. 10-27.
[136] ECtHR (Judgment) 28 May 2002, Case No. 46295/99, *Stafford* v. *the United Kingdom*, paras. 79, 81.

5.3.4 Expert consensus

The Court finally also reverts to expert consensus when dealing with highly delicate, complicated and technical issues. Expert consensus often refers to consensus in the scientific world. Although a helpful tool in case of lack of consensus in the legal practice of the Contracting States, expert consensus is often inexistent when it comes to controversial issues.[137]

It emerges from the case law that expert consensus is mostly not a decisive, but a supplementary argument. Moreover, it is mostly referred to in combination with other types of consensus.

5.3.4.1 F. v. Switzerland

In *F.* v. *Switzerland* the Court needed to consider whether the temporary prohibition of remarriage after divorce in Swiss law was compatible with Article 12 (right to marry) of the Convention. It recognised that the stability of marriage was a legitimate aim in the public interest. Referring to expert consensus, the Court however expressed its doubts regarding the appropriateness of the temporary prohibition of remarriage to achieve that aim.[138]

> "The Court […] doubts, however, whether the particular means used were appropriate for achieving that aim. In Switzerland itself, the Study Group on the partial reform of family law and subsequently the Committee of Experts on Family Law Reform would seem to have had similar doubts, since they recommended the repeal of Article 150 of the Civil Code […]."[139]

This finding contributed to the Court's conclusion that the temporary prohibition of remarriage was disproportionate to the legitimate aim pursued and that consequently, there was a violation of Article 12.[140]

5.3.4.2 L. and V. v. Austria

L. and V. were two Austrian men that had been convicted to imprisonment on probation because of homosexual acts with adolescents. Article 209 of the Austrian Code namely penalised homosexual acts of adult men with consenting 14 to 18 year olds. L. and V. alleged that this article and their conviction violated their right to respect for their private life as safeguarded by Article 8 of the Convention. They also alleged that the article was discriminatory under Article 14 in conjunction with Article 8 of the Convention, as

[137] Dzehtsiarou, *supra* n. 62, p. 552-553.
[138] ECtHR (Judgment) 18 December 1987, Case No. 11329/85, *F.* v. *Switzerland*, paras. 8, 30, 36.
[139] ECtHR (Judgment) 18 December 1987, Case No. 11329/85, *F.* v. *Switzerland*, para. 36.
[140] ECtHR (Judgment) 18 December 1987, Case No. 11329/85, *F.* v. *Switzerland*, para. 40.

heterosexual or lesbian relations between adults and adolescents between 14 and 18 years old were not prohibited.[141]

Taking into account the nature of the case, the Court directly examined the case under Article 14 in conjunction with Article 8 of the Convention. Dealing with the question of the existence of a justification for the different treatment of homosexuals and heterosexuals and lesbians, the Court took into account expert consensus and consensus between the Contracting States.

> "In *Sutherland,* the Commission, having regard to recent research according to which sexual orientation is usually established before puberty in both boys and girls and to the fact that the majority of member States of the Council of Europe have recognised equal ages of consent, explicitly stated that it was "opportune to reconsider its earlier case-law in the light of these modern developments".[142]

> "The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary to avoid "a dangerous strain ... be[ing] placed by homosexual experiences upon the sexual development of young males". However, this approach has been outdated by the 1995 parliamentary debate on a possible repeal of that provision. As was rightly pointed out by the applicants, the vast majority of experts who gave evidence in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, that is, shortly before the applicants' convictions, in January and February 1997 respectively, to keep Article 209 on the statute book."[143]

According to recent research, a different age of development of sexual orientation could not serve as a justification. Furthermore, the majority of the Council of Europe member States had recognised equal ages of consent. Hence, the margin of appreciation was to be interpreted narrowly and the 'justification box' from which Austria could draw was small.[144] Accordingly, the Court found that:

> "[t]o the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour".[145]

Hence, the Court concluded that there had been a violation of Article 14 in conjunction with Article 8 of the Convention.[146]

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[141] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, paras. 1, 3, 10-16, 34.
[142] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, para. 47.
[143] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, para. 51.
[144] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, paras. 47, 49-51.
[145] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, para. 52.
[146] ECtHR (Judgment) 9 January 2003, Cases No. 39392/98 and 39829/98, *L. and V.* v. *Austria*, para. 54.

6. Why Consensus?

6.1 The Europeanisation of legal concepts

At first sight, the use of a comparative approach by wielding the consensus principle is tenable, given that most social problems today confront the developed industrial countries with a high degree of urbanisation and democratic institutions more or less equally.[147] ANCEL called this the 'internationalisation of legal concepts'.[148] In Europe we can *a fortiori* speak of the 'Europeanisation of legal concepts'. The Contracting States are all being confronted with topics such as equal rights for same-sex couples, freedom of speech and the equality between men and women. Moreover, "the Council of Europe seeks to develop common and democratic principles on the European continent".[149] Hence, existing European consensus can serve as the ideal peg for the development of common principles with regard to common human rights issues.

6.2 Reinforcing legitimacy as an answer to lack of enforcement power

6.2.1 Enforcement issues today

The 6th Annual Report of the Committee of Ministers on the Supervision of the execution of judgments and decisions of the European Court of Human Rights demonstrates a decrease in the number of repetitive, well-founded, cases in which the Court has rendered a judgment and in the number of repetitive applications in general in 2012. 1710 repetition cases became final in 2010, 1606 in 2011 and 1438 in 2012. Although a positive trend of approximately 10% can be identified, the number of repetitive applications remains high.[150] The Director General of Human Rights and Rule of Law BOILLAT accordingly stated that:

> "The long term success of the current efforts thus hinges on the capacity of member States to continue to ensure that pilot judgments and other judgments revealing important systemic problems are rapidly and adequately executed – a priority under the new working methods."[151]

The Brighton High-Level Conference on the future of the European Court of Human Rights of 2012 hence deservedly reaffirmed the crucial role of the Committee of Ministers for the enforcement of the Convention and the Court's judgments.[152]

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[147] Gorlé, Bourgeois, Bocken, Reyntjens, De Bondt and Lemmens, *supra* n. 66, p. 89.
[148] M. Ancel, "Quelques considérations sur les buts et les méthodes de la recherche juridique comparative", in M. Rotondi (ed.), *Inchiesti di Diritto Comparato II: Buts et méthodes du droit comparé* (Padua, Cedam 1973) p. 3-13.
[149] Council of Europe, "Who we are", <www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en>.
[150] Council of Europe Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 6th Annual Report of the Committee of Ministers 2012*, <www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf>, p. 9, 11, 42-43.
[151] Council of Europe Committee of Ministers, *supra* n. 150, p. 11.
[152] Brighton Declaration of 20 April 2012.

The Report illustrates that enforcement of judgments remains a structural problem for human rights protection in Europe. One of the greatest impediments for the European Court of Human Rights to guarantee the abidance of the Contracting States to the Convention is the lack of coercive power to enforce its judgments. Moreover, coercive force does not ensure compliance. In order for Contracting States to comply, the judgments should possess authority. Hence, it is of substantial importance that the Contracting States consider the Court's judgments as legitimate. When the Contracting States consider the Court's judgments as legitimate because of the lucid method of reasoning, they will be inclined to self-enforce them.[153]

The lack of coercive authority of the Court's judgments is argued to have two causes. First, there is no legal bedrock to declare the Court's formally binding decisions enforceable. Second, it is often argued that the Court cannot fall back on true formal democratic legitimacy, as the proposed candidates that run for judge in the elections by the Parliamentary Assembly of the Council of Europe are not democratically appointed by the Contracting States' people.[154]

Consequently, legitimisers are searched to forestall the lack of coercive power. The Court has many spectators and is confronted with the difficult task to win them all over. The legitimisers must be acceptable to both the Contracting States and the general public. As the majority of the public mostly acquiesces in the decision of its state to accept the judgment, it is of utmost importance that the latter explicitly consents to the judgment.[155]

The Contracting States consented to the Convention dropwise. The initial signatory States agreed to a Convention that is now 63 years old, but never gave their express consent to the interpretive methods cultivated by the Court. Only the newer signatories were aware of the approach to new issues and the deployment of certain interpretive techniques by the Court before consenting to the Convention. Accordingly, DZEHTSIAROU argues that one would be jumping to conclusions by deducing legitimacy for the Court's judgments solely out of the consent of the Contracting States to the Convention.[156] LETSAS on the other hand argues that the approach grounded in a consent-based relation between the Contracting States does not fit in the Court's history and practice.[157]

[153] Dzehtsiarou, *supra* n. 62, p. 534-535.
[154] Dzehtsiarou, *supra* n. 62, p. p. 535-536 and European Court of Human Rights, *The ECHR in 50 questions*, <www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/50Questions_ENG.pdf>, p. 4.
[155] Dzehtsiarou, *supra* n. 62, p. 536.
[156] Dzehtsiarou, *supra* n. 62, p. 537.
[157] G. Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR", 15 *European Journal of International Law* (2004), p. 305.

As will be argued more extensively below, the consent to the Convention and the appointment of the judges of the Court cán be contemplated as factors guaranteeing the democratic legitimacy of the Court.[158]

Nevertheless, in order to act upon the criticism regarding lacking democratic legitimacy and to counter the structural enforcement problems in any case, the Court's needs to reinforce its authoritative power by reverting to other legitimisers.

6.2.2 In search for legitimisers

6.2.2.1 Procedural legitimacy based on foreseeability and consensus

DZEHTSIAROU argues that three theoretical schools relating to legitimacy can be distinguished: the school that focuses on outcome, the one that concentrates on procedure and another built around substance. He deservedly disregards legitimisers based on outcome, as the legitimacy of human rights judgments can impossibly be evaluated based on how the addressees feel about them. Procedural and substantive legitimisers can however contribute to authorising the judgments.[159]

In *Demir and Baykara* v. *Turkey*, the Court stated:

> "While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[160]

With regards to procedural legitimacy, the Court thus adheres to principles such as legal certainty, foreseeability and equality before the law. It also engages not to depart from precedents, except when there are convincing arguments to do so. On the level of procedural legitimacy, this creates room for another question. How can foreseeability still be guaranteed in case reasons to depart from precedents are imaginable? This is when consensus comes into play. Although it has never been the sole reason for a judgment of (non-) violation, consensus between the Council of Europe Member States indicates a chance that the Court will depart from its earlier precedents.[161]

[158] See chapter 10: "Criticising current consensus".
[159] Dzehtsiarou, *supra* n. 62, p. 537-538.
[160] ECtHR (Judgment) 12 November 2008, Case No. 34503/97, *Demir and Baykara* v. *Turkey*, para. 153.
[161] Dzehtsiarou, *supra* n. 62, p. 534.

6.2.2.2 Substantive legitimacy based on inclusive data consideration and correct comparison

Substantive legitimacy is based on the inclusion of all relevant data in the consideration of a case.[162] The Court's consideration of consensus based on the comparative report prepared by the Research Division bolsters the substantive legitimacy of judgments, as it contributes to the idea that the Court has looked for the best solution to a particular issue.[163]

It should however not be disregarded that the question of substantive legitimacy comes into play not only on the level of the judgment, but also on the level of the argument. Using consensus as a legitimiser does not imply that the consensus referred to was identified legitimately. In the process of identifying consensus as a legitimiser, all relevant data should be taken into account. The substantive legitimacy issue thus touches upon the issue of correct identification of comparable data and warns for 'looking for friends in a crowd'.[164]

6.3 Justification for a progressive approach

The European Court of Human Rights uses a teleological approach in order to interpret the Convention. Instead of looking in the rear mirror to the drafters' intentions, the Court looks at the Convention as "a living instrument".[165]

The evolutive approach needs to be understood bearing in mind the Council of Europe's aim to achieve greater unity between its members and its underlying conviction that fundamental freedoms are best maintained by a common understanding.[166]

In order to detect the present-day conditions in light whereof the Convention needs to be interpreted, the Court searches for consensus among the Contracting States.[167] To that effect, in *Cossey* v. *the United Kingdom*, in his dissenting opinion, Judge MARTENS argued that:

> "the development of common standards may well prove the best, if not the only way of achieving the Court's professed aim of ensuring that the Convention remains a living instrument to be interpreted so as to reflect societal changes and to remain in line with present-day conditions."[168]

The Committee of Ministers already struggles with the enforcement of the Court's judgments in general. It can be assumed that the struggle is even harder for judgments concerning new,

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[162] Dzehtsiarou, *supra* n. 62, p. 538.
[163] Dzehtsiarou and Lukashevich, *supra* n. 62, p. 274.
[164] See Chapter 4: "How the Court detects consensus".
[165] I.a. ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom,* para. 102; ECtHR (Judgment) 23 February 2012, Case No. 27765/09, *Hirsi Jamaa and others* v. *Italy*, para. 175.
[166] Preamble of the European Convention on Human Rights.
[167] Helfer, *supra* n. 4, p. 134.
[168] ECtHR (Dissenting opinion Martens) 27 September 1990, Case No. 10843/84, *Cossey* v. *the United Kingdom*, para. 3.6.3.

sensitive issues that are being dealt with based on an evolutive interpretation of the Convention. It can therefore be agreed with Judge MARTENS that consensus is an appropriate way of legitimately achieving a present-day interpretation of the Convention. It namely is the only 'democratic' legitimiser available next to consent to the Convention.

The concrete interplay between the evolutive interpretation of the Convention and consensus will be elaborated on in Chapter 7.

6.4 Putting the subsidiarity principle in practice

The overarching judicial protection of individual rights and freedoms envisaged by the Convention collides with deference to national decision-makers in that respect.[169] In order to honour the principle of subsidiarity[170], the Court developed the margin of appreciation doctrine, which allocates *room to breathe* to the Contracting States. As the aim of the Convention however is to uniformly protect human rights throughout Europe, the margin is not unlimited and the Court is burdened with demarcating its ambit. One of the tools for this demarcation is taking into account the existence or absence of European consensus.[171]

6.5 École de vérité for judicial activism

As the quantitative burden of proof for consensus is not fixed, the discovery of consensus through comparative methods can serve as an *école de vérité* for the Court. When the Court applies comparative law in order to safeguard human rights in the best way possible and thus engages in judicial activism, comparative law enriches the supply of possible solutions. It offers a wide spectrum of possible approaches wherefrom the Court can draw the most desirable solution from a critical point of view.[172]

6.6 Digestibility

When it comes to sensitive issues, the Court's judgments might not always be easy to digest. Both the parties that were involved in a case and the general public might be of the opinion that they were wronged by a Court the composition whereof does not originate in a democratic vote of the European people. Consensus can serve as an alleviating drug against such feeling of injustice, as it mostly refers to the majority opinion in the legal practice of the Contracting States, which is the result of democracy.

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[169] Helfer, *supra* n. 4, p. 141.
[170] See "The subsidiarity principle" in Chapter 2 "Research: scope and method".
[171] A more thorough analysis of the margin of appreciation doctrine and the place of European consensus in the demarcating process follows in Chapter 8: "The inverse relation between consensus and the margin of appreciation".
[172] Zweigert and Kötz, *supra* n. 65, p. 6.

6.7 Ornamental use

When the Court has a clear-cut answer ready but is in the impossibility to display a wide range of motivations, it might also revert to consensus for 'decorational purposes'. Such ornamental use creates the impression that the answer is based on thorough research and consideration, even if this is not the case.

Further, it is argued that reference to international treaties and thus international consensus creates the impression of reliance on multiple precedents. Hence, the judges can enhance their prestige as scholars by giving the impression to contribute to conformity between the different human rights adjudicators.[173]

[173] D. Shelton, "The boundaries of human rights jurisdiction in Europe", 13 *Duke Journal of Comparative & International Law* (2003), p. 129.

7. Consensus as a tool for evolutive interpretation

"The truth is a trap: you cannot get it without it getting you; you cannot get the truth by capturing it, only by its capturing you"

(Søren Kierkegaard)

7.1 The Convention as a living treaty

7.1.1 Evolutive interpretation as a tool for a moralist and independent Court

The interpretative hallmark of the European Convention is that it is considered to be a constantly evolving, living treaty, rather than a snapshot of the human rights protection that was premised 63 years ago. For the founding fathers of the Convention, only just after World War II, the priority was "to have a short, non-controversial text which the governments could accept at once, while the tide for human rights was strong" [174]. The creation of a limited text does however not imply a restrictive and static interpretation of the Convention. The preamble of the Convention considers "that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms". "Maintenance" can be interpreted to indicate that the interpreters of the Convention are burdened with the task to interpret the Convention in an effective way. "Further realisation" leaves room for evolution and innovation in the interpretation of the Convention.[175]

The conception of the Convention as a living instrument indicates the interpretive ethic applied by the Court. The Convention is regarded as autonomous from the 'moralistic' views that lived or still live in the Contracting States. LETSAS describes these moral views as "views which propose that someone should be deprived of a liberty or an opportunity solely because others (usually the majority) think of him as less then an equal or do not care about him as they care about others."[176] Homosexuals, juvenile offenders, children born out of wedlock, transsexuals and foetuses are examples of categories that are or were considered less than equal. Based on the principle of evolutive interpretation, the Court tries to identify the moral values that are and have always been inherent to the Convention rights, although they only became apparent over time. If it finds that a 'less than equal'-category should receive equal rights as others based on present-day considerations, the non-equal treatment of that category is no violation based on changed rules and attitudes. It rather is a violation that has always

[174] D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009) p. 3 and in the same sense: M. Ambrus, "Comparative law method in the jurisprudence of the European Court of Human Rights in the light of the rule of law", 2 *Erasmus Law Review* (2009), p. 356.
[175] F. Tulkens, Dialogue between judges, European Court of Human Rights, Council of Europe, 2011, p. 7.
[176] G. Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", 21 *European Journal of International Law* (2010), p. 527.

been a violation according to the moral values inherent to the Convention, even when it was not yet considered like that.[177]

7.1.2 Tyrer v. the United Kingdom

The concept of evolutive interpretation was lucidly developed for the first time in *Tyrer* v. *the United Kingdom.* Mr. Tyrer had undergone three strokes of the birch after his conviction by a juvenile court on the Isle of Man. The Court was confronted with the question whether this corporal punishment violated Article 3 (prohibition of torture) alone or in conjunction with Article 14 (prohibition of discrimination) of the Convention.[178]

Article 3 of the Convention states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Court found that the punishment of Mr. Tyrer did neither amount to "torture", nor to "inhuman punishment".[179] When finally assessing whether the strokes of the birch amounted to a particular level of humiliation and thus whether it could be qualified as "degrading punishment", the Court stated that:

> "the Convention is a living instrument which, […] must be interpreted in the light of present-day conditions. […] [T]he Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field."[180]

Thus, the principle of evolutive interpretation was linked with European consensus from the word go. Regrettably, the Court did not explore the penal policy of the member States in the part of the judgment concerning Article 3 and did not draw any conclusions from whether or not a European consensus could be identified in that respect. The Court concluded that the corporal punishment of Mr. Tyrer was degrading, because of factors such as the administration of the corporal punishment over the bare posterior and the interval between Mr. Tyrer's conviction and the punishment.[181]

The Court further needed to check whether the legislative autonomy of the Isle of Man, a dependent territory of the United Kingdom, could excuse the Isle for the breach of Article 3. The Court referred to European consensus in its consideration in this regard, stating that the great majority of the member States did not enact judicial corporal punishment. This argument strengthened the consideration that the local public opinion with regards to the necessity of corporal judicial punishment did not suffice to conclude that there were local requirements affecting the application of Article 3 in the Isle of Man. Hence, the judicial

[177] Letsas, *supra* n. 176, p. 527, 530.
[178] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, paras. 9-10, 19, 28.
[179] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 29.
[180] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 31.
[181] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, paras. 31, 33, 35.

corporal punishment of Mr. Tyrer was labeled as violating Article 3 of the Convention.[182]

Although consensus was mentioned in the *Tyrer* judgment, the Court did not refer to concrete evidence of the existence of consensus in the penal policy of the Contracting States. Consensus can thus not be regarded as a decisive criterion in this case. The Court rather directly based its decision on the inherent values of Article 3 of the Convention:[183]

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State [...]. Thus, although the applicant did not suffer any severe or long- lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity."[184]

7.1.3 Rationale for an evolutive and moralist reading of the Convention

In *Scoppola* v. *Italy (No. 2)*, a case concerning the right to a fair trial, the Court spelled out the rationale for the evolutive interpretation as follows:

> "Since the Convention is first and foremost a system for the protection of human rights, the Court must […] have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved […]. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[185]

7.1.4 Origin of the treaty conception as a living tree

The concept of evolutive interpretation can be assumed to be inspired by the adaptation of law to new factual situations in the common law system. Civil law systems usually react to social developments by making new or adapting old laws. Frequently creating or amending legal texts to keep up with substantial social developments would however be a very heavy burden for an organisation like the Council of Europe. From a law and economics approach, the common law solution of keeping up is much more beneficial. Common law systems 'simply' correct the old interpretation as if the statute law and case law always had the interpretation that tallies with today's society. This view is supported by the words of Lord Sankey in *Edwards* v. *Attorney General for Canada*, which seem to have been echoed in *Tyrer* v. *the United Kingdom.*

> "The *British North America Act* planted in Canada a living tree capable of growth and expansion

[182] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, paras. 36, 38-39.
[183] Letsas, *supra* n. 176, p. 528.
[184] ECtHR (Judgment) 25 April 1978, Case No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 33.
[185] ECtHR (Judgment) 17 September 2009, Case No. 10249/03, *Scoppola* v. *Italy (No.2)*, para. 104.

within its natural limits."[186]

7.2 The interplay between consensus and evolutive interpretation

Treating the Convention as a living treaty leads to the interpretation of the Convention against the background of today's society. It makes dealing with the emerging new challenges that evolve from changes in society, morals, mentalities, laws, technological innovations and scientific progress possible. The implementation of the principle of evolutive interpretation can however not be accomplished without the commitment of both the national authorities and the Court itself. In order for the Court to be *really* able to make the treaty come alive, first of all, it needs the national authorities to actively response to and act upon the Court's judgments. Second of all, the Court itself needs to pay attention to the changed legal practice or changed social attitudes in the Contracting States. This is where consensus makes its appearance.[187]

In the context of evolutive interpretation, consensus can come into play on four levels. Firstly, on the level of *launching the idea* of possible evolutive interpretation. Secondly, on the level of *legitimisation* of 'modern' human rights protection. Thirdly, on the level of *reception* by the Contracting States. Finally, the interplay comes to full circle if the evolutive interpretation of the Convention *triggers the emergence of (new or a higher degree of) consensus* among Contracting States.

7.2.1 Consensus as an identifier of development in society

In order to determine changed legal practice or social attitudes in the Contracting States, the Court reverts to a search for European consensus or trends. The denotation of changed consensus or an emerging trend justifies the consideration of the Court to interpret the Convention accordingly. Hence, depending on the current state of mind in the Contracting States, consensus and trends can be both engines for progress and catalysts for stagnation. Consensus can however never give rise to the erosion of the Convention rights as such.[188]

7.2.2 Consensus as a legitimiser of 'modern' human rights protection

Consensus works the other way around as well. Next to acting as a trigger for the consideration of evolutive interpretation, consensus also plays a justifying role. The Court refers to consensus to underpin its evolutive interpretation, which was initially supported by other arguments than consensus.[189]

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[186] Edwards v. A.G. of Canada [1930] A.C. 124, p. 136.
[187] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 13; J.-P. Costa, Dialogue between judges, European Court of Human Rights, Council of Europe, 2011, p. 5 and Kovler, *supra* n. 42, p. 10.
[188] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 12.
[189] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 13.

7.2.3 Consensus as a facilitator of reception of evolutive interpretation

Consensus facilitates the reception of 'modern' human rights protection in the Contracting States' law and practice.[190] The wish of the Contracting States to be part of a group – which is most probably more present in the recent signatories – and the peer pressure can be prospected to elicit an urge of conformity.

7.2.4 Evolutive interpretation as a creator of consensus

Another possible interaction between evolutive interpretation and consensus is that the first lays the foundations for the latter. When the Court takes an activist stand by interpreting a concept in an evolutive way, it might sometimes break new ground for human rights protection in other Contracting States.[191]

7.3 New issues, evolutive interpretation and consensus in front of the Court

Same-sex marriages, recognition of transsexualism, equality between men and women and artificial procreation only indicate the tip of the iceberg of new issues the Court is facing today. When domestic laws fail to answer citizens' questions and needs regarding such delicate issues, the citizens come knocking on the door of the European Court of Human Rights.[192]

Although consensus is often referred to in the context of evolutive interpretation, its role and nature (decisive or supportive) cannot be generally defined. As mentioned above, the array of interplays between consensus and evolutive interpretation is large. In *Tyrer* the Court already referred to consensus, but the decisive factor was the nature of Article 3 of the Convention as such. What follows is a selection of cases regarding 'new issues' wherein an existing consensus or an emerging trend was referred to as a contributing factor for 'modern' treaty interpretation.

7.3.1 The right for illegitimate children to be treated equally as legitimate children

7.3.1.1 Marckx v. Belgium

Marckx v. *Belgium* was described above in order to illustrate the reference of the Court to international treaties for the identification of consensus.[193] In this case, the Court referred to the Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children and the Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock: two conventions that had not been ratified by the defending state. The

[190] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 13.
[191] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 19.
[192] Kovler, *supra* n. 42, p. 8.
[193] See Chapter 5: "Typology of consensus".

Court mentioned these treaties to demonstrate the existence of commonly accepted standards with regard to the recognition of equality of 'legitimate' and 'illegitimate' children.[194]

The Court found that the distinction between 'legitimate' and 'illegitimate' children in Belgium amounted to a violation of Alexandra Marckx' right to respect for her private life and to an impermissible distinction based on birth.[195] Although consensus played an important *supporting* role in this finding, the Court's judgment was mainly based on an initial moral reading of the Convention:[196]

> "By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family. The Court concurs entirely with the Commission's established case-law on a crucial point, namely that Article 8 (art. 8) makes no distinction between the "legitimate" and the "illegitimate" family. Such a distinction would not be consonant with the word "everyone", and this is confirmed by Article 14 (art. 14) with its prohibition,in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on "birth"."[197]

The importance of this case mostly lies in the Court's departure from the requirement of a common standard among the Contracting States' legislation for the use of consensus as an argument underpinning a moral reading of the Convention. In *Marckx* v. *Belgium*, the Court made it clear that the principle of evolutive interpretation is meant to discover the true values of the Convention, based on the attitudes and common ground "in modern societies". Hence, it did not longer require common ground in the *legislation* of the Contracting States to interpret the Convention in a modern way.[198]

7.3.2 The right for transsexuals to legal recognition of their new gender

Over the years, transsexuals have been fighting for the full legal recognition of their desired gender before the Court. Legal and expert consensus has played a crucial role in the development of jurisprudence in the context of post gender reassignment recognition.[199]

Since the *Cossey* v. *the United Kingdom* case was covered in chapter 4, the discussion below will be limited to a selection of subsequent cases, as to identify the evolution of common ground according to the Court and the evolutive interpretation related therewith.

7.3.2.1 B. v. France

In *B* v. *France*, Miss B., who was born as a child of the male sex but underwent a sexual conversion, complained about the impossibility to have the sex on her birth certificate

[194] ECtHR (Judgment) 13 June 1979, Case No. 6833/77, *Marckx* v. *Belgium*, para. 41.
[195] ECtHR (Judgment) 13 June 1979, Case No. 6833/77, *Marckx* v. *Belgium*, paras. 37, 43.
[196] Letsas, *supra* n. 176, p. 530.
[197] ECtHR (Judgment) 13 June 1979, Case No. 6833/77, *Marckx* v. *Belgium*, paras. 37, 30.
[198] Letsas, *supra* n. 176, p. 529-530.
[199] Helfer, *supra* n. 4, p. 146-147.

corrected. This was a necessity in order for Miss B. to be able to marry her partner. She alleged that the impossibility of correction violated her right to respect for her private life (Article 8).[200]

Although Miss B. gave several arguments based on scientific developments and consensus among the Contracting States, the Court did not depart from the interpretation of Article 8 in *Cossey* v. *the United Kingdom*.[201] With regard to consensus, the Court considered:

> "that it is undeniable that attitudes have changed, science has progressed and increasing importance is attached to the problem of transsexualism.
>
> [The Court] notes, however, in the light of the relevant studies carried out and work done by experts in this field, that there still remains some uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases is sometimes questioned. The legal situations which result are moreover extremely complex: anatomical, biological, psychological and moral problems in connection with transsexualism and its definition; consent and other requirements to be complied with before any operation; the conditions under which a change of sexual identity can be authorised (validity, scientific presuppositions and legal effects of recourse to surgery, fitness for life with the new sexual identity); international aspects (place where the operation is performed); the legal consequences, retrospective or otherwise, of such a change (rectification of civil status documents); the opportunity to choose a different forename; the confidentiality of documents and information mentioning the change; effects of a family nature (right to marry, fate of an existing marriage, filiation), and so on. On these various points there is as yet no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its Rees and Cossey judgments."[202]

Hence, Article 8 of the Convention was again interpreted as not generally encompassing the right for post-operative transsexuals to obtain legal recognition of their new sex. Accordingly, the margin of appreciation of France was broad. Nevertheless, the Court found that France did not strike a fair balance between the general interest and that of the individual. In France, birth certificates are meant to be updated throughout the individual's life and many official documents revealed a discrepancy between the legal and apparent sex of an individual. Miss B. thus was confronted with a violation of her right to respect for her private life on a daily basis as a consequence of the unwillingness to correct her birth certificate. As the situation of Miss B. could consequently be distinguished from Miss Cossey's situation, the Court held that France violated Article 8 of the Convention.[203]

7.3.2.2 Sheffield and Horsham v. the United Kingdom

In *Sheffield and Horsham* v. *the United Kingdom*, the complaints of Kristina Sheffield and Rachel Horsham, two post-operative female transsexuals, were joined. They both complained

[200] ECtHR (Judgment) 25 March 1992, Case No. 13343/87, *B.* v. *France*, paras. 9, 11-12, 43.
[201] ECtHR (Judgment) 25 March 1992, Case No. 13343/87, *B.* v. *France*, paras. 46, 48.
[202] ECtHR (Judgment) 25 March 1992, Case No. 13343/87, *B.* v. *France*, para. 48.
[203] ECtHR (Judgment) 25 March 1992, Case No. 13343/87, *B.* v. *France*, paras. 48-63.

that the failure of the United Kingdom to legally recognise their female sex interfered with *inter alia* their rights to respect for their private lives as guaranteed by Article 8 of the Convention.[204]

In its consideration of whether or not positive obligations existed with regard to the legal recognition of post-operative transsexuals' new sex, the Court looked whether there had been scientific and legal developments on the matter since *B.* v. *France*. It stated that:

> "In the view of the Court, the applicants have not shown that since the date of adoption of its Cossey judgment in 1990 there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism. […] The Court would add that, as at the time of adoption of the Cossey judgment, it still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.
>
> As to legal developments in this area, the Court has examined the comparative study which has been submitted by Liberty[205] […]. However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender."[206]

Hence, for lack of consensus regarding the implementation measures, the Court anew interpreted Article 8 as not protecting the right of legal recognition of post-operative transsexuals' new sex.[207]

7.3.2.3 Christine Goodwin v. the United Kingdom

Christine Goodwin underwent gender reassignment because she suffered from gender identity disorder: her brain sex did not fit her outward sex. Miss Goodwin was confronted with sexual harassment and other problems at work, as her employers were able to track down her identity based on her National Insurance number. She was further told that she could not benefit from the State pension at the age of entitlement for women, which was 5 years younger than the age for men. Moreover, she was unable to benefit from several advantages, as these advantages required the production of her birth certificate, which was too confronting for Miss Goodwin. Accordingly, she alleged *inter alia* that Article 8 (right to respect for private

[204] ECtHR (Judgment) 30 July 1998, Cases No. 22985/93 and 23390/94, *Sheffield and Horsham* v. *the United Kingdom*, paras. 12-25, 40.
[205] A London based human rights NGO, <www.liberty-human-rights.org.uk/index.php>.
[206] ECtHR (Judgment) 30 July 1998, Cases No. 22985/93 and 23390/94, *Sheffield and Horsham* v. *the United Kingdom*, paras. 56-57.
[207] ECtHR (Judgment) 30 July 1998, Cases No. 22985/93 and 23390/94, *Sheffield and Horsham* v. *the United Kingdom*, para. 58.

and family life) of the Convention was violated by the handling of her legal status as a transsexual with regard to employment, social security, pensions and marriage.[208]

The Court reiterated its awareness concerning the problems confronting transsexuals. It further recalled the intention of the Court as put forward in the previous transsexuals cases to keep the need for appropriate legal measures under review. Hence, the Court tried to find the appropriate interpretation of Article 8 with regard to the legal recognition of transsexuals in the light of present-day conditions. In that respect, it considered the existence of European consensus. The Court found that there was already an emerging consensus regarding the legal recognition post reassignment surgery at the time of *Sheffield and Horsham* v. *the United Kingdom*. The Court did not attach great importance to the lack of consensus as to the way of dealing with the repercussions of legal recognition. The latter lack of consensus implied a wide margin of appreciation for the Contracting States with regard to the measures to resolve the practical problems that accompanied the legal recognition of post-operative transsexuals. That lack of consensus did however say nothing about the clear continuing international trend in favour of legal recognition of post-operative transsexuals.[209] The Court accordingly interpreted Article 8 as follows:

> "In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.
>
> […]
>
> [T]he Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention."[210]

As there were no significant factors that could cause an imbalance between the protection of public interest and the individual transsexual's interest in obtaining legal recognition in this case, the Court concluded that Article 8 of the Convention had been violated.[211]

This judgment serves as an example of how lack of consensus is not always an obstacle for progress.[212] Moreover, it also serves as an example of how the Court can attribute more

[208] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, paras. 3, 12-19.
[209] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, paras. 74-75, 84-85.
[210] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, paras. 90, 93.
[211] ECtHR (Judgment) 11 July 2002, Case No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 93.
[212] Spielmann, *supra* n. 39, p. 592.

weight to a trend regarding the conferment of a basic right than to the existence of consensus regarding the implications of such conferment. The consideration of a general change in attitude in society *supports*, but in this case probably even *triggered* a moral reading of the Convention:

> "[T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings […]."[213]

The Court has been reluctant to include the right to legal recognition for post-operative transsexuals under Article 8 of the Convention. In *Christine Goodwin* v. *the United Kingdom*, it finally decided to take the plunge. There is a tendency to refer to this judgment as an example of judicial activism. It can however rather be labelled as an example of pragmatic progressivism.[214] The Court moved forward, but was not brave enough to plunge independently. Hence, it acted pragmatically as it 'responded' to the existence of a trend regarding the recognition of a basic right under Article 8 of the Convention. It can thus be concluded that the existence of a trend may serve as the final push the Court needs to interpret the Convention in an evolutive and even progressive way.

7.3.3 The right not to be discriminated against based on stereotypes

The explicit reference to stereotypes is a fairly recent phenomenon in the Court. Stereotypes can cause discrimination or can be the result thereof. They create 'in-groups' and 'out-groups' to simplify the world surrounding us. They imply a story of *us* versus *them*. They can further be both negative and positive, but they are mostly negative and even positive stereotypes can have negative consequences.[215]

Stereotypes are closely related to what LETSAS labels as 'the moralistic views' that live in the Contracting States. As mentioned above, he describes 'moralistic views' as "views which propose that someone should be deprived of a liberty or an opportunity solely because others (usually the majority) think of him as less than equal or do not care about him as they care about others".[216] As stereotypes can be defined as "widely accepted beliefs about groups of people",[217] their potentially negative effects can be labelled as 'moral views'.

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[213] ECtHR (Judgment) 11 July 2002, Application No. 28957/95, *Christine Goodwin* v. *the United Kingdom*, para. 90.
[214] Judge Spielmann referred tot his term, but did not exemplify his reason to do so, in Spielmann, *supra* n. 39, p. 592.
[215] A. Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights", 11 *Human Rights Law Review* (2011), p. 708-709, 714-715.
[216] Letsas, *supra* n. 176, p. 527.
[217] Timmer, *supra* n. 215, p. 708.

LETSAS argues that the Court evolved towards a 'moral reading' of the Convention through the years.[218] This evolution marks the silent evolution to a Court that repudiates stereotypes that result in such 'moralistic views'. Regrettably, the Court is reluctant to explicitly name and denounce such stereotypes.

From the three cases discussed below, with regard to discrimination based on gender stereotypes, it will become apparent that the Court refers to consensus to interpret the Convention in light of the present-day conditions in the Contracting States. Following this often short reference to the current state of mind in the Contracting States, the Court uses consensus as one of the criteria to measure the width of the margin of appreciation. The cases about gender-based discrimination serve as excellent examples of how consensus bridges the gap between the evolutive interpretation and the application of the Convention.

When the Court decides the margin of appreciation to be wide in a case regarding discrimination based on stereotypes, it will *de facto* often deny the existence of a problematic stereotype. When the Court decides the margin of appreciation to be narrow, the door is open for both naming and denouncing stereotypes and their blind reception. Consensus thus has the potential to act as an implicit justification for labelling a particular situation as the result of moralistic views based on gender stereotypes. On the other hand, consensus also creates the danger of welcoming stereotypes in the Court's case law.

7.3.3.1 Petrovic v. Austria

Antun Petrovic was a student and worked part time at the moment his child was born. As his wife already worked full time, Mr. Petrovic took parental leave to look after the new-born. Accordingly, he claimed a parental leave allowance. His claim was dismissed as the Austrian law only foresaw parental leave allowance for mothers. Mr. Petrovic alleged that this amounted to discrimination on grounds of sex and thus a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention. [219]

It was not disputed that the Austrian law treated men and women differently with regard to parental leave allowance. Hence, the Court needed to judge whether or not this different treatment was justified.[220] In that regard, the Court stated that:

> "It is true that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention […]."[221]

[218] Letsas, *supra* n. 176, p. 528.
[219] ECtHR (Judgment) 27 March 1998, Case No. 20458/92, *Petrovic* v. *Austria*, paras. 6-13, 20.
[220] ECtHR (Judgment) 27 March 1998, Case No. 20458/92, *Petrovic* v. *Austria*, paras. 35, 37.
[221] ECtHR (Judgment) 27 March 1998, Case No. 20458/92, *Petrovic* v. *Austria*, para. 37.

Nevertheless, the Court found that Austria did not exceed its margin of appreciation, as:

> "at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers.
>
> […]
>
> Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave.
>
> In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel, eligibility for the parental leave allowance was extended to fathers in 1990 […].
>
> It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe.
>
> There still remains a very great disparity between the legal systems of the Contracting States in this field."[222]

Consequently, the Court found that there had been no violation of Article 14 in conjunction with Article 8 of the Convention.[223] Hence, the Court did neither name nor denounce the gender stereotype of women having a more crucial role in parenthood than men. On the contrary, it unfortunately confirmed an – albeit out-dated – stereotype.

7.3.3.2 Ünal Tekeli v. Turkey

In *Ünal Tekeli* v. *Turkey*, the Court examined whether Article 14 in conjunction with Article 8 of the Convention (the right not to be discriminated against in relation to respect for one's private and family life) is to be interpreted as including the right for a woman to keep her maiden surname after she marries.

The Turkish courts refused Misses Ayten Ünal Tekeli to bear only her maiden name after she married, although she was known by this name in her professional life as a trainee lawyer. She alleged that this interfered with her right to protection of her private life (Article 8) and that this amounted to discrimination (Article 14), since married men were in the possibility to bear only their family name after they married.[224]

The Court found that there was a discriminatory gender based distinction, which could only be justified based on a legitimate aim and proportionality. The Court did not recognise the

[222] ECtHR (Judgment) 27 March 1998, Case No. 20458/92, *Petrovic* v. *Austria*, paras. 39-42.
[223] ECtHR (Judgment) 27 March 1998, Case No. 20458/92, *Petrovic* v. *Austria*, para. 43.
[224] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, paras. 3, 10, 13, 39.

reflection of family unity and the ensuring of public order as a valid justification, as the name regulation was not applied even-handedly to both women and men.[225] In that regard, the Court explicitly stated that the gender-based distinction was based on a gender stereotype:

> "Admittedly, that tradition derives from the man's primordial role and the woman's secondary role in the family. Nowadays the advancement of the equality of the sexes in the member States of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-discrimination, prevent States from imposing that tradition on married women."[226]

The court referred to regional and international sources, as well as to the national developments in the Contracting States to identify consensus in favour of non-discrimination with regard to choosing the family name after marriage:

> "The Court reiterates in the first place that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. Two texts of the Committee of Ministers, namely, Resolution (78) 37 of 27 September 1978 on equality of spouses in civil law and Recommendation R (85) 2 of 5 February 1985 on legal protection against sex discrimination, are the main examples of this. These texts call on the member States to eradicate all discrimination on grounds of sex in, among other things, choice of surname. This objective has also been stated in the work of the Parliamentary Assembly […] and the European Committee on Legal Co-operation […].
>
> On an international level, developments in the United Nations concerning the equality of the sexes are heading in this specific area towards recognition of the right of each married partner to keep his or her own surname or to have an equal say in the choice of new family name […].
>
> Moreover, the Court notes the emergence of a consensus among the Contracting States of the Council of Europe in favour of choosing the spouses' family name on an equal footing."[227]

Turkey at that time was the only country that still legally imposed the husband's name as the wife's surname, alone or in combination with her maiden name. This discriminatory backlog compared to the rest of the Contracting States, and the fact that family unity could be preserved by other means, led to the conclusion that there had been a violation of Article 14 in conjunction with Article 8 of the Convention.[228]

The Court did name the gender stereotype at issue, but unfortunately did not denounce it in general. It limited itself to stating that:

> "Nowadays the advancement of the equality of the sexes in the member States of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-

[225] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, paras. 49-50, 55, 57-59.
[226] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, para. 63.
[227] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, paras. 59-61.
[228] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, paras. 61-68.

discrimination, prevent States from imposing [the] tradition [of the wife bearing her husband's name] on married women."[229]

7.3.3.3 Konstantin Markin v. Russia

Konstantin Markin was a military serviceman with three children. After his divorce, he became the sole carer of his children and requested parental leave for three years. This application was rejected because only servicewomen were entitled to three years' parental leave. The rejection was upheld both in first instance and on appeal before the Military Court. The head of his military unit finally granted Mr. Markin the requested parental leave. This was criticised by the Military Court that had ruled on appeal and the case came on the Russian Constitutional Court's plate. The latter found that the right to parental leave of three years for women only could be justified based on "the limited participation of women in military service and, secondly, the special social role of women associated with motherhood." Konstantin Markin took the case to Strasbourg and alleged that Article 14 in conjunction with Article 8 of the Convention was violated, as he was being discriminated against on grounds of sex.[230]

The Court reiterated that, as far as parental leave and parental leave allowances are concerned, men are in an analogous situation to women. Accordingly, there was a clear difference in treatment between servicemen and servicewomen. One of the arguments invoked by the Russian Government as justifying this difference in treatment was "the special role of women in the raising of children".

The Court reiterated its duty to take into account the changing conditions in the Contracting States for instance by responding to any emerging consensus as to the standards to be achieved and found that:[231]

"The relevant international and comparative-law material […] demonstrates that the evolution of society – which began in the 1980s as acknowledged in the Petrovic case – has since significantly advanced. It shows that in a majority of European countries, including in Russia itself, the legislation now provides that parental leave may be taken by civilian men and women, while the countries limiting the parental leave entitlement to women are in a small minority […]. Even more important for the present case is the fact that in a significant number of the member States both servicemen and servicewomen are also entitled to parental leave [...]. It follows from the above that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition. The Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States concerning this issue […]."[232]

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[229] ECtHR (Judgment) 16 November 2004, Case No. 29865/96, *Ünal Tekeli* v. *Turkey*, para. 63.
[230] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, paras. 9-34, 76.
[231] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, para. 126.
[232] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, para. 140. For the comparative research, see paras. 49-75.

This comparative-law material contributed to the conclusion that:

> "the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen, from the entitlement to parental leave. The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation."[233]

This finding and the rejection of the argument that granting three years of parental leave to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces led to the conclusion that there was no justification for the difference in treatment. Consequently, there had been a violation of Article 14 in conjunction with Article 8 of the Convention.[234]

7.3.3.4 Consensus as a mirror of stereotypes

In the past decades, the Court has undertaken many efforts to discover the true values underpinning the Convention, independent from less than equal-considerations about certain groups of people. The Court has mostly set aside less than equal-considerations by reference to the present-day conditions in the Contracting States as apparent from comparative research. The link of such considerations with stereotypes was touched upon rather sporadically. Taking into account that less than equal-considerations are often grounded in stereotypes, it might be time for the Court to develop an anti-stereotyping approach, by explicitly naming and contesting stereotypes.[235] Such an approach can contribute to the optimisation of the Court's moral reading of the Convention, as it has the potential of "more fully protecting specifically disadvantaged groups against stereotypes and other forms of structural discrimination".[236]

The reference to consensus as a legitimiser for the recognition and contestation of problematic stereotypes might have its benefits in terms of digestibility and enforceability. Nevertheless, the disadvantages of consensus outweigh the benefits in this respect. The reality is that when the Court looks for common ground among the Contracting States, it actually internalises stereotypes that have not been addressed as problematic yet. It is only when a common attitude of pillorying a problematic stereotype exists, the Court will dare to identify and denounce the stereotype as such. Although good examples – such as naming and denouncing the stereotype that women are primary child-carers and men primary breadwinners in *Konstantin Markin* –[237] exist, making consensus one of the protagonists in the battle against

[233] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, para. 143.
[234] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, paras. 144-149, 151.
[235] Timmer, *supra* n. 215, p. 718-719.
[236] Timmer, *supra* n. 215, p. 710.
[237] ECtHR (Judgment) 22 March 2012, Case No. 30078/06, *Konstantin Markin* v. *Russia*, para. 143.

moralistic views based on stereotypes *de facto* amounts to idiomatically emptying the ocean with a teaspoon.

7.4 Conclusion: common attitude as a modern treaty interpretation justification

Although it is 63 years old at present, the Convention has never been updated through substantive legislation. Hence, the Court is obliged to interpret the Convention as a living tree in order to keep it blooming. The interpretation in light of present-day conditions is however often argued to take the sovereignty of the Contracting States for a ride. The signatories have never explicitly agreed to 'modern' treaty interpretation. Consequently, the judgments containing evolutive interpretation are often perceived as lacking legitimacy.

Hence, as was argued above, the Court takes recourse to consensus as a 'democratic' legitimiser for the prejudice to the sovereignty principle that goes hand in hand with 'modern' treaty interpretation. As the Court seems to have moved away from the requirement of *true* consensus in the legislation of the Contracting States to the existence of common attitudes in society, it might however be questioned how 'democratic' and 'empirically supported' this legitimiser still is.

Consensus seems to be unfit when evolutive interpretation of the Convention is in any way related to stereotypes. Although consensus might sometimes serve as a 'democratic' legitimiser for contesting stereotypes, it might as well leave room for stereotypes to find their way into the Court's jurisprudence.

The criticism on consensus as a criterion for the interpretation and application of the Convention deserves to be discussed in a separate chapter. The evolution from consensus in the laws of the Contracting States to common attitudes in society and the problem regarding consensus and stereotypes however already throws some light on the precarious and pragmatic character of the concept.

Although consensus might be referred to as independent from evolutive interpretation, the concept often serves as a mediator between modern treaty interpretation and the delimitation of the margin of appreciation.

8. The inverse relation between consensus and the margin of appreciation

"[I]n those situations where the Court imposes self-restraint in its task of interpretation, it is no longer the margin that is left to the national authorities, but in fact the main part of the interpretation work, with the Court simply retaining a margin of review."

(Dean Spielmann)

8.1 The margin of appreciation

8.1.1 The judicial creation of elbow room

In order to strike a balance between Strasbourg and the Contracting States, the Court is expected to always bear in mind that the national internal judicial order and the international legal order complement each other.[238]

The margin of appreciation is the *elbow room* offered to the Contracting States for implementing the Convention. It is an application method that allows the Court to detect when the core universal rights of the Convention are violated within the atmosphere of a broader diverse system.[239] By granting the Contracting States an *air gap*, the Court recognises that domestic authorities are better placed to evaluate local issues. Moreover, by granting this *leeway*, the Court confirms the Contracting States' democratic mandate to decide on certain matters of human rights[240] and limits its own power of review.[241] Hence, it respects the subsidiarity principle.[242] Further, the margin of appreciation demonstrates the deference of Strasbourg to the Contracting States' sovereignty and the value of pluralism, especially when it comes to sensitive issues.[243] The room for manoeuvre finally serves as a great weapon against judicial backlog and as a preserver of the Court's limited resources.[244]

The leeway that is left to the Contracting States seems hardly compatible with the universality of human rights. GREER explains the use of such seemingly incompatible concepts as follows: "although Convention rights are expressed in sparse and abstract *universal* terms, it is not at all clear that there are objectively valid interpretations of what they mean at all relevant times

[238] Spielmann, *supra* n. 39, p. 592.
[239] Ostrovsky, *supra* n. 16, p. 48.
[240] Legg, *supra* n. 16, p. 25.
[241] Spielmann, *supra* n. 39, p. 592.
[242] F. Tulkens and L. Donnay, "L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?", 1 *Revue de science criminelle et de droit pénal comparé* (2006), p. 13.
[243] Tulkens and Donnay, *supra* n. 242, p. 14.
[244] Spielmann, *supra* n. 16, p. 1.

and in all relevant places."[245] OSTROVSKY argues that the margin "allows human rights norms to take on local flavour" within the boundaries of universal human rights norms. Accordingly, the Court accommodates various interpretations of the Convention among states, yet preserves the core European values they reflect. Hence, he argues that the margin of appreciation and universalise act in symbiosis.[246]

GREER further proposes to define the margin of appreciation as "the room for manoeuvre the judicial institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations."[247] In that regard, it should be pointed out that this room for manoeuvre does not exempt the Contracting States for taking measures that would otherwise constitute infringements of the Convention. The margin leaves it up to the Contracting States to choose the measures most fit to implement the Convention on their territories, without crossing the boundaries of the Convention.[248]

The margin of appreciation doctrine has no basis in the Convention, but was created and developed by the Strasbourg organs. The Brighton Declaration of 20 April 2012 however heralds the inclusion of the margin of appreciation in the Convention's Preamble.[249]

First reference to "une certaine marge d'appréciation" was made in *Greece* v. *the United Kingdom*, a decision of the European Commission on Human Rights in light of a public emergency derogation as foreseen in Article 15 of the Convention. This derogation was invoked by the United Kingdom, that was administering Cyprus at that time, and that was alleged to have violated the Convention during counter-insurgency operations.[250]

The Court itself *implicitly* referred to the margin of appreciation for the first time in a case regarding the alleged discrimination between French and Dutch speaking students concerning the language of instruction in schools:

> "In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters

[245] S. Greer, "The interpretation of the European Convention on Human Rights: Universal principle or margin of appreciation?", 3 *UCL Human Rights Review* (2010), p. 1.
[246] Ostrovsky, *supra* n. 16, p. 47, 57-58.
[247] Greer, *supra* n. 245, p. 2.
[248] Tulkens and Donnay, *supra* n. 242, p. 6.
[249] Brighton Convention of 20 April 2012, para. 12, b).
[250] ECommHr (Decision) 26 September 1958, Case No. 176/56, *Greece* v. *the United Kingdom*, *Yearbook of the European Convention on Human Rights*, Vol. 2, 1958-59, p. 176; Yourow, *supra* n. 39, p. 16 and Greer, *supra* n. 245, p. 2.

which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention."[251]

The Court *expressly* referred to "the power of appreciation" for the first time in the *vagrancy* case, which concerned the right to respect for correspondence as provided in Article 8 of the Convention.[252]

Although the margin of appreciation doctrine definitely originates in the various national legal systems, its exact origin remains disputed. The Anglo-Saxon world argues that the margin's roots lay in French public law, while the continental authors argue that the margin is a product of the common law system.[253]

In order to demarcate the boundaries of the margin, the Court takes into account factors such as the type of provision invoked, the goal pursued by the alleged interference, the context and consensus.[254] Consequently, from a technical point of view, the margin of appreciation doctrine can be described as "a doctrine of judicial deference whereby judges are influenced by factors outside of the immediate pros and cons of a particular decision related to their own institutional competence."[255]

Numerous authors have taken up the task of drawing up comprehensive lists and analyses of margin of appreciation application in the past. YOUROW listed up chronologically all the cases wherein the Court has used the margin of appreciation doctrine.[256] Later, ARAI-TAKAHASHI catalogued those cases by Convention article.[257] More recently, LETSAS launched a different approach. He distinguishes two different ways in which the Court uses the margin of appreciation doctrine. The *substantive concept* of the doctrine addresses the relationship between individual freedoms and collective goals. The *structural concept* addresses the limits of intensity of the Court's review in light of its status as an international tribunal.[258]

It is the aim of this part of this dissertation to sketch the general framework of the margin of appreciation, in order to subsequently discuss the role of consensus in this doctrine. The cases

[251] ECtHR (Judgment) 23 July 1968, Case No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* v. *Belgium*, para. 10 of point I.B. and Tulkens and Donnay, *supra* n. 242, p. 4.
[252] ECtHR (Judgment) 18 June 1971, Cases No. 2832/66; 2835/66; 2899/66, *De Wilde, Ooms and Versyp ("vagrancy")* v. *Belgium*, para. 93.
[253] S. Van Drooghenbroeck, *La proportionnalité dans le droit de la convention européenne des droits de l'homme* (Brussels, Bruylant 2001) p. 492.
[254] Spielmann, *supra* n. 16, p. 11-24.
[255] Legg, *supra* n. 16, p. 1.
[256] Yourow, *supra* n. 39.
[257] Arai-Takahashi, *supra* n. 16.
[258] G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (New York, Oxford University Press 2007, 1st ed.), p. 80-81.

referred to below are drawn from the comprehensive lists of case law available and only serve as legal sources and illustrations.

8.1.2 Application scope of the doctrine

During the course of time, the Court broadened the application scope of the margin of appreciation doctrine from Article 15 of the Convention (derogation in time of emergency) to almost the entire framework of the Convention.[259]

Nevertheless, in general, it can be posited that the Court accommodates the margin of appreciation doctrine far more easily when dealing with derogable rights than when confronted with non-derogable rights.[260] It should however be stressed that the Court's tendency to apply the doctrine will always depend on the context of a given case. If the Court is for instance confronted with a case of crystal clear Convention violation, the Court will most likely ignore the margin of appreciation doctrine, even if the case concerns a derogable right that requires a balancing of interests.[261]

The right to private and family life (Article 8), the right to freedom of thought, conscience and religion (Article 9), the right to freedom of expression (Article 10), the right to freedom of association (Article 11) and the right to freedom of movement (Article 2 of Protocol No. 4) are matrices *par excéllence* for the application of the margin of appreciation doctrine. The escape clause included in their second paragraphs leads the Court to gradually answering the following questions. First, the Court checks whether there is a "limitation to", "restriction of" or "interference with" the right provided in the first paragraph. If the answer to this question is yes, the Court evaluates whether such limitation, restriction or interference is "prescribed by law" or "in accordance with the law". If the Court answers this question affirmatively, it goes on to assess whether the limitation, restriction or interference serves "a legitimate aim". If the latter question is answered positively as well, it remains for the Court to consider the "necessity" of the limitation, restriction or interference "in a democratic society". The parameters for the latter consideration are "pressing social need" and "proportionality".[262] As the Convention itself leaves room for justifiable divergence from the rights enshrined in Articles 8 to 11, the preponderance of margin of appreciation applications with regards to these articles can be contemplated as a corollary. Accordingly, TULKENS and DONNAY call these rights "des terrains d'élection naturels" for the application of the margin of appreciation.[263]

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[259] Vande Lanotte and Haeck, *supra* n. 1, p. 207-210 and Tulkens and Donnay, *supra* n. 242, p. 6.
[260] Spielmann, *supra* n. 16, p. 5-7.
[261] Vande Lanotte and Haeck, *supra* n. 1, p. 210-211; 215. See for instance ECtHR (Judgment) 18 March 2011, Case No. 30814, *Lautsi and Others* v. *Italy*, wherein the Court stated that the decision whether or not to allow crucifixes in the classroom is a matter falling within the margin of appreciation, although this was a case concerning the right to education, which is non-derogable by nature. This case is further discussed below.
[262] Vande Lanotte and Haeck, *supra* n. 1, p. 123-124.
[263] Tulkens and Donnay, *supra* n. 242, p. 6-7.

Application of the margin of appreciation doctrine is further possible whenever the Court needs to balance the interests of the individual and the society in general, when it needs to interpret vague concepts or when it is confronted with a State's interpretation of its positive obligations.[264]

When a Treaty provision allows a certain extent of derogation only on the condition that precisely measured and described requirements are met, there is almost no room for balancing of interests and thus for the margin of appreciation.[265]

The right to life (Article 2) except in respect of deaths resulting from lawful acts of war, the prohibition of torture (Article 3), the prohibition of forced labour and servitude (Article 4, para. 1), the prohibition of punishment without law (Article 7), the prohibition of death penalty in time of peace (Article 1 and 2 of Protocol No. 6), the right not to be tried or punished twice (Article 4 or Protocol No. 7) and the prohibition of death penalty at all times (Article 1 of Protocol No. 13) are rights that under no circumstances can be limited, restricted, interfered with or derogated from. These rights are labelled as 'notstandsfest' as they are the most fundamental human rights. Self-evidently, these rights do not leave much room for application of the margin of appreciation doctrine.[266] However, as will become apparent from the examples to illustrate the role of consensus in delimiting the margin, there are exceptions that prove this rule.

8.1.3 Object of the doctrine

For the discussion of the margin of appreciation doctrine's object, at the outset, it is important to mention the polysemic nature of the term 'margin of appreciation'. The term is used to refer to both the Contracting Parties' discretion and the Court's subsidiary review. In that respect, doctrine often disregards the enjoyment of discretion by the Contracting States as a consequence of the Convention's nature, apart from the Court's subsidiary review. If the Court measures the margin of appreciation, it actually broadens or constricts the discretion that already belongs to the Contracting States.[267]

The first object of the margin of appreciation is the interpretation and application of facts and law in a given case.[268] The reference to 'the margin of appreciation' in that regard solely refers to the Court's subsidiary review. The Court's role is only to verify whether the effects

[264] Vande Lanotte and Haeck, *supra* n. 1, p. 213-214.
[265] Vande Lanotte and Haeck, *supra* n. 1, p. 214.
[266] Art. 15, para. of the Convention; Article 3 of Protocol No. 6; Article 4, para. 3 of Protocol No. 7 and Art. 2 of Protocol No. 13; Vande Lanotte and Haeck, *supra* n. 1, p. 92-94; 214-215.
[267] J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden, Martinus Nijhoff Publishers 2009) p. 236-238.
[268] Spielmann, *supra* n. 16, p. 7-8.

of the domestic interpretation and application of facts and law is compatible with the Convention.[269]

The second object of the margin of appreciation is the manner in which the Contracting States apply the Convention, which naturally is preceded by an own interpretation of the Convention.[270] This is the object that is relevant for this dissertation, as this is the object that is subject to the consideration of measures such as consensus.[271] The manner in which the Contracting States apply the Convention is first of all related to the discretion of the Contracting States. When the Court assesses whether the Contracting State's margin of appreciation is broad or narrow, it actually broadens or narrows the discretion that already lies with the Contracting State.[272] The subsequently increased or decreased subsidiarity of the Court's review is only a consequence of the enlarged or constricted discretion of the Contracting State.

8.1.4 Width of the margin

8.1.4.1 An interplay of factors

In order to measure the leeway accorded to the defending State, the Court will always consider the circumstances, the subject matter and the background of the case.[273] It will however also take into account factors that are not so closely related to the case itself.

When the Court measures the margin, at the outset, it takes into consideration factors that are directly related to the pros and cons of the final outcome. The type of right at issue and the context of a given case are examples of such *internal* factors. A reasoning based on such factors can be labelled as 'first-order reasoning'. LEGG argues that although first-order reasons may affect the magnitude of the margin of appreciation's impact, these factors are not analytically useful.[274] Scholars such as SPIELMANN and VAN DROOGHENBROECK on the other hand label these factors as basic factors that influence the demarcation of the margin of appreciation's scope.[275]

The Court further mostly takes into account *external* factors: criteria that are not directly related to the advantages or disadvantages of the anticipated decision. Like a couple considers the opinion of others before filing for divorce and common law courts consider the system of precedent, Strasbourg considers for instance consensus before deciding on an alleged

[269] ECtHR (Judgment) 22 September 1993, Case No. 15473/89, *Klaas* v. *Germany*, para. 29 and ECtHR (Judgment) 19 September 2008, Case No. 9174/02, *Korbely* v. *Hungary*, para. 72.
[270] Spielmann, *supra* n. 16, p. 9.
[271] Spielmann, *supra* n. 16, p. 18-22.
[272] Christoffersen, *supra* n. 267, p. 237.
[273] ECtHR (Judgment) 28 October 1987, Case No. 8695/79, *Inze* v. *Austria,* para. 41 and ECtHR (Judgment) 12 February 2008, Case No. 21906/04, *Kafkaris* v. *Cyprus,* para. 161.
[274] Legg, *supra* n. 16, p. 13, 21.
[275] Spielmann, *supra* n. 16, p. 11-22; Van Drooghenbroeck, *supra* n. 253 p. 512-522.

violation of the Convention. LEGG labels this orientation as 'second-order reasoning': a way of reasoning which takes into consideration determinants that are alien to the direct pros and cons of the anticipated outcome.[276]

Without rendering a value judgment, it can be endorsed that given their different nature, *internal* and *external* factors serve different functions. The *external* factors serve as *fortifiers* or *belittlers* of *internal* factors. To make this interplay between both factor types apprehensible, LEGG identified four pseudo-mathematical examples.[277] The 'formulae' listed below represent these examples. Being examples, the formulae are not generally applicable to all cases, as the number of *internal* and *external* factors varies from case to case. Formula (ii) was adapted (as *x* was missing in the initial example) and the explanation of every formula was elaborated in order to ensure the understanding of the reader. The dynamics of these formulae with regard to consensus were added below, bearing in mind the Court's extensive body of case law regarding the margin of appreciation and consensus.

Legend
a, b and c = first-order reasons related to a decision; a and b are in favour of x and c is in favour of y
s = second-order reason
x = outcome 1
y = outcome 2

Examples: Possible operations and consequent intercommunication

(i) x (a + b) considered along with y (c) (s)
→ In formula (i), the second-order reason s affects first-order reason c either to fortify or reduce reasons to produce outcome y. s can be crucial in steering the Court towards deciding y. Second-order reason s might either strengthen or reduce the weight of first-order reason c. Hence, s might reinforce c so that the Court is more inclined to judge y, but s might as well water down c so that the Court is more inclined to judge x. Finally it can occur that c does not have an effect at all.

(ii) x (a(s) + b) considered along with y (c)
→ In formula (ii) the second-order reason s affects first-order reason a. s might fortify or attenuate a and this will result in tilting the decision more towards x or y respectively.

(iii) x (a + b(s)) considered along with y (c)
→ In formula (iii) the second-order reason s affects first-order reason b. s might fortify or weaken b and this will result in tilting the decision more towards x or y respectively.

(iv) x (a + b) (s) considered along with y (c)
→ In formula (iv), the second-order reason s strengthens or attenuates the combination of first-order reasons a and b, so that the Court is more inclined to judge x or y respectively.

In the above-mentioned examples, according to LEGG, *s* can consist of democratic legitimacy, current practice of states or expertise.[278] As the typology of consensus indicated, *s* can

[276] Legg, *supra* n. 16, p. 1.
[277] Legg, *supra* n. 16, p. 22.
[278] Legg, *supra* n. 16, p. 67.

however also consist of other types of consensus. In order to correctly apply the examples with regards to consensus, *x* and *y* should alternatively be identified as the outcome with no or a narrow margin of appreciation and as the outcome with a (wide) margin of appreciation. In margin of appreciation discussions, the applicant and respondent will alternatively support *x* or *y* and use *s* in order to out-argue one another. Whether or not consensus will push the Court towards granting a wide margin of appreciation *should* (but *does* not always[279]) depend on the degree and the type of consensus identified.

The general remark that should be made with respect to the formulae is that reasons for a (wide) margin of appreciation – such as consensus – act as a request, not as an order. The Court is the authority that remains competent to review all relevant factors at issue.[280]

8.1.4.2 Factors influencing the width of the margin

The Court has never listed up the criteria that play a role for the margin's demarcation. It might even be argued that drawing up an inventory of criteria influencing the width of the margin is against the very nature of the concept.[281] Nevertheless, the identification of the factors taken into consideration for measuring the margin of appreciation's ambit has been the subject of numerous studies. Such identification namely entails the potential to substantiate the debate concerning the margin's unpredictable character.[282] Moreover, it makes the ascription of a certain degree of leeway in a given case comprehensible for both human rights lawyers and citizens. The factors mentioned below are the ones listed up by SPIELMANN, the current president of the Court, as he drew up a concise enumeration of the factors identified by other legal writers.[283] It should at the outset be stressed that the impact of these factors is rather relative than fixed, as one factor might lead to the neutralisation or fortification of another.[284]

a. The provision invoked

There are some areas of the Convention wherein the Court almost always grants a wide respectively a narrow or no margin to the Contracting States. In that respect, the application scope of the margin of appreciation discussed above provides guidance for the prediction of much or little room for manoeuvre. The seriousness of the alleged infringement might further trigger a narrower or wider margin of appreciation than the one usually granted in relation to a certain right.[285]

[279] See chapter 10: "Criticising current consensus".
[280] Legg, *supra* n. 16, p. 23-24.
[281] Van Drooghenbroeck, *supra* n. 253 p. 511.
[282] Tulkens and Donnay, *supra* n. 242, p. 15.
[283] Spielmann, *supra* n. 16, p. 13.
[284] Vande Lanotte and Haeck, *supra* n. 1, p. 216.
[285] Van Drooghenbroeck, *supra* n. 253 p. 515.

The Court for instance leaves considerable leeway to the Contracting States for their assessment of an exceptional situation within the meaning of Article 15 of the Convention.[286] Further, although there are exceptions that prove the rule, the Court for example tends to deny the existence of appreciation leeway with regard to the right to life.[287]

The Court described the dynamics of this factor in *Connors* v. *the United Kingdom*, a case concerning the eviction of a gypsy family from a locally governed gypsy site:

> "[The] margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights". [288]

b. The interests at stake

Once the provision invoked triggers the eligibility for the defending State to have acted within its margin of appreciation, the width of the margin will follow a sliding scale according to the interests at stake.[289]

In *Taşkin and others* v. *Turkey* for instance, a case wherein the residents of the land surrounding a goldmine complained that the issuance of a permit to use a particular extraction process in the mine had given rise to a violation of their right to a healthy environment under Article 8 (right to respect for private and family life), the Court stated that:

> "[…] in cases raising environmental issues the State must be allowed a wide margin of appreciation".[290]

c. The goal pursued by the measure allegedly violating the Convention

The goal pursued by the indicted measure also has the potential of unchaining a wider margin of appreciation or tightening the margin delimited based on other criteria.[291]

When one invokes the derogations provided in the escape clauses that succeed several Convention rights, the nature of the goal hoped to achieve with the interference might trigger the widening or the narrowing down of the margin. In case the interference fits in the tackling of an emergency, the margin will for instance be wide. When the indicted measure was

[286] ECtHR (Judgment) 18 January 1978, Case No. 5310/71, *Ireland* v. *the United Kingdom*, para. 207.
[287] Spielmann, *supra* n. 16, p. 11.
[288] ECtHR (Judgment) 27 May 2004, Case No. 66746/01, *Connors* v. *the United Kingdom*, para. 82.
[289] Spielmann, *supra* n. 16, p. 11.
[290] ECtHR (Judgment) 10 November 2004, Case No. 46117/99, *Taşkin and others* v. *Turkey*, para. 116.
[291] Spielmann, *supra* n. 16, p. 17.

applied to protect the morals in the Contracting State, the Court's approach will be rather strict.[292]
The aim pursued will further often consist of the implementation of a particular policy. As long as the implementation of a national policy does not cross the Convention's boundaries, the Court does not interfere. Depending on the type of policy, the Court will hold itself even more aloof.

Powell and Rayner v. *the United Kingdom* offers a brisk example of the wide margin afforded in case of implementation of policies in a difficult social and technical sphere. In this case regarding regulatory measures to minimise aircraft noise, the Court stated that:

> "It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognised as enjoying a wide margin of appreciation."[293]

Another example is *Jahn and Others* v. *Germany*, wherein the Court found that if the goal pursued is the implementation of social and economic policies, the margin of appreciation will be wide. To that effect, the Court stated that the judgment of the legislature as to what is in the public interest should be respected "unless that judgment is manifestly without reasonable foundation".[294]

d. The historical context of the alleged interference

SPIELMANN identifies the context of the alleged interference as the next factor that might shorten or stretch the breadth of the margin.[295] This criterion however overlaps with other criteria, such as the existence of consensus and the goal of the interference, which often fits in policy implementation. A criterion that is not captured by other listed criteria is the historical and general political context of the interference. This criterion is normally taken into account for the delimitation of the margin, especially when the Court is confronted with a Contracting State in transition.[296]

The influence of the historical and political context on the margin can be illustrated by reference to *Tănase* v. *Moldova*. In that case, Mr. Alexandru Tănase alleged that the ineligibility for Moldovans holding other nationalities and not having started a procedure to renounce those nationalities to take their seats as members of Parliament following their

[292] Vande Lanotte and Haeck, *supra* n. 1, p. 219-220.
[293] ECtHR (Judgment) 21 February 1990, Case No. 9310/81, *Powell and Rayner* v. *the United Kingdom*, para. 44.
[294] ECtHR (Judgment) 30 June 2005, Case Nos. 46720/99, 72203/01 and 72552/01, *Jahn and Others* v. *Germany*, para. 91.
[295] Spielmann, *supra* n. 16, p. 17.
[296] Spielmann, *supra* n. 16, p. 17.

election violated the right of free elections as guaranteed by Article 3 of Protocol No.1 and the prohibition of non-discrimination related therewith, as guaranteed by Article 14 of the Convention. The Court left the question open whether this ineligibility fitted in the legitimate aim of securing the loyalty to the State. In assessing the margin of appreciation with regard to the proportionality of the interference, the Court acknowledged the historical and political context as a stretching factor:[297]

> "The Court emphasises the special position of Moldova, which has a potentially high proportion of dual nationals and has only relatively recently become independent. The Court considers that in light of Moldova's […] there was likely to be a special interest in ensuring that, upon declaring independence in 1991, measures were taken to limit any threats to the independence and security of the Moldovan State in order to ensure stability and allow the establishment and strengthening of fragile democratic institutions. […] The restriction introduced by Law no. 273 must be assessed with due regard to this special historico-political context and the resultant wide margin of appreciation enjoyed by the State […]. Accordingly, the Court does not exclude that in the immediate aftermath of the Declaration of Independence by Moldova in 1991, a ban on multiple nationals sitting as members of Parliament could be justified."[298]

e. The degree of proportionality of the alleged interference

SPIELMANN labels the degree of proportionality of the alleged interference not only as the most important, but even as the decisive factor for the margin's width.[299] If this ought to be true, the Court would actually deny the 'normal' course of reasoning. Instead of identifying the margin and appreciating the interfering measure's proportionality in light thereof, it would demarcate the margin based on the proportionality between the means employed and the goal pursued. This viewpoint cannot be supported.

It can be assumed that SPIELMANN actually meant to indicate that if the Court finds a measure to be disproportionate, the width of the margin does not play a decisive role anymore, as the measure will be incompatible with the Convention anyway. Hence, in case of clear disproportionality, the proportionality principle rather than the margin of appreciation is the decisive factor. This argument is supported by the example referred to by the President of the Court, drawn from *Kart* v. *Turkey*:

> "The right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be

[297] ECtHR (Judgment) 27 April 2010, Case No. 7/08, *Tănase* v. *Moldova,* paras. 94-95, 170, 172.
[298] ECtHR (Judgment) 27 April 2010, Case No. 7/08, *Tănase* v. *Moldova,* para. 173.
[299] Spielmann, *supra* n. 16, p. 22-23.

> achieved […]. The right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court".[300]

f. Comprehensive analysis by superior national courts

The comprehensive analysis of the alleged restriction is another factor that SPIELMANN incorrectly lists as a criterion to measure the width of the margin of appreciation.[301] It is true that if superior national courts have analysed an alleged violation comprehensively, taking into account the Convention and the case law, the Court will need to evince strong reasons to turn around the view of those courts. This does however not imply the widening of the margin of appreciation. It is only a question of respecting good qualitative legal reasoning.

g. Consensus

Although consensus is commonly known as a factor for the evolutive interpretation of the Convention, SPIELMANN rightly points out that it also reflects "the delicate balance that has to be struck in the relationship between the Strasbourg system and domestic systems".[302] The inverse relation between consensus and the margin of appreciation was identified as the *application* method to be dealt with in this dissertation. Accordingly, it deserves to be discussed separately.

8.2 Consensus as the margin of appreciation's enemy

8.2.1 Inverse proportionality

European consensus frequently plays an important role in demarcating the boundaries of a Contracting State's margin of appreciation. Although not always the decisive criterion, consensus has the potential to increase the national authorities' and citizens' feeling of predictability, fairness and legitimacy. Accordingly, consensus can facilitate the reception of the Court's judgments in the domestic legal order.[303]

The relation between consensus and the margin of appreciation was clearly set out in *Evans* v. *the United Kingdom*:

> "Where […] there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider".[304]

[300] ECtHR (Judgment) 3 December 2009, Application No. 8917/05, *Kart* v. *Turkey*, para. 79.
[301] Spielmann, *supra* n. 16, p. 23-24.
[302] Spielmann, *supra* n. 16, p. 18-22.
[303] See also in that sense: Spielmann, *supra* n. 39, p. 592; Spielmann, *supra* n. 16, p. 18; Dzehtsiarou, *supra* n. 62, p. 534.
[304] ECtHR (Judgment) 10 April 2007, Case No. 6339/05, *Evans* v. *the United Kingdom*, para. 77.

Thus, the latitude of common ground between Contracting States is inversely related to the allowed margin of appreciation. The broader the consensus, the narrower the margin of appreciation.[305] Hence, consensus can be regarded as the margin of appreciation's enemy and an ally to the Court's judicial powers.

BREMS lucidly translated the implication of the inverse proportionality for the parties to a case as follows: "if a practice or regulation that a state claims to fall within its domestic margin of appreciation is not found in the legal system of any other state party, this practice or regulation is suspicious, and the margin of appreciation is likely to be restricted for this reason. If on the contrary, a practice or regulation is found in other member States as well, this will strengthen the national government's case".[306]

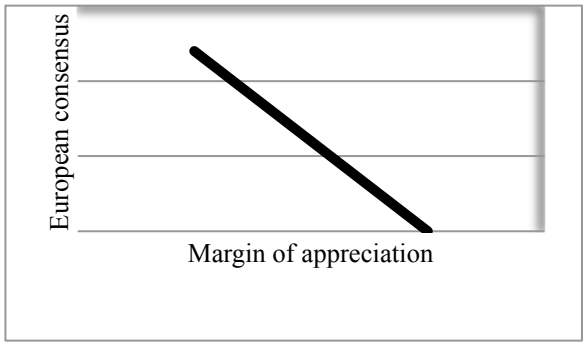

***Chart** - The margin of appreciation is inversely proportional to the existence of a European consensus.*

As to the consequences for the Court, like the presence of European consensus indicates limited elbow room for the Contracting States, the absence of European consensus indicates room for innovative solutions brought up by the Court.[307] Nevertheless, the Court is rather inclined not to take the lead in finding solutions when there is no consensus and the margin is wide. Acting otherwise would hold the risk to be labelled as judicial activism.[308]

Moreover, the Court sometimes even refrains from progressive jurisprudence if this is backed up by an existing European consensus. In *A, B and C* v. *Ireland*, a case concerning three women that travelled to England for an abortion as this was not possible in Ireland, the Court *inter alia* needed to deal with the impossibility to have an abortion for health or other well-being reasons. According to the Irish Constitution, legal abortion was only possible in case the mother's life is at risk. While considering whether the Irish abortion regulation violated the right to respect for private and family life as guaranteed by Article 8 of the Convention, the Court referred to consensus:[309]

> "[T]he Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than

[305] Kovler, Zagrebelsky, Garlicki, Jaeger and Liddell, *supra* n. 41, p. 3.
[306] Brems, *supra* n. 20, p. 412.
[307] Spielmann, *supra* n. 39, p. 592.
[308] Spielmann, *supra* n. 16, p. 18.
[309] ECtHR (Judgment) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, paras. 13, 18, 22, 167.

> accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained […]. Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion."[310]

The Court first reiterated that the Contracting States enjoy a significant margin of appreciation in relation to abortion. It then stated that although the margin of appreciation will normally be restricted when a particularly important facet of one's existence is at stake, this margin will be wider in case there is no consensus within the Member States of the Council of Europe. This is especially so when the case concerns sensitive moral or ethical questions.[311]

As there a clear consensus among the member States of the Council of Europe existed, it could have been expected that the margin afforded to Ireland would be narrow. Nonetheless, the Court disregarded these principles and focused on the Irish view that unborn children had a right to life. As there was no European consensus regarding the moment life starts and as Ireland legally allowed women to travel abroad for an abortion, the Court concluded that there was no violation of Article 8.[312]

A, B and C v. *Ireland* was the first case wherein internal consensus trumped European consensus.[313] It illustrates the Court's fickle approach to European consensus. Even if all circumstances seem right, it can still be thrown overboard. This was criticised by Judges ROZAKIS, TULKENS, FURA, HIRVELÄ, MALINVERNI and POALELUNGI in their partly dissenting opinion. They rightfully pointed out that in the case at hand, the Court did not need to measure the margin of appreciation with regards to the question when life begins. The Court was asked to balance the interests of the mother against that of the foetus and needed to measure the margin of appreciation in that regard. As a clear European consensus in favour of the protection of the mother's well-being and health was apparent, the margin accorded to Ireland needed to be narrow. Accordingly, the Court should have found a violation of Article 8 of the Convention in this regard.[314]

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[310] ECtHR (Judgment) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, para. 235.
[311] ECtHR (Judgment) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, paras. 185, 232.
[312] ECtHR (Judgment) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, paras. 237-242.
[313] F. de Londras and K. Dzehtsiarou, "Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010", 62 *International and Comparative Law Quarterly* (2013), p. 253.
[314] ECtHR (Dissenting opinion of judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, paras. 2, 4-7, 11.

In the interview conducted, former Judge TULKENS reiterated her great concern about allowing internal consensus to precede European consensus in the hierarchy of margin of appreciation meters. TULKENS is of the opinion that such practices might be the beginning of the end of the Court's supranational control.[315]

8.2.2 Rationale of the inverse proportionality

In the above discussed *A, B and C* v. *Ireland,* dissenting Judges ROZAKIS, TULKENS, FURA, HIRVELÄ, MALINVERNI and POALELUNGI shed their light on the rationale behind the inverse proportionality between consensus and the margin of appreciation:

> "This approach is commensurate with the "harmonising" role of the Convention's case-law: indeed, one of the paramount functions of the case-law is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence. The harmonising role, however, has limits. One of them is the following: in situations where it is clear that on a certain aspect of human rights protection, European States differ considerably in the way that they protect (or do not protect) individuals against conduct by the State, and the alleged violation of the Convention concerns a relative right which can be balanced – in accordance with the Convention – against other rights or interests also worthy of protection in a democratic society, the Court may consider that States, owing to the absence of a European consensus, have a (not unlimited) margin of appreciation to themselves balance the rights and interests at stake. Hence, in those circumstances the Court refrains from playing its harmonising role, preferring not to become the first European body to "legislate" on a matter still undecided at European level."[316]

Although it is understandable that the Court refrains from playing its harmonising role in case European consensus is absent, it should be cautious for *over*restraint. Although the Court is not a legislator, it is the only body that keeps the Convention blooming. Therefore, it should bear in mind that the absence of European consensus might not always originate in the Contracting States' deliberate wish to abstain from law-making. As SPIELMANN rightly points out, a general indifference with regard to a particular human rights issue might as well lay at the basis of the absence of consensus.[317] As the Court is supposed to be a human rights watchdog, it can consequently be doubted whether the Court should always exhibit judicial restraint where European consensus is absent.

8.3 Enemies in the Court

The list of cases wherein the Court has referred to European consensus to deal with sensitive moral or ethical issues is extensive. In case of sensitive moral or ethical issues, the Court generally confers a considerable margin of appreciation on the Contracting States. If the Court

[315] See: "Annex: Interview with former Vice-President of the Court Tulkens".
[316] ECtHR (Dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi) 16 December 2010, Case No. 25579/06, *A, B and C* v. *Ireland*, para. 5.
[317] Spielmann, *supra* n. 39, p. 593.

ascertains the existence of a European consensus on the matter, it is however inclined to narrow the margin.[318]

8.3.1 The right for homosexuals to adopt

The right of respect for private and family life does not encompass the right to adopt a child.[319] Furthermore, the right to respect for family life is based on the existence of a family and does not include the right to found a family.[320] These delineations apply to both married or unmarried and heterosexual or homosexual persons. Nevertheless, it remains possible that in the process of applying for adoption, the right of respect for one's private life without discrimination is infringed, when sexual orientation becomes the decisive factor for denying access to the adoption procedure.

In *Fretté* v. *France*, the Court faced the refusal of prior authorisation for Mr. Fretté, a homosexual man, to adopt. The reason for the initial refusal was twofold: according to the national authorities, Fretté had no stable maternal role model to offer and had difficulties in envisaging the practical consequences of adopting a child. In the subsequent administrative procedures, these grounds were abandoned and no other ground, equally applying to a homosexual or heterosexual unmarried single person with the same child-raising qualities, was to be found. Fretté alleged that the refusal of prior authorisation was based primarily on his sexual orientation and that it breached Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private an family life) of the Convention.[321]

The French Civil Code gives all single persons the right to apply for adoption with a precondition of obtaining authorisation. Given that Mr. Fretté was refused authorisation based on his sexual orientation, the Court concluded that his right to apply for adoption, which falls within the ambit of Article 8, was infringed.[322]

However, the Court found that the refusal of authorisation served a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure. The Court went on to stress that there was no common ground on the question whether or not homosexuality has a potentially negative impact on children, hence whether or not homosexuals should be barred from adoption. Consequently, the Court concluded that the Contracting States enjoy a wide margin of appreciation when they make rulings on matters like the one at hand. The Court however stressed that a wide margin of appreciation does not

[318] ECtHR (Judgment) 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, para. 60.
[319] ECommHr (Decision) 10 July 1997, Case No. 31924/96, *Di Lazzaro* v. *Italy*, p. 134; ECommHR (Decision) 10 July 1975, Case No. 6482/74, *X.* v. *Belgium and the Netherlands*, p. 75.
[320] ECtHR (Judgment) 13 June 1979, Case No. 6833/77, *Marckx* v. *Belgium*, para. 31 and ECtHR (Judgment) 28 May 1985, Case No. 9214/80; 9473/81; 9474/81, *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*, para. 62.
[321] ECtHR (Judgment) 26 February 2002, Case No. 36515/97, *Fretté* v. *France,* paras. 9-16, 26.
[322] ECtHR (Judgment) 26 February 2002, Case No. 36515/97, *Fretté* v. *France,* para. 32.

equal arbitrary power. In light of the broad margin of appreciation and the legitimate aim of protecting children's best interests, it concluded that there was no violation of Article 14 of the Convention taken in conjunction with Article 8.[323]

Judges BRATZA, FUHRMANN and TULKENS dissented and found that there had been no violation of Article 14 of the Convention, read in conjunction with Article 8. They argued that France went beyond its positive obligations under the Convention, but did not live up to its duty to implement the system in a non-discriminatory manner. Hence, they found that the refusal based solely on the grounds of Fretté's sexual orientation amounted to a breach of Article 14 of the Convention. Further, they found that the French Conseil d'Etat failed to explain how and why the child's interests opposed Fretté's application for authorisation. With regard to proportionality, the Judges labelled the absence of consensus as irrelevant. Although they agreed that some margin of appreciation should be left to the States in the area of adoption by homosexuals, they valued the Court's task to secure the Convention rights more. This dissenting opinion can be viewed as an example of Judge TULKENS' and her colleagues' warning for the danger of irrational use of the consensus doctrine, advocating for judicial activism in order to secure the Convention rights.[324]

Later, in *E.B.* v. *France*, the Court was confronted with a woman who also was refused prior authorisation to adopt on two grounds. Firstly, the authorities argued that there would be a lack of a paternal role model or referent for the child, as the woman lived with a female partner and could not propose a suitable referent. Secondly, they considered the ambivalence of the commitment of each member of the household, as the applicant's partner was not involved in the decision to adopt. E.B. alleged that there was a breach of Article 14 of the Convention as she had been discriminated against on the ground of her sexual orientation, which had interfered with her right to respect for her private life, as guaranteed by Article 8 of the Convention.[325]

Notwithstanding the great similarity between *Fretté* v. *France* and *E.B.* v. *France*, the Court noted several differences. In the case of E.B., the Court did not expressly refer to E.B.'s "choice of lifestyle" as a homosexual.[326] Next, unlike *Fretté,* who was deemed to have had

[323] ECtHR (Judgment) 26 February 2002, Case No. 36515/97, *Fretté* v. *France,* paras. 38-43.
[324] ECtHR (Dissenting opinion Bratza, Fuhrmann and Tulkens) 26 February 2002, Case No. 36515/97, *Fretté* v. *France,* paras. 1-2.
This is confirmed in a blog post written by BURGORGUE-LARSEN, which also deals with the critical viewpoint of former Judge and Vice-President of the Court Tulkens with regards to the margin of appreciation and consensus: L. Burgorgue-Larsen, "Le jeu ambigu du consensus européen dans la determination de la marge d'appréciation. La vision critique de Françoise Tulkens.", 6 September *Strasbourg Observers* (2012), <http://strasbourgobservers.com/2012/09/06/le-jeu-ambigu-du-consensus-europeen-dans-la-determination-de-la-marge-dappreciation-la-vision-critique-de-francoise-tulkens/>.
[325] ECtHR (Judgment) 22 January 2008, Case No. 43546/02, *E.B.* v. *France*, paras. 7-25, 32.
[326] ECtHR (Judgment) 26 February 2002, Case No. 36515/97, *Fretté* v. *France*, para. 32 and ECtHR (Judgment) 22 January 2008, Case No. 43546/02, *E.B.* v. *France*, para. 71.

difficulties in envisaging the practical consequences of the changes triggered by the arrival of a child, the domestic administrative authorities mentioned E.B.'s qualities and child-raising and emotional capacities.[327] Further, the authorities took into account E.B.'s partner, with whom she had declared to be in a stable relationship.[328] Such an angle did not appear in Fretté's case.

The Court ruled that E.B. had not been discriminated against as far as the value attributed to the non-involvement of her partner was concerned. It argued that it is in the child's best interests to examine the household wherein it would end up. Nevertheless, the Court regarded the two grounds for refusal as concurrently and noted that the lack of a paternal role and the homosexuality of E.B. played an omnipresent role in the administrative proceedings. As no reasonable justification could be found for this focus on E.B.'s homosexuality, the Court concluded that there had been a breach of Article 14 of the Convention in conjunction with Article 8.[329]

The evolution from *Fretté* v. *France* to *E.B.* v. *France* illustrates the volatility and weakness of consensus as a criterion to measure the margin of appreciation. In *Fretté* v. *France*, the majority of the judges referred to the absence of consensus as a decisive argument, while the dissenting judges found it to be a completely irrelevant factor. Later, in *E.B.* v. *France*, the Court reversed its former viewpoint on adoption by homosexuals and the margin of appreciation discussion linked with the consensus argument disappeared completely.[330] This could imply that the Court took the *Fretté* dissenters' argument to heart. Although lack of consensus implies an appreciation margin, the Court should keep pulling the strings when it comes to protecting fundamental human rights.

For the sake of completeness, it should be added here that the Court dealt with adoption by a homosexual again more recently in *Gas and Dubois* v. *France.* However, the Court found that there had been no discriminatory treatment of homosexuals compared to heterosexuals. Hence, there was no need for the Court to enter into the margin of appreciation and consensus discussion.[331]

8.3.2 The right to have religious symbols in state school's classrooms

In *Lautsi and Others* v. *Italy*, Ms. Soile Lautsi and her two children alleged that their rights under Article 2 of Protocol No. 1 (right to education) and Article 9 (freedom of thought,

[327] ECtHR (Judgment) 26 February 2002, Case No. 36515/97, *Fretté* v. *France*, paras. 28-29 and ECtHR (Judgment) 22 January 2008, Case No. 43546/02, *E.B.* v. *France*, para. 71.
[328] ECtHR (Judgment) 22 January 2008, Case No. 43546/02, *E.B.* v. *France*, paras. 7-25.
[329] ECtHR (Judgment) 22 January 2008, Case No. 43546/02, *E.B.* v. *France*, paras. 76-98.
[330] See to that effect: Dialogue between judges, European Court of Human Rights, Council of Europe, 2008, p. 58.
[331] ECtHR (Judgment) 15 March 2012, Case No. 25951/07, *Gas and Dubois* v. *France*, paras. 65-69.

conscience and religion) of the Convention were violated because of the fact that crucifixes were fixed to the wall in each classroom of the State school attended by the two children.[332]

In 2009, the Chamber unanimously held that these articles had been violated. In 2011, the Grand chamber overturned this finding and found that the Italian regulation allowing the fixation of crucifixes in the State school classroom does not constitute a violation of the Convention.[333]

In the majority of member States of the Council of Europe, the question of presence of religious symbols in the classroom in state schools was not governed by specific regulations. The Court therefrom inferred that there was no European consensus regarding this question. Accordingly, it found that the margin of appreciation included the response to the question. Although the Court added that the margin of appreciation was not unlimited, it concluded that the crucifixes in Italian State schools did not result in indoctrination, as a crucifix is an essentially passive symbol.[334]

As Judge MALINVERNI, joined by Judge KALAYDJIEVA, properly observed, the Court's reliance on the lack of any European consensus in this case can be put into question. The presence of religious symbols in state school's classes is only regulated in Poland, Austria and certain regions of Germany. The question has not yet specifically been addressed in the majority of the member States of the Council of Europe. Hence, it is difficult to draw definite conclusions regarding the existence of a European consensus on the issue and thus regarding the appropriate degree of judicial restraint.[335] This perfectly illustrates the argument made above, that an unaddressed issue does not necessarily imply the deliberate intention of the Contracting States to refrain from law-making. It might also be a consequence of general indifference.[336]

As LEMMENS argued, the Court seems to have *re*valued the margin of appreciation in cases such as *A, B and C* v. *Ireland* and *Lautsi* v. *Italy* to cope with the criticism that it too often assumes the role of lawmaker. Standalone the appropriate degree of activism the Court can afford, the use of an equivocal consensus concept to evade the debate on crucifixes in the classroom is in any case deplorable. The inadequate analysis of the factors influencing the margin of appreciation leads to paradoxical situations. Leyla Şahin cannot attend university wearing a headscarf, but the Italian state may fix crucifixes to the walls of state school's classrooms. Allowing a broad margin appreciation to the defending state based on inaccurate

[332] ECtHR (Judgment) 18 March 2011, Case No. 30814/06, *Lautsi and others* v. *Italy*, paras. 1, 10, 29.
[333] ECtHR (Judgment) 18 March 2011, Case No. 30814/06, *Lautsi and others* v. *Italy*, paras. 30, 77-78.
[334] ECtHR (Judgment) 18 March 2011, Case No. 30814/06, *Lautsi and others* v. *Italy*, paras. 26, 69-72.
[335] ECtHR (Dissenting opinion Malinverni joined by Kalaydjieva) 18 March 2011, Case No. 30814/06, *Lautsi and others* v. *Italy*, para. 1.
[336] Spielmann, *supra* n. 39, p. 593.

comparison and unjustified conclusions deducted therefrom thus leads to an unacceptable neglect of minorities. [337]

8.3.3 The right to have children through in vitro fertilisation

In *S. H. and others* v. *Austria,* the applicants alleged that the Austrian law prohibiting the use of ova and sperm from donors for in vitro fertilisation – the only option for them to conceive children – violated their rights under Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the Convention.[338]

The Court considered that the right of a couple to conceive a child through medically assisted procreation is protected by Article 8 of the Convention. As the Austrian Artificial Procreation Act clearly interfered with this right, the Court assessed whether this interference could be justified. In its assessment of the necessity of the interference in a democratic society, the Court reiterated that in case a particularly important facet of an individual's existence is at stake, the margin of appreciation will normally be restricted. When there is no European consensus on the matter, the margin will however be wider. The Court went on to conclude that:[339]

> "[…] there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilisation, which reflects an emerging European consensus. That emerging consensus is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State.
>
> Since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is not yet clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one".[340]

The Court found that this wide margin of appreciation was not exceeded by the Austrian regulation that only allowed the use of gametes from spouses for artificial procreation. To reach this conclusion, it took account of the goals which legitimised the Austrian regulation according to the Government: the protection of women, the safeguarding of the *mater semper certa est*-maxim, the protection of the well being of children and the fear of selective reproduction. Accordingly, the majority concluded that there was no violation of Article 8 taken together with Article 14 of the Convention.[341]

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[337] K. Lemmens, "Kruisbeelden in klassen mogen toch volgens EHRM", 227 *Juristenkrant* (2011), p. 3.
[338] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 3.
[339] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, paras. 82, 88, 89, 94 .
[340] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, paras. 96-97.
[341] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 98-116, 120.

Dissenting Judges TULKENS, HIRVELÄ, LAZAROVA TRAJKOVSKA and TSOTSORIA heavily objected the Court's considerations regarding European consensus and its impact on the margin of appreciation. The dissenters started by pointing out that considering a case wherefore the judgment was delivered at the end of 2011 in light of the 1999 context deprived the judgment of any real substance. The majority had pointed out that although considering the case in the 1999 context, it could take into account subsequent developments. Nevertheless, the Court disregarded the considerable evolution of the issue of sperm and ova use for in vitro fertilisation since 1999. This was all the more problematic as the majority deducted a lack of European consensus from this context.[342]

Hence, although the majority recognised that there had been changes in medical science and in the Contracting States' legislation, it completely disregarded this evolution. This was striking, especially taking into account that at the time of the judgment the parliament had still not thoroughly assessed the artificial procreation regulation notwithstanding the Constitutional Court's prospect thereof in 1999.[343]

Further, the dissenters pilloried the fact that although there already was a consensus even in 1999, the majority disregarded this because it was not grounded in settled and long-standing principles established in the law of the member States. They linked this extension of the margin of appreciation beyond limits to "the current climate", which refers to the criticism of the Court's judicial powers as 'too broad' and 'too different from what has originally been agreed upon in the fifties'.[344] With regard to the effect of this extension, Judges TULKENS, HIRVELÄ, LAZAROVA TRAJKOVSKA and TSOTSORIA found that:

> "The differences in the Court's approach to the determinative value of the European consensus and a somewhat lax approach to the objective indicia used to determine consensus are pushed to their limit here, engendering great legal uncertainty."[345]

The contradiction between the data and the considerations of the majority itself and the conclusion that there was no European consensus that led to the granting of a wide margin of appreciation contributed to the dissenter's opinion that Article 8 of the Convention had been violated.[346]

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[342] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 115-116, 120.
[342] ECtHR (Judgment) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, paras. 115-116, 120.
[342] ECtHR (Dissenting Opinion Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, paras. 4-5.
[343] ECtHR (Dissenting Opinion Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 5-6.
[344] This will be exemplified below.
[345] ECtHR (Dissenting Opinion Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 8.
[346] ECtHR (Dissenting Opinion Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria) 3 November 2011, Case No. 57813/00, *S. H. and Others v. Austria*, para. 10, 14.

As TIMMER properly observed, the majority of the Grand Chamber – again – went "on great lengths […] to appease its critics and appear respectful of State sovereignty" in *S. H. and Others* v. *Austria*.[347] Former Vice-President of the Court TULKENS expressed great concern about this evolution in the interview conducted. What the Court did in *S. H. and Others* v. *Austria de facto* qualifies as letting internal consensus precede European consensus in the hierarchy of margin of appreciation meters. This echoes what the Court did in *A, B, C* v. *Ireland.* TULKENS is – deservedly – worried about the fact that the Court is not insensitive to the criticism that currently floods it. Human rights judges are supposed to lead the way and to accordingly protect certain human rights when the time is right, not puppets that need to hide behind the margin of appreciation and consensus puppet show.[348]

8.4 The Brighton Declaration

It can be expected that the role of the margin of appreciation – and with it the role of European consensus – will become even more important in the near future.

The European human rights apparatus has long served as the example of effective human rights protection. Today, judicial backlog and criticism on the Court's legitimacy overshadow this success.[349] Accordingly, on the High-Level Conferences in 2010 in Interlaken and in 2011 in Izmir, the member States of the Council of Europe recognised unanimously that a reform of the European Court of Human Rights was needed in order to safeguard the effectiveness of the Convention system.

In April 2012, the United Kingdom – in its capacity as Chairman of the Council of Europe's Committee of Ministers – organised the High-Level Conference on the future of the European Court of Human Rights in Brighton. What followed was the Brighton Declaration of 19 April 2012, wherein the delegates to the High-Level Conference concluded that for "reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention and [invited] the Committee of Ministers to adopt the necessary amending instrument by the end of 2013" [350]. The *animo* of this conclusion was clearly set out by Council of Europe Secretary General Thorbjørn Jagland: "Effective human rights

[347] A. Timmer, "S. H. and Others v Austria: margin of appreciation and IVF", 9 November *Strasbourg Observers* (2011), <http://strasbourgobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/>.
[348] See: "Annex: Interview with former Vice-President of the Court Tulkens".
[349] K. Dzehtsiarou, "Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy", *to be published,* p. 116.
[350] Brighton Declaration, para. 12, b).

protection starts at home. The meaning of the Court was never to take over responsibility of the national courts" [351].[352]

The Brighton Declaration demonstrates an intergovernmental call for judicial restraint, reiterating the importance of the margin of appreciation. It should however be stressed that the inclusion of the margin of appreciation will only result in the doctrine becoming a general principle of interpretation. As consensus is used as a *method within* the margin of appreciation *method*, it can be expected that consensus will start to play an even more prominent role in the future case law of the Court. The question that remains to be answered is whether the Court will translate this into a situation wherein the end justifies the means.

8.5 Margin of appreciation or margin of review?

The term 'margin' in 'margin of appreciation' gives the impression that the doctrine refers to a residual power that is attributed to the Contracting States. Accordingly, it appoints the Court as the main reviewing body.[353] This dynamic echoes Article 32 of the Convention, which states that "the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred".

Since the Court has been exposed to criticism relating to *over*activism, especially from the other side of the Channel, it has attached greater importance to the margin of appreciation. This tendency will continue taking into account the spirit of the Brighton Declaration. A question that is phrased in this regard is whether in case the Court imposes self-restraint as a consequence of a broad margin of appreciation, the Court remains the main reviewer or this power shifts to the Contracting State and the Court only retains a margin of review.[354]

This question becomes all the more pertinent taking into account the functioning of the Contracting States' law and practice as a criterion to measure the margin. This is not the right forum to criticise the margin of appreciation as the Court deploys it. Nevertheless, it is appropriate to state here that consensus in its current capacity has the potential of endangering the Court's power of review.

As demonstrated above, the Court's legal comparison and the inferences made therefrom leave much to be desired. Accordingly, it can be assumed that the Court is often inclined to 'find' a lack of consensus in morally sensitive cases – such as in *Lautsi* v. *Italy* and *S. H. and*

[351] Council of Europe, "Jagland: Court reform strengthens Europe's Human Rights system", Council of Europe press release, Strasbourg, 19 April 2012, <www.coe.int/t/dgi/brighton-conference/Documents/PressRelease_Brighton_BIL.pdf>.
[352] Council of Europe, "High Level Conference on the Future of the European Court of Human Rights", <www.coe.int/t/dgi/brighton-conference/default_en.asp>.
[353] Spielmann, *supra* n. 16, p. 3.
[354] Spielmann, *supra* n. 16, p. 3.

others v. *Austria* – as to evade the debate. In *A, B and C* v. *Ireland,* the Court even played leapfrog by valuing internal consensus more than European consensus. In doing so, the Court can fight shy of *over*activism criticism.

Although a healthy degree of subsidiarity deserves to be supported and the use of consensus might serve useful purposes, its use as a veil to cover up the Court's erosion of its own powers cannot be accepted.

9. Statistics

The question lying at the heart of the consensus and comparative law debate is the relevance thereof. How present is consensus in the Court's case law? How often does the Court revert to comparative law? Does the use of consensus increase over time? Can we expect an increase or decrease of such use? These questions relate to the relevance of the research embodied in this dissertation and the discussion about the future of consensus and comparative law in the Court's case law.

In 2009, DZEHTSIAROU undertook statistical trend research to identify trends in the use of consensus and comparative law by the Court from 1999 to 2007.[355] To be able to draw up-to-date conclusions in this dissertation, the trend research was continued as to include the use of consensus and comparative law between 2008 and 2012.

9.1 Trend research

All the above-mentioned questions can be answered through statistical trend research. It enables us to identify trends and to predict future evolutions.

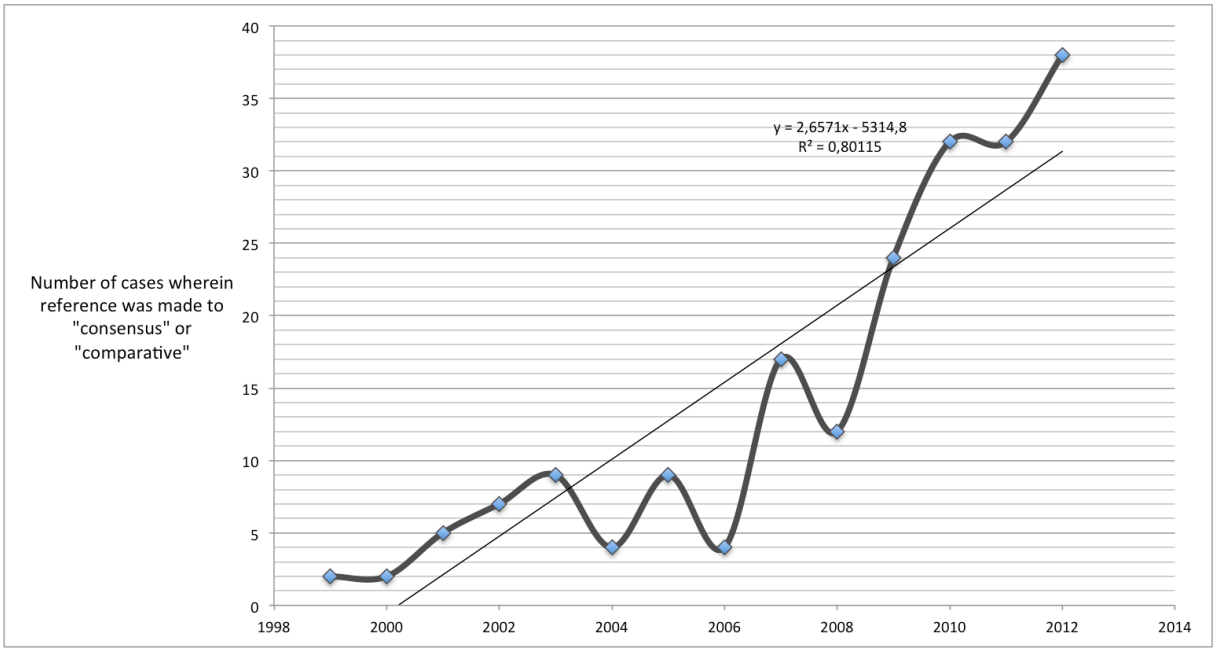
9.1.1 Method

In order to identify trends, DZEHTSIAROU'S results were assumed for the period between 1999 and 2007. In order to obtain statistical data for the period between 2008 and 2012, the same research method as DZEHTSIAROU'S was applied. The Court's HUDOC database was used as a filter for the cases of both the Grand Chamber and the Chambers mentioning the key words "consensus" and "comparative". All judgments of the Court included in the HUDOC database between 2008 and 2012 were accordingly identified as the population. As the words "consensus" and "comparative" are multi-employable, the filtered cases were analysed one by one. 301 cases were read and screened for references to consensus and comparative law in the sense of this dissertation.

The use of the two key words "consensus" and "comparative" does not allow us to identify every case wherein reference was made to the comparative law argument, the existence of consensus or trend. However, it enables us to draw general trends in the use of consensus and comparative law in the case law.

[355] Dzehtsiarou, *supra* n. 20, p. 8-9.

9.1.2 Results



It can be supposed that DZEHTSIAROU's starting point for research – 1999 – was chosen for negligibility of the number of references to consensus and comparative law before that year. This is confirmed by the mere filtering of "consensus" and "comparative" out of the earlier cases in the HUDOC database.

Although there were downturns in 2004, 2006 and 2008, the number of references to "consensus" and "comparative" generally increased since 1999. The results of the trend research however show that it was only from 2006 on that the Court really got the consensus ball rolling. The number of references to consensus and comparative law has been increasing since 2008.

The steep increase in references to consensus from 2008 until 2012 demonstrates that something was cooking in Europe. Indeed, this trend should be considered in light of the storm of criticism that has hit the Court these last years. As former Vice-President of the Court TULKENS pointed out, the Court has been subject to criticism originating in different European countries and settings. There was (or is) political criticism coming from the United Kingdom, philosophical criticism originating in the Netherlands,[356] and even judicial criticism from the Belgian corner. This criticism gave rise to the Court playing hide and seek by applying the margin of appreciation doctrine and consensus more easily once a morally sensitive topic comes on its plate. A height was reached in 2012, at the Brighton Conference,

[356] Baudet, *supra* n. 7.

where it was fortunately decided that the margin of appreciation should only be included in the Convention's preamble, not in the Convention.[357]

The equation representing the trend of reference to consensus and comparative law over time is *y = 2,6571x – 5314,8.* By applying this equation it can be foreseen that the Court will revert at least 39 times to consensus in 2015 and at least 53 times in 2020. It should however be stressed that in trend research, applying the equation linked to an upward trend always leads to an underestimation. Taking into account the attention awarded to consensus by the Court and scholars, as well as the Brighton Declaration, it can be foreseen that the frequency of references to consensus will be higher than the one calculated based on the equation.[358]

9.2 Conclusion

The research undertaken does not allow drawing conclusions with regards to the relevance and frequency of reference to the *concept* of consensus in the Court's case law. As stressed earlier, consensus is a concept with many faces. It would require a more profound research, going through every case of the Court to identify the true frequency of use of the *concept* of consensus. The research done does however allow identifying an upward trend in the reference to "consensus" in the case law during the last 14 years. This finding, and the fuel that Brighton threw to the fire, justifies the attention that is given to consensus, by the Court and by many scholars.

[357] See: "Annex: Interview with former vice-president of the Court Tulkens".
[358] See also: "Annex: Interview with former vice-president of the Court Tulkens".

10. Criticising current consensus

"A genuine leader is not a searcher for consensus but a molder of consensus."

(Martin Luther King Jr.)

10.1 The glass wall

Among the 800 million citizens of the Council of Europe, there are undoubtedly many individuals who regard the Court as a human rights watchdog, advocate *and* activist. The margin of appreciation can however be considered as a 'glass wall' created by the subsidiarity principle, which holds the Court back from unilaterally setting progressive standards.

In order to measure the margin of appreciation, the Court takes into account consensus. Consensus is not only used as a tool for the application of the Convention, but also as a reference point for its interpretation. If an arbitrary number of Contracting States who agree on a certain interpretation or application of the Convention can have the casting vote, consensus thickens the 'glass wall'. This is even more so if minorities' interests are at stake.

Consensus serves as a 'democratic' legitimiser for present-day interpretation of the Convention. The Court further deploys the concept to scan the flexibility of the Contracting States regarding sensitive human rights issues. If this flexibility is lacking, the Court will be inclined to ascribe a narrow margin to the Contracting States. Moreover, in case of inflexibility, it will mostly be reluctant to set progressive standards.

Accordingly, consensus is often criticised as a mask for judicial restraint. However, it can also serve as a veil to conceal the large discretionary powers the Court allocates to itself. This criticism has gained popularity during the last couple of years. The fog surrounding the concept of consensus has thus led to two problematic evolutions in the Court's case law. Firstly, the Court can revert to consensus when being confronted with a sensitive topic in order to avoid setting progressive standards and the subsequent labelling of the Court as a judicial activist. Hence, the Court can erode its own power of review. Secondly, the Court can use consensus in order to justify judicial *imperialism*. The Court can undertake a cherry-picking expedition through the Contracting States' law, expert and scientific knowledge in order to support the degree of activism it assumes appropriate at a given time. Accordingly, through the years, the balance was lost, as consensus became an ally of extremes.

The thickened 'glass wall' only demonstrates the tip of the iceberg of criticism on the use of consensus. The most problematic issues of the concept will be addressed below. Taking into account the increasing reference to consensus by the Court as apparent from the trend research and the benefits of consensus, it would probably be a bridge too far to desire the exit

of consensus. Hence, a roadmap for the further development of the consensus concept was drawn up. In order to unleash the potential of consensus, the Court should at least develop clearly delineated definitions of consensus and trend as well as lucid application modalities.

10.2 A Danaides barrel of challenges

10.2.1 Lack of transparency impeding thorough research

One of the greatest problems endeavoured when researching the role of consensus in the Court is the confidential character of the comparative law reports. The reports are not available to the public and the Court's staff is very cautious to provide researchers with information on their content. This causes uncertainty about the representativeness of the comparative law considerations in the judgments. Accordingly, it should at the outset be stressed that the criticism included in this dissertation is based on the data publicly available: judgments, literature and interviews with judges.

10.2.2 Reduction of an inexistent legitimacy deficit by playing into the hands of the majority

According to several authors, the Court risks judicial illegitimacy every time it engages in a reasoning that differs from the drafters' intentions.[359] This comment is present in several Contracting States as well, where more and more voices tag the Court's jurisprudence as a *'gouvernement des juges'*. Evolutive interpretation can amount to *de facto* creation of new laws and consequently risks disregarding the sovereignty of states and the principle of subsidiarity.[360] As the Contracting States never explicitly accepted the Court's interpretation and application methods, European consensus is put at the forefront as a legitimiser.

In that regard, taking European consensus as a supportive argument to depart from the drafters' intentions is defendable based on considerations of democracy and subsidiarity. As pointed out earlier, consensus seems to be the only 'democratic' criterion left, other than the signature of the Convention, and the latter says nothing about the acceptance of the Court's interpretation techniques. However, minority values always lose in the consensus approach.[361] Departing form the drafters' intentions, by interpreting the Convention against the backdrop of today's society and by taking an activist stand from time to time can be fully supported. The function of consensus as a 'democratic legitimiser' to do so is however not convincing.

Judge ZUPANČIČ illustrated the unfitness of consensus as a legitimiser for evolutive interpretation as follows: "imagine that we have a medical council dealing with a particular issue – cancer. We have surgeons, dermatologists, and other medical specialists – consilium. They debate over the issue. They may not arrive at consensus. Somebody may disagree whether there is cancer or there is no cancer. The issue is not whether we have consensus or

[359] For instance: Helfer, *supra* n. 4, p. 134.
[360] Dzehtsiarou, *supra* n. 5, p. 1734.
[361] Benvenisti, *supra* n. 16, p. 851; Shelton, *supra* n. 173, p. 134 and Brems, *supra* n. 20, p. 41.

not – the issue is whether there is cancer or not."[362] DZEHTSIAROU found this illustration unconvincing, as the purpose of the Court is not to establish scientifically proven truth.[363] Although the latter is true, that is probably not the point Judge ZUPANČIČ tried to make. Assumedly, he meant to compare the core task of doctors to heal people and the core task of the Court to protect citizens against human rights violations. In carrying out these tasks, both doctors and the Court should in the first place identify the existence of a problem, and not the existence of consensus about the criteria to decide whilst there is such a problem. Interpretation of human rights as enshrined in the Convention by a Court that is expected to be independent, should not depend on what has been agreed on by the majority of the Contracting States.[364]

In this respect, BENVENISTI for instance wrote that:

> "Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of emerging custom, or "consensus." By resorting to this device, the court eschews responsibility for its decisions. But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities."[365]

The crucial question to be addressed is whether or not there truly *is* a legitimacy deficit surrounding the interpretation and application methods of the Court. Without these methods, the Convention would be an out-dated, rigid and ineffective instrument. The Court keeps the 63-year-old treaty blooming without requiring bureaucratic decision-making. This can only be supported from an activist point of view.

Consequently, it is true that the judges swing on the thin line between law and politics. The subsequent question is whether they are democratically appointed as semi-policymakers. This question immediately collides with the independency of the Court. It seems that the Court has solved this issue by identifying a fair balance between democratic representation and independent reasoning based on moral values and personal capacities.

For the appointment of the judges, every Contracting State presents three candidates required to be of high moral character and to possess highly estimated qualifications. The Council of Europe then elects the judge for the presenting State.[366] Given that every Council of Europe

[362] Judge ZUPANČIČ gave this comparative illustration in an interview with Dzehtsiarou. Dzehtsiarou, *supra* n. 5, p. 1734.
[363] Dzehtsiarou, *supra* n. 5, p. 1739.
[364] Letsas, *supra* n. 157, p. 304.
[365] Benvenisti, *supra* n. 16, p. 852.
[366] Committee on Legal Affairs and Human Rights, *Procedure for electing judges to the European Court of Human Rights*, <www.assembly.coe.int/CommitteeDocs/2011/27102011_procedureelectionsjuges_E.pdf>.

Member State has a number of representatives according to the size of their country, there is democratic representation at least to a certain extent in the choice of the most suitable judges. Hence, the interpretation methods as applied by the Court can already be considered democratically legitimate based on the procedure of judge appointment.[367]

Further, as argued above, the Convention as a democratic instrument in itself creates room for evolutive interpretation. The preamble requires effective Convention interpretation and further realisation of human rights. This can only be accomplished through evolutive Convention interpretation.

Disregarding consensus' superfluous character with regard to the legitimisation of the Court's actions, as will become apparent below, the 'legitimising' argument *in its current state* is hardly valid.

10.2.3 Ambiguity as a result of lacking demarcation

Neither the Convention nor the Court provides guidance on the definition and scope of European consensus. It is unclear which indicators imply consensus and thus a limited margin of appreciation or a change in interpretation. As a consequence, as long as the Court elaborates no comprehensive definition, foreseeability and legitimacy of the Court's judgments based on consensus remain at risk. Moreover, lack of foreseeability and legitimacy go hand in hand with lack of enforcement.

With regard to the evolutive interpretation of the Convention, the evolution towards taking into account common attitudes in society as a sufficient factor to trigger a shift in interpretation was illustrated above.[368] The judgment of this evolution depends on one's opinion on how activist the Court should be and on the true moral values that underpin the Convention.

From a pro-activism point of view, this evolution can be considered positive, in the sense that it can lead to the final push towards 'modern' interpretation, but superfluous, in the sense that the existence of common attitudes in society hardly qualifies as a true 'democratic legitimiser'. The question deserves to be asked: does an independent Court really need a mask to hide its human rights advocacy in light of pure Convention application from the people?

From a neutral point of view, the evolution can in any case be considered alarming, as it results in the use of a very general criterion to mask the Court's true purpose. The Court can

[367] See, in the same sense: J. Rozenberg, "Yes, criticize individual cases but Strasbourg court should develop law", *The Guardian*, 20 April 2012, <www.guardian.co.uk/law/2012/apr/20/strasbourg-court-develop-law-study>.
[368] See Chapter 7: "Consensus as a tool for evolutive interpretation".

refer to the existence of common attitudes in society both to hold on to old treaty interpretation and to cause an upheaval in the case law. The use of consensus as a veil, whether leading to reticent or progressive behaviour, is unacceptable. The Court has a pedagogical function, which is foreclosed by the use of veils like the current consensus concept.

In the current state of the case law, it is possible that the Court 'looks for friends in a crowd' in order to support its desire to refrain from judicial activism or, rather exceptionally, impose judicial progressivism. This is particularly dangerous for Contracting States on the disagreeing side of the definition of consensus applied by the Court in a particular case. When they experience the reasoning of the Court as illegitimate or arbitrary because of the lack of a lucid definition of consensus, there is a great risk that they will refrain from implementing the judgment. Hence, the reference to an opaque and broad concept of consensus, relying on carefully picked out cherry-examples cannot be supported.

10.2.4 The child was named wrong

Although the Court's practice of analysing the approaches to particular human rights issues in the Contracting States as well as internationally is often labelled as comparative law, this is an incorrect description. The wrong name tagged on the Research Division's research is due to the limited manpower and lack of specialisation of the Division's staff and interns.[369] As was demonstrated above, the Division often fails to identify useful comparators and limits itself to identify 'friends in a crowd'. At the most, the Court's comparative research can be identified as comparative description.

Comparative description is not problematic as such, as will become apparent below. However, with regard to it forming the basis of a consensus argument as a democratic legitimiser, several issues can be summed up.

One problem is that incorrect comparison and comparative description do not allow drawing conclusions with regard to the existence of a certain degree of agreement that can be labelled as consensus. This is all the more problematic if consensus based on mere comparative description of carefully picked out examples is deployed as one of the main arguments. This was for instance the case in *Van der Heijden* v. *the Netherlands,* which concerned the power of a Contracting State to oblige an individual to testify against his or her long-time partner. For the assessment of whether this power was necessary in a democratic society, the Court referred to:

[369] Annex: "Interview with former vice-president of the Court Tulkens", p. I.

> "the wide variety of practices among Council of Europe member States relating to the compellability of witnesses […]. Although the lack of common ground is not in itself decisive, it militates in favour of a wide margin of appreciation in this matter."[370]

Accordingly, the Court found that compelling the applicant to testify against her partner did not violate Article 8 of the Convention (right to respect for private and family life).[371] This finding was criticised by Judges TULKENS, VAJIC, SPIELMANN, ZUPANČIČ and LAFFRANQUE in their dissenting opinion:

> "In order to ascertain whether this interference was necessary in a democratic society, the majority begin by referring to the lack of common ground, which, although "not in itself decisive, ... militates in favour of a wide margin of appreciation" […], thus rendering any other argument superfluous. As Judges Casadevall and López Guerra have also observed, a more precise analysis of the comparative law material presented by the Court concerning testimonial privilege in the member States of the Council of Europe shows that, on the contrary, there is indeed common ground in this area, that is to say that a majority of States would de facto have exempted the applicant from testifying in such a case […]."[372]

These judges went as far as saying that:

> "This observation confirms, once again, the relative nature of the Court's approach to the existence of a consensus and, more generally, raises the question whether it should not be "disentangled" from the margin of appreciation in certain types of cases."[373]

Clearly, the questionable method of identifying common ground and the capricious use of consensus has not gone unnoticed within the Court's walls either. This is why TULKENS stressed the lack of a causal link between the Court's comparative research and the identification of a European consensus in the interview conducted. According to her, a human rights judge should not only take into account the comparative research undertaken by the Research Division, but should also glance at soft law, international court practice and so on.[374] *Van der Heijden* however illustrates that not all the judges in the Court are convinced of this lack just yet.

One of the other problems with the Court's current methodology to identify consensus is that in order for the comparative analysis to be taken serious as a plausible democratic legitimiser, it should at least take into account all Contracting States. It should not be limited to data that are easily accessible. This is so much the more true in light of the Interlaken Declaration,

[370] ECtHR (Judgment) 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, paras. 13, 38, 60.
[371] ECtHR (Judgment) 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, para. 78.
[372] ECtHR (Dissenting opinion of judges Tulkens, Vajic, Spielmann, Zupančič and Laffranque) 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, para. 5.
[373] ECtHR (Dissenting opinion of judges Tulkens, Vajic, Spielmann, Zupančič and Laffranque) 3 April 2012, Case No. 42857/05, *Van der Heijden* v. *the Netherlands*, para. 5.
[374] Annex: "Interview with former vice-president of the Court Tulkens", p. II-III.

which stresses the importance of the *erga omnes* effect of the Court's jurisprudence.[375] Naturally, a Contracting State will be inclined to enforce a judgment wherein its situation was included in the comparative research rather than a judgment wherein it was completely disregarded.

10.2.5 At odds with the rule of law

All the foregoing issues indicate that the current use of the consensus criterion by the Court is at odds with the rule of law. This fundamental principle of law aims to limit the exercise of public power. At the time of Plato, it was a weapon against tyranny, while nowadays it has become a dyke against arbitrariness of powerful institutions. As the Court is a powerful institution that might have a significant effect on society, the rule of law is applicable to it.[376] Accordingly, the Court deservedly argues that the concept is inherent in all the Convention articles.[377]

AMBRUS researched the compatibility of the comparative law method deployed by the Court with the rule of law in its formal conception. The formal conception of the principle focuses on the use of proper sources and legality. It requires that the law should be able to act as a guide for the individual's conduct. This is only possible if the law is (i) correctly passed, (ii) transparent and (iii) consistent. With regard to the comparative law method used by the Court, all but the first criteria can be tested. Hence, the first criterion should be replaced by methodological correctness. The questions that relate to the first criterion, 'Why to compare?', 'What to compare?' and 'How to compare?' and the problems related therewith have been addressed throughout this dissertation. What is left to be addressed here is the inconsistency and lack of transparency surrounding the consensus argument.[378]

The first inconsistency that can be identified is the reference to international treaties that have not even been ratified as to prove consensus, if the latter serves as a criterion to measure the margin of appreciation. The margin of appreciation is a method to implement the subsidiarity principle. It aims to show deference to the respondent state's implementation of the Convention as long as it does not cross the boundaries of the Convention. Taking into account international treaties that have not been ratified by the respondent state to measure the extra leeway to be afforded to that state is at odds with this goal. In such case, the respondent state has ratified the *European* Convention, but did not ratify the international treaty. Using the international treaty as a meter for the margin accordingly seems unfair.[379] Glancing at international treaties that have not been ratified for other purposes such as the evolutive

[375] Interlaken Declaration of 29 February 2010, para. B, 4. b)-c).
[376] Ambrus, *supra* n. 174, p. 353-354.
[377] ECtHR (Judgment) 28 May 2002, Case No. 46295/99, *Stafford* v. *the United Kingdom*, para. 63; ECtHR (Judgment) 2 October 2012, Cas No. 1484/07, *Kakabadze and others* v. *Georgia,* para. 62.
[378] Ambrus, *supra* n. 174, p. 354-355.
[379] Ambrus, *supra* n. 174, p. 365.

interpretation of the Convention or the interpretation of vague concepts seems more acceptable. In such contexts, the unratified international treaties provide more solutions to cope with a human rights issue.

Another inconsistency is the choice of the sources subject to comparison. The gamut of sources reaches from domestic laws to scientific evidence. Foreseeability would benefit from consistency in the comparison of particular sources in relation to specific issues. At least, there should be transparency as to the reason why particular sources of comparison are deployed.[380]

The Court is further inconsistent by letting internal consensus precede European consensus. If European consensus at all plays a legitimising role, the Court certainly undermines this role by allowing internal consensus to play leapfrog. This inconsistency was demonstrated in *A, B and C* v. *Ireland.* It firstly creates the danger that it is no longer clear what a particular Convention right actually requires from the Contracting States. Accordingly, the states might even downgrade their level of human rights protection based on self-declared internal consensus. Worst case scenario, this might trigger a race to the bottom. Secondly, it subordinates an international legal obligation to a public sentiment, which is perpendicular to the principle that individuals are not full subjects of international law. Thirdly, the identification of internal consensus is methodologically even more deplorable than that of European consensus. It is based on a thumb approximation of a national sentiment.[381] TULKENS explicitly warned for the *slippery slope* grounded in jurisprudence like the *A, B, C* case. Engaging in internal consensus prevalence ideas heralds the end of the supranational control of the Court, which should absolutely be evaded.[382]

With regard to transparency, several issues can be addressed. The comparative law reports are not accessible. Moreover, there is no system in the Court's reference to consensus with regard to several interpretation and application principles. Sometimes the concept is used, sometimes it is not. Next, the concept is not clearly demarcated. The parties today can only guess which degree of agreement will convince the Court to interpret the Convention progressively or to decide that the Convention's boundaries are easily overstepped as the margin is narrow. Such lack of transparency again jeopardises foreseeability. Moreover, it leaves room for arbitrary conclusions drawn from arbitrary comparison.

Subsequently, the comparative law method of the Court and the linked consensus argument are undoubtedly at odds with the rule of law.

[380] Ambrus, *supra* n. 174, p. 365.
[381] de Londras and Dzehtsiarou, *supra* n. 313, p. 259-260.
[382] Annex: "Interview with former Vice-President of the Court Tulkens", p. IV.

10.2.6 Settling for the lowest common denominator

At the time of the Convention's birth the founding fathers searched for the lowest common denominator concerning fundamental human rights. The preamble however indicates that it was not their goal to limit human rights protection in Europe to *this* or *a* lowest common denominator forever. On the contrary, they offered the prospect of "future realisation of human rights and fundamental freedoms".

Using European consensus as an indicator to move on to modern treaty interpretation and as a meter for the margin of appreciation however risks the jurisprudence breaking down at the lowest common denominator.[383] CAROZZA lucidly summarised the danger of reference to such common denominators: "To base the content of obligations on what the states are actually doing has the potential to amount to no more than a vulgar form of positivism, one that certainly contravenes the spirit of international human rights' normative aspirations and idealism."[384]

10.3 Comparison to the use of comparative law by the U.S. Supreme Court

10.3.1 Introduction

The European Court of Human Rights' case law is not the only breeding ground for criticism on consensus. It may not come as a surprise that the use of such a nebulous concept gives rise to conflict in any system where consensus is used for the interpretation or application of human rights.[385]

In order to put the European consensus debate in perspective, this dissertation glimpses at the use of comparative law by the U.S. Supreme Court. On the other side of the North Atlantic Ocean, this court reverts to the existence of consensus by comparing the States' laws and by comparing U.S. law with for instance European, South-African or Canadian law in order to justify its decisions. This practice is referred to as 'constitutional comparativism'.[386]

10.3.2 Consensus and comparative law in the U.S. Supreme Court

Just like Strasbourg, the U.S. Supreme Court often relies on a certain degree of agreement among the states to identify what DE LONDRAS calls "the tipping point"[387], the right time to evolutively interpret the Constitution.[388]

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[383] Shelton, *supra* n. 173, p. 134 and Brems, *supra* n. 20, p. 41.
[384] P. G. Carozza, "Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights*",* 73 *Notre Dame Law Review* (1998), p. 1228.
[385] J.L. Murray, Dialogue between judges, European Court of Human Rights, Council of Europe, 2008, p. 3.
[386] C. M. Zoethout, "The Dilemma of Constitutional Comparativism or the Legitimacy of References to Foreign Law", <www.juridicas.unam.mx/wccl/ponencias/15/345.pdf>, p. 1.
[387] F. de Londras, "International Human Rights Law and Constitutional Rights: In Favour of Synergy", 9 *International Review of Constitutionalism* 2009, p. 312.

The two most striking examples of comparative law and consensus in the U.S. Supreme Court are *Lawrence* v. *Texas* and *Roper* v. *Simmons.* The disunity in the Court with regard to the role consensus and comparative law can or may play clearly came forward from the dissenting opinions in these cases.

10.3.2.1 Lawrence v. Texas

In *Lawrence* v. *Texas*, the U.S. Constitutional Court needed to pass judgment on the Texan sodomy laws, which prohibited sexual intercourse between same-sex persons. The request for this judgment was occasioned by an incident in Houston, Texas, whereby the local police department arrested two men who were engaging in a sexual act and who were later convicted.[389]

The Court was actually asked to overturn its judgment in *Bowers* v. *Hardwick.* In that case, the Court had relied on the ancient roots of proscriptions against sodomy between same-sex persons and thus looked at internal consensus in order to reach the conclusion that intimate sexual acts between homosexuals were not protected by the Due Process clause under the Fourteenth Amendment.[390]

The Court overturned *Bowers* by reference to both consensus among the States and trends in the rest of the world. It first argued that, unlike what was considered in *Bowers*, there was no historical consensus among the States against sodomy between same-sex persons:

> "Far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century. Even now, only nine States have singled out same-sex relations for criminal prosecution. Thus, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated."[391]

Instead, the Court drew the attention to:

> "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[392]

It further referred *inter alia* to *Dudgeon* v. *the United Kingdom* in order to underpin its finding that homosexuals had the right to enter into intimate relationships:

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[388] K. Dzehtsiarou and C. O'Mahony, "Evolutive interpretation of rights provisions: a comparison of the European Court of Human Rights and the U.S. Supreme Court", 44 *Columbia Human Rights Law Review* (2013), p. 313-314.
[389] 539 U.S. 558, 123 S.Ct. 2473, 2475.
[390] 478 U.S., at 192, 106 S.Ct. 2841.
[391] 539 U.S. 558, 123 S.Ct. 2473, 2474.
[392] 539 U.S. 558, 123 S.Ct. 2473, 2474.

> "Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) & 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization."[393]

The constitutional comparativism deployed by the Court was severely criticised by Justice SCALIA:

> "Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on "values we share with a wider civilization," *ante,* at 2483, but rather rejected the claimed right to sodomy on the ground that such a right was not " 'deeply rooted in *this Nation's* history and tradition,' " 478 U.S., at 193–194, 106 S.Ct. 2841 (emphasis added). *Bowers'* rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization," see *id.,* at 196, 106 S.Ct. 2841. The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans."[394]

10.3.2.2 Roper v. Simmons

Chief Justice of Ireland MURRAY called the role of consensus in the death penalty case law "the muddiest battlefield of all".[395] The most striking example in that respect is *Roper* v. *Simmons*.

Christopher Simmons committed murder at the age of seventeen. Taking into account Simmons' confession and the aggravating circumstances submitted by the State, the jury of the trial Court recommended the death penalty.[396] A while after his conviction, in *Atkins* v. *Virginia*, the U.S. Supreme Court held that the Eighth Amendment (protection against cruel and inhumane punishment) prohibited the execution of mentally retarded persons.[397] Simmons accordingly filed for post-conviction relief relying on the similarity between minors and retarded people.[398]

[393] 539 U.S. 558, 123 S.Ct. 2473, 2481.
[394] 539 U.S. 558, 123 S.Ct. 2473, 2494-2495.
[395] Murray, *supra* n. 385, p. 3.
[396] 543 U.S. 551, 125 S.Ct. 1187.
[397] 536 U.S. 304, 122 S.Ct. 2242.
[398] 543 U.S. 551, 125 S.Ct. 1184.

The Court heavily relied on the national legislation of other countries and international treaties for finding that the Eighth Amendment prohibits the execution of minors who were under the age of eighteen at the time of the crime:

> "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.
>
> […]
>
> Respondent and his *amici* have submitted, and petitioner does not contest, that only seven coun- tries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Ar- abia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49–50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."[399]

Again, Justice SCALIA did not agree. For instance, he criticised the reference to the U.N. Convention on the Rights of the Child, while the U.S. had not even ratified that treaty:

> "Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position."[400]

10.3.3 Criticism on constitutional comparativism

Justice SCALIA provides the liveliest examples of the discord among the U.S. Supreme Court's justices. On the one side, for certain justices the subsidiarity principle is written large within the boundaries of the Constitution. They plead for elbow room for the States and judicial restraint from the Court. For them, consensus is only established in case of very high degree of *internal* convergence. On the other hand, there are the justices who consider themselves rather as moral crusaders. They use consensus when it suits their purpose and are less strict when it comes to the identification of consensus and the sources referred to in that respect. Even treaties that have not been ratified can be dished up if the end justifies the means.

In legal doctrine, constitutional comparativism is not spared from criticism either. It all begins with the 'counter-majoritarian dilemma', which puts into question whether nine judges *at all* can declare a democratic product unconstitutional. The reliance of these judges on foreign laws and treaties only seems to enhance this dilemma. Other criticism is directed towards the Court's suboptimal methodology, in respect whereof the cherry-picking fallacy is put on the

[399] 543 U.S. 551, 125 S.Ct. 1199-1200.
[400] 543 U.S. 551, 125 S.Ct. 1226.

table.[401] Despite the criticism, consensus is everything but pushing daisies in the U.S. Supreme Court.

10.3.4 Taking stock of consensus and comparative law in the U.S. Supreme Court

A first and very important consideration in order to evaluate the use of consensus in the U.S. Supreme Court is the direct enforceability of its judgments.[402] Another is the democratic legitimacy of these judgments. This democratic legitimacy is ensured by two factors. First, the judges of the Supreme Court are nominated by the President and elected by the Senate.[403] Second, unlike the European Court of Human Rights, the Supreme Court faces the legislator: the famous *checks and balances*.[404]

Reference to comparative law in the U.S. Supreme Court accordingly does not seem to be a matter of legitimacy in order to secure enforcement. It rather seems to serve consensus' other purposes: facilitating digestibility, enhancing the judges' high esteem and maybe even propaganda in disguise.

Constitutional comparativism further only seems to relate to the evolutive interpretation of the Constitution. It is not used as a meter of some kind of margin of appreciation, but as a catalyst to move forward. As it serves no truly legitimising function, the problems surrounding constitutional comparativism regarding the choice of sources and the weight to attribute to this research are not as fundamental as in Europe. What the U.S. Supreme Court currently does is actually what TULKENS identified as a human rights protecting court's task. It looks at international law, soft law and other court's practice in order to identify the right time to move ahead.[405]

10.4 Taking stock of comparative law and consensus in the European Court of Human Rights

It can be argued that the consensus argument referred to in Strasbourg is superfluous as a democratic legitimiser for the Court's interpretation and application methods. Taking into account that independent, highly qualified judges are more flexible and effective than bureaucratic parliamentary assemblies, their role as evolutive interpreters deserves to be acclaimed. It should be stressed that the Court does not appropriate itself a law-making capacity. At the time of the Convention's birth, the founding fathers agreed to umbrella provisions, which could not be considered otherwise than covering many unidentified issues at that time. Therefore, the preamble explicitly foresees the further realisation of human

[401] Zoethout, *supra* n. 386, p. 7 and Dzehtsiarou and O'Mahony, *supra* n. 388, p. 340-342.
[402] Dzehtsiarou and O'Mahony, *supra* n. 388, p. 335.
[403] United States Senate Committee on the Judiciary, "The Supreme Court of the United States", <www.judiciary.senate.gov/nominations/SupremeCourt/SupremeCourt.cfm>.
[404] M. Kelly, "Checks and Balances – Defining Governmental Authority", *About.com*, <http://americanhistory.about.com/od/usconstitution/a/checks_balances.htm>.
[405] Annex: "Interview with former vice-president of the Court Tulkens", p. IV-V.

rights. This explicit mention as well as the election of the judges by the Parliamentary Assembly of the Council of Europe suffice as legitimisers for both the evolutive interpretation of the Convention and the cultivation of effective interpretation and application methods. Accordingly, the role of consensus as a democratic legitimiser of evolutive Convention interpretation cannot be endorsed.

Notwithstanding the superfluity of consensus as a democratic legitimiser for the 'modern' interpretation and application methods deployed by the Court and the danger for settling for the lowest common denominator, consensus can reinforce the Court's authoritative power as it serves plural useful purposes. Firstly, consensus seems to be a suitable criterion to measure the margin of appreciation. Secondly, the comparative law lying at the basis of consensus is a very rich source of possible solutions to human rights issues. Thirdly, it might help both the Contracting States and the citizens to digest judgments concerning morally sensitive issues. Fourthly, the consensus argument has the potential of facilitating the reception of judgments deploying relatively new interpretation and application methods. This is all the more true for recent signatories who feel an urge for conformity. Lastly, reference to comparative law, especially on the international level, contributes to the high esteem of the Court by other international tribunals.

The need for more authoritative power is an argument in support of reference to consensus by the European Court of Human Rights, whereas this need is much less present in the U.S. Supreme Court, as its judgments are directly enforceable. For the U.S. Supreme Court, constitutional comparativism rather is a tool for well-informed decision-making. It can therefore be argued that the criticism regarding definition and delineation of the consensus concept and methodology is much more pertinent for the European Court of Human Rights than for the U.S. Supreme Court.

The lacking definition and demarcation of the concept and the incorrect comparative law lead to insurmountable objections to the use of consensus in its current capacity by the European Court of Human Rights. Consensus nowadays serves as a veil for arbitrary powers, which has the potential of resulting in both judicial restraint and judicial imperialism. This is at odds with the rule of law which leads to the conclusion that the Court cannot keep sailing this course.

In 1993, HELFER argued that the lack of precise demarcation was a result of the Court's young age and its limited number of judgments.[406] Today however, this justification can no longer be upheld, as the Court celebrates its 54th anniversary and has delivered more than 15,000

[406] Helfer, *supra* n. 4, p. 140.

judgments since its creation in 1959.[407] In the mean time, the Court has had many opportunities to define consensus and clarify the indicators that should be looked for in consensus inquiry. Consequently, it is high time to sail new waters.

10.5 Roadmap to lifting the veil of consensus

Many authors have already proposed a well-structured and acceptable approach to consensus. After a study of their suggestions, the end goal of this dissertation became to propose a roadmap for the future application of consensus, based on both existing literature and new insights. Two routes will be proposed. The first one includes comparative law but excludes the concept of consensus as such. The second one holds on to the concept of consensus but outlines new application modalities.

10.5.1 Route 1: Leaving consensus yet keeping comparative law

DZEHTSIAROU and LUKASHEVICH argue that comparative law surveys undertaken by the Court contribute to the substantive legitimacy of the Court's judgments. They do not ascribe this legitimacy to the use of 'democratic' consensus as an argument. They rather ascribe it to the consideration of comparative analysis of the resolution of particular issues in the Contracting Parties and even outside Europe. If the Court takes into account comparative law, it sends out the impression that it exerted every effort to identify the optimal solution to the issue at hand. The impression of a well-informed decision might trigger the public's feeling of legitimacy.[408]

The impression of well-informed decision-making when considering the results of a comparative survey can be supported. This argument acclaims the mention of comparative results before the Court starts its assessment and the consideration of the Court of some of these results. It does however not support the consensus argument. The consensus argument is based on a certain degree of agreement among the Contracting States, not on the identification of the optimal solution to a particular issue.

Comparative data can inspire the Court to make the right decision by demonstrating pre-digested solutions. Moreover, the reference to comparative data does not raise issues with regard to correct legal comparison. Hence, reference to comparative data as such would be possible to consider a couple of solutions for informational purposes without the risk of being non-democratic. Furthermore, referring to comparative law without reference to consensus evades settling for the lowest common denominator.

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[407] European Court of Human Rights, "Overview 1959-2011", February 2012, <www.echr.coe.int/NR/rdonlyres/E58E405A-71CF-4863-91EE-779C34FD18B2/0/APERCU_19592011_EN.pdf>, p. 3.

[408] Dzehtsiarou and Lukashevich, *supra* n. 62, p. 274, 277-278.

As reference to comparative data as such entails legitimising and inspiring potential, the Court might consider banning consensus yet remaining faithful to comparative description in the Court.

10.5.2 Route 2: Changing consensus' modalities

10.5.2.1 Step 1: Textual and structural interpretation as a springboard to consensus

In order to take account of the *'gouvernement des juges'* criticism to a certain extent, it is desirable for consensus to be used as an interpretive tool only after applying textual and structural approaches in order to interpret the Convention. Rather than using a concept like consensus, which leaves the door open for arbitrariness, the use of textual and structural methods of interpretation creates a feeling of predictability and fairness. Once it is clear whether or not a right can be implied from the Convention based on textual or structural interpretive methods, the subsequent use of consensus will appear to be justified.[409]

The Court applied this order of methods for instance in *Soering* v. *the United Kingdom*[410]. Although Amnesty International argued that it could be derived from the fact that the majority of European states had formally abolished the death penalty that capital punishment was no longer consistent with regional standards of justice and should be viewed as an inhuman or degrading punishment within the meaning of Article 3 of the Convention, the Court disagreed. Instead of relying on such a consensus argument, the Court referred to the existence or Protocol No. 6 concerning the abolition of the death penalty. As some states had not ratified the Protocol at the time,[411] the Court did not follow the view that the death penalty could be qualified as an inhuman or degrading punishment within the meaning of Article 3 of the Convention.[412]

10.5.2.2 Step 2: Identifying a soil to sow consensus

Next, the text of the Convention as such offers the perfect soil to sow consensus. The text itself offers a 'spectrum' of positions that indicate the Court's authority to lean on European consensus or trends. Three types of soil can be distinguished within the spectrum.

The first type of soil is the one of the issues wherefore the Convention expressly authorises the Contracting States to limit the exercise of individual rights. For instance, Article 2 limits the Court's ability to interpret the prohibition against inhuman or degrading punishment as foreseen by Article 3 of the Convention evolutively, as it permits the use of the death penalty. Notwithstanding the textual restriction of an evolutive interpretation, in *Soering* v. *the United Kingdom*, the Court accepted such interpretation to a limited extent. It seems that only if

[409] Helfer, *supra* n. 4, p. 155.
[410] ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom*.
[411] At this time Russia is the only member of the Council of Europe that has not ratified the Protocol.
[412] ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom*, paras. 101-104 and Helfer, *supra* n. 4, p. 156.

states would uniformly reject death sentence in a binding legal text, subsequent developments could be taken into account as a form of European consensus for the interpretation of Article 3.[413] Hence, in order to harvest decisive consensus from such soil, the soil needs to be irrigated by uniform legal texts.

The second type of soil is the one that takes a more moderate, centrist position along the spectrum. This concerns provisions such as Article 12 of the Convention on the right to marry, which refer to the national laws governing a human right. Such soil is not really fertile for decisive consensus, as it offers great authority to the Contracting States. However, case law has indicated that trends among the Contracting States might erode this great stately power when the trends have been widely adopted.[414] Consequently, in order to harvest decisive consensus, this soil needs to be soaked by widely adopted trends.

The third type of soil, which is located at the back end of the spectrum, concerns the group of Convention articles that contain an express list of legitimate goals that justify a restriction to the right or freedom enshrined in the article. Such stately interferences must also be necessary in a democratic society. In order to test this necessity, the Court developed three criteria, which are neither cumulative nor exhaustive.

The main criterion is "pressing social need", as put forward in for example *Handyside* v. *the United Kingdom*.[415] The two subcriteria are suitability and proportionality of the interference. As the "democratic society" is constantly evolving and the way in which the democratic society perceives its fundamental values never stands still, the drafters of the Convention have put the door wide open for consensus inquiry. Especially when testing proportionality, the Court often uses the comparative method, mostly invoking legal practices applied in other Contracting States in order to justify an approach that departs from the defending state's position.[416] Accordingly, it can be concluded that articles such as Article 6 – which enshrines the right to a fair trial – and Article 10 – which protects the freedom of expression – serve as the most fruitful soils for decisive consensus.

Subsequently, the Court's pedagogical value and the anticipation of criticism on the irreconcilability of reference to consensus and the letter of the Convention might benefit from the identification of the soil.

[413] Helfer, *supra* n. 4, p. 157-158 and ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering* v. *the United Kingdom*, para. 103.
[414] Helfer, *supra* n. 4, p. 158.
[415] ECtHR (Judgment) 7 December 1976, Case No. 5493/72, *Handyside* v. *the United Kingdom*, para. 48.
[416] Vande Lanotte and Haeck, *supra* n. 1, p. 146.

10.5.2.3 Step 3: True comparative law

If European consensus ought to be a 'democratic' legitimiser and is mainly identified through comparative law, the research should at least be scientifically defendable. True legal comparison starts with the identification of correct *comparanda*, and depends on thorough research. Legitimacy and publicity go hand in hand. Therefore, if comparative law arguments are meant to increase the legitimacy and authoritative nature of the Court's judgments, the comparative surveys should firstly be open to the public. Secondly, the sources consulted by the Court should be acknowledged.[417]

The Court's idea to outsource the comparative research to universities is encouraged, as the Court lacks specialised staff to deal with every human rights issue. The choice of the universities and researchers should however be well considered, as objectivity should be guaranteed. Moreover, it can be recommended to set time limits for the research, in order to provide the Court with the results in due time.

10.5.2.4 Step 4: A clear-cut definition of European consensus

As the case law now stands, consensus seems to indicate a certain quantity of actors in support of a common denominator required to tilt the Court toward modern treaty interpretation or to limit of margin of appreciation. The degree of agreement required however seems to 'accordion' from case to case. For the sake of foreseeability and respect of the rule of law, a clear-cut definition of European consensus accordingly is desirable. It is proposed to link this definition to the identification of a European consensus burden and standard of proof.

10.5.2.5 Step 5: A specific consensus burden and standard of proof

When is there a sufficient degree of consensus in order for the margin of appreciation to narrow? How many Contracting States need to agree on a change of meaning of a concept? Who should prove the existence or the required degree of consensus? Is this a task for the Court? Or should the one that is seeking benefit from the use of consensus be the one to undertake a thorough study of the Contracting States' law, science or expertise?

Step five in the right direction to solve the legal uncertainty surrounding consensus would be to identify the burden of proof and standard of proof for the identification of European consensus.

Both the European Convention on Human Rights and the Rules of Court abstain from answering questions related to the burden of proof and the standard or proof in general.

[417] Dzehtsiarou and Lukashevich, *supra* n. 62, p. 274, 286.

During the course of time, the Court has developed several principles concerning the burden and standard of proof.

The general burden of proof allocation is governed by the *affirmanti incumbit probatio* principle.[418] He who alleges certain facts or a certain human rights violation carries the burden of proof. In cases such as *Timurtaş* v. *Turkey*, the Court stated that this principle cannot *always* be rigorously applied.[419] This implies *a contrario* that *affirmanti incumbit probatio* is the standard principle with regards to burden of proof. A question of consensus as a general fact is different from for instance a question intrinsically related to an alleged human rights violation[420] or a question only one of the parties alone has an answer to[421]. Hence, we can assume that *affirmanti incumbit probatio* is a reasonable starting point for the proof of consensus.

The Court at this time does not have the manpower to conduct a thorough European consensus investigation every time it needs to deal with consensus in light of evolutionary interpretation, margin of appreciation, proportionality and so on. Therefore, it would be for the benefit of both the parties and the Court that the one who alleges the existence of consensus needs to prove it. As a consequence, the Court would sometimes be a comparatist, but would as often be a verifier. In order to guarantee the quality of research presented to the Court, the Court might require the parties alleging the existence of European consensus to collaborate with a university appointed by the Court.

In *Cobzaru* v. *Romania*, the Court made clear that there is no such thing as a general standard of proof.

> *"[T]he level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights."*[422]

Once the Court has developed a reasoning that justifies the recourse to European consensus based on the text of the Convention, it needs to analyse the extant or forthcoming degree of European consensus. A sufficient common ground needs to be found in the domestic laws of

[418] ECtHR (Judgment) 13 May 2008, Case No. 65097/01, *N.N. and T.A.* v. *Belgium*, para. 41.
[419] ECtHR (Judgment) 13 June 2000, Case No. 23531/94, *Timurtaş* v. *Turkey*, para. 66; See also: ECtHR (Judgment) 13 November 2007, Case No. 57325/00, *D.H. and Others* v. *The Czech Republic*, para. 179; ECtHR (Judgment) 13 December 2012, Case No. 39630/09, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, para. 152.
[420] ECtHR (Judgment) 13 December 2012, Case No. 39630/09, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, para. 152.
[421] ECtHR (Judgment) 22 May 2012, Case No. 5826/03, *Idalov* v. *Russia*, para. 98.
[422] ECtHR (Judgment) 26 July 2007, Case No. 48254/99, *Cobzaru* v. *Romania,* para. 93.

the Contracting States, among experts or scientists, in international treaties or regional legislation or internally in a Contracting State.

Bearing in mind the subsidiarity principle, the Court should respect the diverse answers Contracting States give to certain human rights issues. It is only when a single solution is clearly emerging in the majority of Contracting States, that valuing this solution over the ones put forward by deviating Contracting States seems justified. Hence, in order for the consensus method to be considered as a structured justified and generally accepted method by the wide public, a certain degree of European consensus should be premised.

HELFER proposes that at least half of the Contracting States should have adopted some form of the rights-enhancing measure in question. In order to calculate whether or not the threshold has been reached, the Court needs to take into account judicial, administrative and legislative responses of the Contracting States. HELFER however argues that there are factors favouring deference to the national decision-makers (e.g. when a clear distinction can be made between progressive and conservative Contracting States when it comes to a particular subject) and factors favouring an assertive role of the Court (e.g. when the Court is dealing with a right that enjoys enhanced protection). It needs to be borne in mind that a simple head count will not always reflect the desired result.[423]

10.5.3 Conclusion

Until today, the consensus method remains to be clear as dishwater. The benefits of such an ambiguous consensus method as a veil are twofold. First of all, it leaves room to the Court for diplomacy. It might refrain from holding that a Contracting State violated the Convention if this declaration would offend the respondent state. This benefit however leaves room for the discussion to what extent the Court is required to be a diplomatic body. Second of all, the Court might carry out a less precise analysis of consensus if the goal is to enhance the protection of certain rights prior to the emergence of a progressive norm in Europe. Hence, the use of a vague consensus method grants the Court the opportunity to be flexible in order to reach its desired degree of human rights protection. The other side of the coin is that in applying an ambiguous consensus method, the risk for judicial illegitimacy and arbitrariness, as well as for *over*activism is high.[424] Reiterating the rule of law it is key to strive for the lifting of the veil.

In order to extinguish the criticism on European consensus as a veil to conceal the arbitrary powers the Court allocates to itself, a more rigorous approach to the concept is required.

[423] Helfer, *supra* n. 4, p. 159-161.
[424] Helfer, *supra* n. 4, p. 164-165.

11. Conclusion

"The winds are against us"

(Françoise Tulkens)

Consensus is a versatile concept that is often difficult to grasp. It is an abstract concept that deserves an abstract definition. It is the required quantity of actors in support of an identified common denominator. The quantity required depends on the purpose of the use of this common denominator. Consensus can be distinguished from trend, another concept that demands a place in the Court's case law. Trend can be defined as the required degree of convergence among the members of a certain group, the intensity of which depends on the purpose of the use of the trend. Naturally, the Court is rather convinced by the existence of a European consensus than by an emerging trend.

The nature of the two applications of consensus touched upon in this dissertation, *margin* of appreciation and *living* instrument already indicates the everything but mechanic method consensus implies. A mechanic application of the consensus method would particularly run in counter to the constant developments of society. Hence, although *comparative research* is the main source for the identification of *European consensus*, there is no causal link between them. European consensus is not a mathematical, yet a qualitative concept.

The Court's recourse to consensus serves many purposes. It is often argued to be a democratic legitimiser forestalling lack of enforcement. As there is no legal measure commanding the enforcement of the Court's judgments, indeed the Court needs to rely on legitimacy considerations. Such legitimacy especially is required in relation to judicially developed *interpretation* and *application* methods, such as the evolutive interpretation and the margin of appreciation doctrine. The Court already seems to meet such legitimacy through – at least to a certain extent – the democratic appointment of the judges and the Convention preamble. The latter foresees "the further realisation of human rights and freedoms". Notwithstanding the superfluity of consensus as a democratic legitimiser, the concept has the potential of enhancing the Court's authoritative power by facilitating digestion and reinforcing the judges' high esteem in Europe and beyond.

Different types of consensus can be identified in the Court's case law: consensus among the Contracting States, international consensus, scientific consensus and internal consensus. In spite the disregard thereof in some recent judgments, logic requires a hierarchical relation between the different types of consensus. As the Court is expected to contribute to the creation of a common legal and democratic Europe, it should live up to its harmonising function. Hence, it is unfortunate that the Court created a *slippery slope* by putting internal consensus before European consensus in cases such as *A, B, C* v. *Ireland* and *S. H. and Others* v. *Austria*. The Court's reference to international and scientific consensus on the other

hand deserves to be applauded. By embracing external sources, the Court is well informed and opens up to a wide range of policy options.

The European Convention on Human Rights represents the lowest common denominator of human rights protection identified just after World War II. In order to keep the Convention effective and blooming, the Court interprets it in light of society's present-day conditions. The first role of European consensus in the jurisprudence discussed in this dissertation is that of a red rag that urges to move forward. During the course of time, the Court seems to have moved away from a consensus concept related to a weighty majority reflected in law and jurisprudence to a criterion indicating common attitudes in society.

Next to the *interpretation* method of the Convention as a living instrument, the Court developed the *application* method of the margin of appreciation. The leeway granted to the Contracting States through the margin of appreciation doctrine ensures deference to the sovereignty principle and the subsidiarity role of the Court. The second role of European consensus identified is that of a measure for the margin of appreciation's breadth. There is an inverse proportionality between the existence of European consensus and the margin of appreciation. If a European consensus can be identified, the Contracting State's *air gap* will be limited.

Since its very early days, the Court was criticised as being a *'gouvernement des juges'*. This criticism reached higher peeks during the past couple of years, which eventually culminated in the Brighton Declaration. The criticism should however be put in perspective, as it only stems from a limited number of countries and is magnified by the media. The Brighton Declaration embodies a call for judicial restraint from the Court and consequently more deference to the Contracting States' sovereignty. To that effect, the Committee of Ministers was invited to include the margin of appreciation in the Convention's preamble. Fortunately, this inclusion does not impose an obligation for the Court to apply the doctrine, but only creates a general principle of interpretation.

President SPIELMANN and former Vice-President TULKENS have expressed their concern about the threat to the supranational control of the Court that accompanies the Court's increased deference to the governments. Trend research demonstrates that the number of references to consensus and comparative law has been increasing ever since 2008. Although the inclusion of the margin of appreciation in the preamble of the Convention does not impose an obligation on the Court to apply the doctrine, the Court is not insensitive to criticism. Accordingly, an even more increased reference to the margin of appreciation accompanied by consensus might be expected in the near future.

European consensus in its current capacity is a veil for arbitrary powers, be those reticent or progressive. This can be concluded from the spectrum of problems surrounding the concept. The current conception of European consensus leads the Court to playing into the hands of the majority, although the minority often is the exact object of human rights violations. The concept lacks foreseeability and legitimacy as it is neither clearly defined nor demarcated. The main source for the identification of European consensus is comparative research, which in its current state at most can be labelled as comparative description. Such description does not allow drawing conclusions as to the identification of a European consensus. The uncontrolled choice of sources to identify European consensus and the lack of identified hierarchy between the different types of consensus only indicate a few inconsistencies in relation to European consensus. The reference to the concept further lacks transparency, as the comparative law reports are not accessible. These factors contribute to the finding that European consensus in its current conception is at odds with the rule of law. Probably the biggest concern is that European consensus leads to settling for the lowest common denominator, which is perpendicular to human rights idealism.

The U.S. Supreme Court's constitutional comparativism was also hit by criticism. This criticism can be framed in the much bigger debate concerning the 'counter-majoritarian' dilemma. Other issues relate to the reference to sources from outside of the U.S. and suboptimal methodology. Taking into account the direct enforceability of the Court's judgments and the American '*checks and balances'*, these issues are less relevant in the United States than in Europe. It can even be argued that the U.S. Supreme Court sets a good example. It looks at international law, soft law and the law of the States without entering into technical structures. This enables the Court to make well-informed decisions to move ahead.

The road to lifting the veil of European consensus is long. In order to attain that goal, the Court can follow two routes. The first route leaves the area of European consensus but continues to take comparative research into consideration. This route allows the Court to make well-informed decisions by not losing sight of the Contracting States' law and practice, whilst not having to deal with the fog surrounding European consensus.

However, as the use of consensus has become deeply rooted in the Court's practice, the concept will probably not be docked in the near future. Accordingly, the Court can also follow another route. In order to release the potential of European consensus, the Court should develop a clear order of reasoning. First, it should consider textual and structural interpretation of the Convention. If such interpretation does not provide the Court with a satisfying answer, it should – secondly – identify the soil under its feet. The Court can fulfil its pedagogical task by developing a coherent reasoning concerning the Convention articles that lend themselves to the application of European consensus arguments. Third, the Court should outsource the comparative research to universities, as to guarantee its quality. To that

effect, it should however be stressed that the selection of universities and researchers should be done carefully, as to guarantee objectivity. Moreover, it deserves recommendation to set a time limit on the universities' research. Finally, the Court should identify a burden and standard of proof for the identification of consensus. A burden of proof allocation based on the *affirmanti incumbit probatio* principle can be encouraged as to decrease the Court's workload. In order to guarantee qualitative research, the Court might require collaboration between the one who alleges and universities appointed by the Court. The standard of proof should be defined based on the sensitivity of the issue and the right at stake.

"The winds are against us." The Brighton Declaration has heralded a new era, wherein even more judicial restraint is required from the Court. The gradual emergence of nationalism in Europe and the crisis only give an impression of the diplomatic and political reasons for asking the Court to take a step back. The climate accordingly does not facilitate the lifting of the European consensus veil. On the contrary, at this time, it leaves the Court with a veil to mask progressivism from critics or to counter imperialism accusations. The reaction of the Court to the entrance of the margin of appreciation in the preamble needs to be monitored carefully.

The European consensus concept is everything but perfect from a legal and logical perspective. From an idealistic point of view, the Court should however keep hiding behind the European consensus veil at least until the threat to the supranational monitoring of human rights has blown over.

12. Bibliography

Legislation

Treaties

Universal Declaration of Human Rights of 10 December 1948.

European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

Vienna Convention on the Law of Treaties of 23 May 1969.

Declarations

Interlaken Declaration of 29 February 2010.

Brighton Declaration of 20 April 2012.

Case law

European Commission of Human Rights

26 September 1958	ECommHR, *Greece* v. *the United Kingdom*
10 July 1975	ECommHR, *X.* v. *Belgium and the Netherlands*
10 July 1997	ECommHR, *Di Lazzaro* v. *Italy*

European Court of Human Rights

27 June 1968	ECtHR, *Wemhoff* v. *Germany*
23 July 1968	ECtHR, *Case relating to certain aspects of the laws on the use of languages in education in Belgium* v. *Belgium*
18 June 1971	ECtHR, *De Wilde, Ooms and Versyp ("vagrancy")* v. *Belgium*
16 July 1971	ECtHR, *Ringeisen* v. *Austria*
21 February 1975	ECtHR, *Golder* v. *the United Kingdom*
8 June 1976	ECtHR, *Engel and others* v. *the Netherlands*
7 December 1976	ECtHR, *Handyside* v. *the United Kingdom*
18 January 1978	ECtHR, *Ireland* v. *the United Kingdom*
25 April 1978	ECtHR, *Tyrer* v. *the United Kingdom*
26 April 1979	ECtHR, *Sunday Times* v. *the United Kingdom*
13 June 1979	ECtHR, *Marckx* v. *Belgium*
24 October 1979	ECtHR, *Winterwerp* v. *the Netherlands*
24 February 1983	ECtHR, *Dudgeon* v. *the United Kingdom*
21 February 1984	ECtHR, *Öztürk* v. *Germany*
28 November 1984	ECtHR, *Rasmussen* v. *Denmark*
28 May 1985	ECTHR, *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*
17 October 1986	ECtHR, *Rees* v. *the United Kingdom*
24 November 1986	ECtHR, *Gillow* v. *the United Kingdom*

18 December 1986	ECtHR, *Johnston* v. *Ireland*
30 November 1987	ECtHR, *H.* v. *Belgium*
28 October 1987	ECtHR, *Inze* v. *Austria*
18 December 1987	ECtHR, *F.* v. *Switzerland*
7 July 1989	ECtHR, *Soering* v. *the United Kingdom*
21 February 1990	ECtHR, *Powell and Rayner* v. *the United Kingdom*
22 May 1990	ECtHR, *Autronic AG* v. *Switzerland*
27 September 1990	ECtHR, *Cossey* v. *the United Kingdom*
30 October 1991	ECtHR, *Borgers* v. *Belgium*
25 March 1993	ECtHR, *Costello Roberts* v. *the United Kingdom*
22 September 1993	ECtHR, *Klaas* v. *Germany*
22 April 1997	ECtHR, *X, Y and Z* v. *the United Kingdom*
27 March 1998	ECtHR, *Petrovic* v. *Austria*
30 July 1998	ECtHR, *Sheffield and Horsham* v. *the United Kingdom*
20 May 1999	ECtHR, *Rekvényi* v. *Hungary*
16 December 1999	ECtHR, *T.* v. *the United Kingdom*
1 February 2000	ECtHR, *Mazurek* v. *France*
13 June 2000	ECtHR, *Timurtaş* v. *Turkey*
18 January 2001	ECtHR, *Beard* v. *the United Kingdom*
18 January 2001	ECtHR, *Chapman* v. *the United Kingdom*
18 January 2001	ECtHR, *Christine Goodwin* v. *the United Kingdom*
18 January 2001	ECtHR, *Lee* v. *the United Kingdom*
21 November 2001	ECtHR, *Al-Adsani* v. *the United Kingdom*
19 December 2001	ECtHR, *Bankovic and other* v. *Belgium and others*
26 February 2002	ECtHR, *Frette* v. *France*
29 April 2002	ECtHR, *Pretty* v. *the United Kingdom*
28 May 2002	ECtHR, *Stafford* v. *the United Kingdom*
11 July 2002	ECtHR, *Christine Goodwin* v. *the United Kingdom*
9 January 2003	ECtHR, *L. and V.* v. *Austria*
13 February 2003	ECtHR, *Odièvre* v. *France*
12 March 2003	ECtHR, *Öcalan* v. *Turkey*
24 July 2003	ECtHR, *Karner* v. *Austria*
27 May 2004	ECtHR, *Connors* v. *the United Kingdom*
8 July 2004	ECtHR, *Vo* v. *France*
10 November 2004	ECtHR, *Taşkin and others* v. *Turkey*
16 November 2004	ECtHR, *Ünal Tekeli* v. *Turkey*
30 June 2005	ECtHR, *Jahn and Others* v. *Germany*
13 September 2005	ECtHR, *B. and L.* v. *the United Kingdom*
6 October 2005	ECtHR, *Hirst* v. *the United Kingdom*
10 November 2005	ECtHR, *Leyla Şahin* v. *Turkey*

10 April 2007	ECtHR, *Evans* v. *the United Kingdom*
30 August 2007	ECtHR, *J. A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd* v. *the United Kingdom*
13 November 2007	ECtHR, *D.H. and Others* v. *The Czech Republic*
4 December 2007	ECtHR, *Dickson* v. *the United Kingdom*
30 January 2007	ECtHR, *Yumak and Sadak* v. *Turkey*
10 April 2007	ECtHR, *Evans* v. *the United Kingdom*
26 July 2007	ECtHR, *Cobzaru* v. *Romania*
10 December 2007	ECtHR, *Stoll* v. *Switzerland*
10 January 2008	ECtHR, *Kearns* v. *France*
12 February 2008	ECtHR, *Kafkaris* v. *Cyprus*
13 May 2008	ECtHR, *N.N. and T.A.* v. *Belgium*
8 July 2008	ECtHR, *Georgian Labour Party* v. *Georgia*
19 September 2008	ECtHR, *Korbely* v. *Hungary*
12 November 2008	ECtHR, *Demir and Baykara* v. *Turkey*
2 December 2008	ECtHR, *K.U.* v. *Finland*
17 September 2009	ECtHR, *Scoppola* v. *Italy (No.2)*
3 December 2009	ECtHR, *Kart* v. *Turkey*
3 December 2009	ECtHR, *Zaunegger* v. *Germany*
2 March 2010	ECtHR, *Kozak* v. *Poland*
27 April 2010	ECtHR, *Tănase* v. *Moldova*
16 December 2010	ECtHR, *A, B and C* v. *Ireland*
18 March 2011	ECtHR, *Lautsi and others* v. *Italy*
7 July 2011	ECtHR, *Bayatyan* v. *Armenia*
3 November 2011	ECtHR, *S. H. and Others* v. *Austria*
23 February 2012	ECtHR, *Hirsi Jamaa and others* v. *Italy*
15 March 2012	ECtHR, *Gas and Dubois* v. *France*
22 March 2012	ECtHR, *Konstantin Markin* v. *Russia*
3 April 2012	ECtHR, *Van der Heijden* v. *the Netherlands*
22 May 2012	ECtHR, *Idalov* v. *Russia*
2 October 2012	ECtHR, *Kakabadze and others* v. *Georgia*
13 December 2012	ECtHR, *El-Masri* v. *The Former Yugoslav Republic of Macedonia*
19 February 2013	ECtHR, *X and Others* v. *Austria*
26 March 2013	ECtHR, *Valiulienė* v. *Lithuania*

National case law

U.S. Supreme Court

539 U.S. 558, 123 S.Ct. 2472

543 U.S. 551, 125 S.Ct. 1183

478 U.S. 186, 106 S.Ct. 2841

Judicial Committee of the Privy Council, Canada

Edwards v. A.G. of Canada [1930] A.C. 124.

Doctrine

Books

ARAI-TAKAHASHI, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp, Intersentia 2002).

BREMS, E., *Human rights: universality and diversity* (The Hague, Nijhoff 2001).

CHRISTOFFERSEN, J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden, Martinus Nijhoff Publishers 2009).

GORLÉ, F., BOURGEOIS, G., BOCKEN, H., REYNTJENS, F., DE BONDT, W. and LEMMENS, K., *Rechtsvergelijking* (Mechelen, Kluwer 2007, 4th ed.).

HAECK, Y. and BURBANO HERRERA, C., *Procederen voor het Europees Hof voor de Rechten van de Mens* (Antwerp, Intersentia 2011).

HARRIS, D. J., O'BOYLE, M., BATES, E. P. and BUCKLEY, C. M., *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009).

KOKKINI-IATRIDOU, D., *Een inleiding tot het rechtsvergelijkende onderzoek* (Deventer, Kluwer 1988).

LEGG, A., *The Margin of Appreciation in International Human Rights Law* (Oxford, Oxford University Press 2012).

LETSAS, G., *A Theory of Interpretation of the European Convention on Human Rights* (New York, Oxford University Press 2007).

MACDONALD, R. ST. J., *The European system for the protection of human rights* (Dordrecht, Nijhoff 1993).

REID, K., *A Practitioner's Guide to the European Convention on Human Rights* (London, Sweet & Maxwell 2004, 2nd ed.).

VANDE LANOTTE, J. and HAECK, Y., *Handboek EVRM*, *I* (Antwerp, Intersentia 2005).

VILJANEN, J., *The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law* (Tampere, University of Tampere 2003).

VAN DROOGHENBROEck, S., *La proportionnalité dans le droit de la convention européenne des droits de l'homme* (Brussels, Bruylant 2001).

YOUROW, H. C., *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague, Kluwer law international 1995) 224 p.

ZWEIGERT, K. and KÖTZ, H., *An introduction to comparative law* (Oxford, Oxford University Press 1992, 2nd ed.).

Contributions in edited books or collections

RABEL, E., "Aufgabe und Notwendigkeit der Rechtsvergleichung", in H. G. LESER (ed.), *Gesammelte Aufsätze*, III (Tübingen, Mohr 1965).

ANCEL, M., "Quelques considérations sur les buts et les méthodes de la recherche juridique comparative", Rotondi, M. (ed.), *Inchiesti di Diritto Comparato II: Buts et méthodes du droit comparé* (Padua, Cedam 1973).

Contributions in compilations

GANSHOF VAN DER MEERSCH, W. J., "La Convention européenne des droits de l'homme a-t-elle, dans le cadre du droit interne, une valeur d'ordre public?" in W.J. GANSHOF VAN DER MEERSCH (ed.), *Les droits de l'homme en droit interne et en droit international* (Brussels, Presses universitaires de Bruxelles 1968).

MAHONEY, P., "The comparative method in judgments of the European Court of human rights: reference back to national law" in G. CANIVET (ed.), *Comparative law before the courts* (London, BIICL 2004).

WILDHABER, L., "The Role of Comparative Law in the Case-Law of the European Court of Human Rights" in L. WILDHABER (ed.), *The European Court of Human Rights 1998-2006. History, Achievements, Reform* (Kehl am Rhein, Engel Verlag 2006).

Contributions in journals

AMBRUS, M., "Comparative law method in the jurisprudence of the European Court of Human Rights in the light of the rule of law", 2 *Erasmus Law Review* (2009), p. 353-371.

BABAYEV, R. R., "EU Charter of Fundamental Rights: What is the legal impact of being chartered?", 4 *Romanian Journal of European Affairs* (2006), p. 63-75.

BAKIRCIOGLU, O., "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases", 8 *German Law Journal* (2007), p. 711-733.

BENVENISTI, E., "Margin of appreciation, consensus, and universal standards", 31 *N.Y.U. Journal of International Law and Politics* (1998-1999), p. 843-854.

BRADLEY, D., "Comparative Law, Family Law and Common Law", 23 *Oxford Journal of Legal Studies* (2003), p. 127-146.

BRAUCH, J. A., "The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law", 11 *Columbia Journal of European Law* (2004/2005), p.113-153.

BRAUCH, J. A., "The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights", 52 *Howard Law Journal* (2009), p. 277-318.

CANIVET, G., "The Practice of Comparative Law by the Supreme Courts: Brief Reflections on the Dialogue Between the Judges in French and European Experiences", 80 *Tulane Law Review* (2006), p. 1377-1400.

CAROZZA, P. G., "Uses and misuses of comparative law in international human rights: some reflections on the jurisprudence of the European Court of Human Rights*",* 73 *Notre Dame Law Review* (1998), p. 1217-1237.

COSTA, J.-P., "Concepts juridiques dans la jurisprudence de la Cour européenne des Droits de l'Homme: de l'influence de différentes traditions nationales", 57 *Revue trimesterielle des droits de l'homme* (2004), p. 101-110.

DE LONDRAS, F. "International Human Rights Law and Constitutional Rights: In Favour of Synergy", 9 *International Review of Constitutionalism* (2009), p. 307-328.

DE LONDRAS, F. AND DZEHTSIAROU, K., "Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010", 62 *International and Comparative Law Quarterly* (2013), p. 250-262.

DONOHO, D. L., "Autonomy, self-governance and the margin of appreciation: developing a jurisprudence of diversity within universal human rights", 15 *Emory International Law Review* (2001), p. 391-438.

DRZEMCZWESKI, A., "The Sui Generis Nature of the European Convention on Human Rights", 29 *International and Comparative Law Quarterly* (1980), p. 54-63.

DZEHTSIAROU, K., "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", 12 *German Law Journal* (2011), p.1730-1745.

DZEHTSIAROU, K., "Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights", Jul *Public Law* (2011), p. 534-553.

DZEHTSIAROU, K. and LUKASHEVICH, V., "Informed decision-making: The comparative endeavours of the Strasbourg court", 30 *Netherlands Quarterly of Human Rights* (2012), p. 272-298.

EDGE, P. W., "The European Court of Human Rights and Religious Rights", 47 *International and Comparative Law Quarterly* (1998), p. 680-687.

ERDMAN, J. N., "The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom", 2 *Journal of Law & Equality* (2003), p. 318-347.

GANSHOF VAN DER MEERSCH, W. J., "Reliance, in the case-law of the European Court of Human Rights, on the domestic law of the states", 1 *Human Rights Law Journal* (1980), p. 13-35.

GREER, S., "The interpretation of the European Convention on Human Rights: Universal principle or margin of appreciation?", 3 *UCL Human Rights Review* (2010), p. 1-14.

HELFER, L. R., "Finding a consensus on equality: the homosexual age of consent and the European Convention on Human Rights", 65 *New York University Law Review* (1990), p. 1044-1093.

HELFER, L. R., "Consensus, Coherence and the European Convention on Human Rights", 26 *Cornell International Law Journal* (1993), p. 133-165.

HERINGA, A. W., "The 'Consensus Principle'. The role of 'common law' in the ECHR case law", 3 *Maastricht Journal of European and comparative law* (1996), p. 108-145.

HEY, E. and MAK, E., "Introduction: The Possibilities of Comparative Law Methods for Research", 2 *Erasmus Law Review* (2009), p. 287-289.

HUTCHINSON, M. R., "The margin of appreciation doctrine in the European Court of Human Rights", 48 *International and Comparative Law Quarterly* (1999), p. 638-650.

JOHNSON, P., "Homosexuality, freedom of assembly and the margin of appreciation doctrine of the European Court of Human Rights: Alekseyev v Russia", 11 *Human Rights Law Review* (2011), p. 578-590.

LEESTMANS, D., "Over fundamentele rechten is er geen onderhandelingsruimte", 267 *Juristenkrant* (2013), p. 8-9.

LEMMENS, K., "Kruisbeelden in klassen mogen toch volgens EHRM", 227 *Juristenkrant* (2011), p. 3.

LETSAS, G. "The Truth in Autonomous Concepts: How To Interpret the ECHR", 15 *European Journal of International Law* (2004), p. 279-305.

LETSAS, G., "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer", 21 *European Journal of International Law* (2010), p. 509-541.

MCGOLDRICK, D., "Religion in the European Public Square and in European Public Life – Crucifixes in the Classroom?", 11 *Human Rights Law Review* (2011), p. 451-502.

MORAWA, A., "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom", 3 *German Law Journal* (2002), <www.germanlawjournal.com/index.php?pageID=11&artID=172>.

MUZNY, P., "Jurisprudence of the European Court of Human Rights and comparative law: rationality", *Annales de droit de Louvain* (2003), p. 27-76.

OSTROVSKY, A. A., "What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals", 1 *Hanse Law Review* (2005), p. 47-64.

POPELIER, P., "Behoorlijke wetgeving in de rechtspraak van het Europees Hof voor de Rechten van de Mens (2004)", *TVW* 2005, p. 142-153.

REGAN, D., "European Consensus: A Worthy Endeavour For The European Court of Human Rights?", 14 *Trinity College Law Review* (2011), p. 51-76.

ROBERTS, A., "Comparative International Law? The role of national courts in creating and enforcing international law", 60 *International and Comparative Law Quarterly* (2011), p. 57-92.

ROZAKIS, C. L., "The European Judge as Comparatist", 80 *Tulane Law Review* (2005), p. 257-279.

SHELTON, D., "The boundaries of human rights jurisdiction in Europe", 13 *Duke Journal of Comparative & International Law* (2003), p. 95-136.

SPIELMANN, D., "Consensus et marge d'appréciation nationale", 29 *Journal des tribunaux* (2012), p. 592-593.

SWEENEY, J. A., "Margins of appreciation: cultural relativity and the European Court of Human Rights in the post-Cold War era", 54 *International and Comparative Law Quarterly* (2005), p. 459-474.

TIMMER, A., "Toward an Anti-Stereotyping Approach for the European Court of Human Rights", 11 *Human Rights Law Review* (2011), p. 707-738.

THORNTON, R., "European Court of Human Rights: Consent to IVF treatment", 6 *International Journal of Constitutional Law* (2008), p. 317-330.

TULKENS, F. and DONNAY, L., "L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme. Paravent juridique superflu ou mécanisme indispensable par nature?", 1 *Revue de science criminelle et de droit pénal comparé* (2006), p. 3-23.

TÜMAY, M., "The "Margin of Appreciation Doctrine" developed by the case law of the European Court of Human Rights", 2 *Ankara Law Review* (2008), p. 201-234.

VAN LEUVEN, N., comment on ECtHR, *Evans v. the United Kingdom*, 73 *Rechtskundig Weekblad* (2009-10), p. 466-467.

VAN VYVE, C., "Mensenrechtenhof blaast warm en koud over recht op kunstmatige voortplanting", 241 *Juristenkrant* (2012), p. 2.

WILDHABER, L., "The European Convention on Human Rights and International Law", 56 *International and Comparative Law Quarterly* 2007, p. 217-232.

Papers published online

DZEHTSIAROU, K., "European Consensus: a way of reasoning", 11 *CD Working Papers in Law, Criminology & Socio-Legal Studies* (2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1411063>.

DZEHTSIAROU, K., "Consensus from within the Palace Walls", 40 *CD Working Papers in Law, Criminology & Socio-Legal Studies* (2010), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678424>.

SPIELMANN, D., "Allowing the Right Margin - The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver of Subsidiarity of European Review?", February *CELS Working Paper Series* (2012), <www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf>.

ZOETHOUT, C. M., "The Dilemma of Constitutional Comparativism or the Legitimacy of References to Foreign Law", <www.juridicas.unam.mx/wccl/ponencias/15/345.pdf>.

Unpublished book chapters

DZEHTSIAROU, K. "Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy", *to be published*.

Unpublished contributions in journals

DZEHTSIAROU, K. and O'MAHONY, C., "Evolutive interpretation of rights provisions: a comparioson of the European Court of Human Rights and the U.S. Supreme Court", 44 *Columbia Human Rights Law Review* (2013), p. 311-365.

Unpublished papers

DZEHTSIAROU, K. and REPYEUSKI, P., "European consensus and the EU accession to the ECHR.", *to be published.*

Dialogues between judges

Dialogue between judges, European Court of Human Rights, Council of Europe, 2008.

Dialogue between judges, European Court of Human Rights, Council of Europe, 2011.

Press releases

COUNCIL OF EUROPE, "Jagland: Court reform strengthens Europe's Human Rights system", Council of Europe press release, Strasbourg, 19 April 2012, <www.coe.int/t/dgi/brighton-conference/Documents/PressRelease_Brighton_BIL.pdf>.

Articles in newspapers

BAUDET, T., "Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie", *NRC*, 13 November 2010, < http://vorige.nrc.nl/article2641416.ece>.

ROZENBERG, J., "Yes, criticize individual cases but Strasbourg court should develop law", *The Guardian*, 20 April 2012, <www.guardian.co.uk/law/2012/apr/20/strasbourg-court-develop-law-study>.

WATT, N., "David Cameron calls for reform of European court of human rights", *The Guardian*, 25 January 2012, <www.guardian.co.uk/law/2012/jan/25/david-cameron-reform-european-court>.

Blog posts

BURGORGUE-LARSEN, L., "Le jeu ambigu du consensus européen dans la determination de la marge d'appréciation. La vision critique de Françoise Tulkens.", 6 September *Strasbourg Observers* (2012), <http://strasbourgobservers.com/2012/09/06/le-jeu-ambigu-du-consensus-europeen-dans-la-determination-de-la-marge-dappreciation-la-vision-critique-de-francoise-tulkens/>.

PUPPINCK, G., "X. and Others v. Austria (Part I): Had the Woman Been a Man…" 4 March *Strasbourg Observers* (2013), <http://strasbourgobservers.com/2013/03/04/x-and-others-v-austria-part-i-had-the-woman-been-a-man/>.

SMET, S., "X. and Others v. Austria (Part II): A Narrow Ruling on a Narrow Issue", 6 March *Strasbourg Observers* (2013), <http://strasbourgobservers.com/2013/03/06/x-and-others-v-austria-part-ii-a-narrow-ruling-on-a-narrow-issue/>.

TIMMER, A., "S. H. and Others v Austria: margin of appreciation and IVF", 9 November *Strasbourg Observers* (2011), <http://strasbourgobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/>.

Other internet references

AMNESTY INTERNATIONAL, "Human Rights Basics", <http://www.amnestyusa.org/research/human-rights-basics>.

COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, *Procedure for electing judges to the European Court of Human Rights*, <www.assembly.coe.int/CommitteeDocs/2011/27102011_procedureelectionsjuges_E.pdf>.

COUNCIL OF EUROPE, "High Level Conference on the Future of the European Court of Human Rights", <www.coe.int/t/dgi/brighton-conference/default_en.asp>.

COUNCIL OF EUROPE, "Who we are", www.coe.int/aboutCoe/index.asp?page=quisommesnous&l=en.

COUNCIL OF EUROPE COMMISSIONER FOR HUMAN RIGHTS, *Discrimination on grounds of sexual orientation and gender identity in Europe* (Strasbourg, Council of Europe Publishing 2011, 2nd ed.), <www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf>.

COUNCIL OF EUROPE COMMITTEE OF MINISTERS, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 6th Annual Report of the Committee of Ministers 2012*, www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf.

EUROPEAN COURT OF HUMAN RIGHTS, *The ECHR in 50 questions*, <www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/50Questions_ENG.pdf>.

KELLY, M., "Checks and Balances – Defining Governmental Authority", *About.com*, <http://americanhistory.about.com/od/usconstitution/a/checks_balances.htm>.

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, What are human rights?", <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>.

EUROPEAN COURT OF HUMAN RIGHTS, "Overview 1959-2011", February 2012, <www.echr.coe.int/NR/rdonlyres/E58E405A-71CF-4863-91EE-779C34FD18B2/0/APERCU_19592011_EN.pdf>.

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, "The Supreme Court of the United States", <www.judiciary.senate.gov/nominations/SupremeCourt/SupremeCourt.cfm>.

Websites

www.echr.coe.int

http://hudoc.echr.coe.int/sites/eng/

www.liberty-human-rights.org.uk/index.php

Dictionaries

The Oxford English Dictionary, <http://oxforddictionaries.com>.

GARNER, B.A. and BLACK, H.C., *Black's law dictionary* (St. Paul, West 2009, 9th ed.), <http://thelawdictionary.org/>.

Illustration

Based on an illustration of Henry Wong

13. Annex: Interview with former vice-president of the Court Tulkens

What follows is the transcript of an interview with prof. dr. Françoise Tulkens, the former vice-president of the Court, that took place on 13 May 2013. The interview more or less followed the sequence of this dissertation. It was based on questions prepared beforehand, but these questions 'accordioned' with the flow of the interview.

If the Court refers to consensus, it often relies on comparative research. Could you explain how the comparative research is done in practice?

On the current comparative research in the Court

TULKENS: "We request this research from the Research Division. In the Research Division there are some lawyers, who are civil servants of the Council of Europe and that are permanent in the Court. But there are also some interns. Many interns are doing this kind of research. I say that because the comparative research that we are doing in the Court, of course it is important, but it is not, I should say, the pure scientific point of view. It's not the best. It's not the best because we want comparative research on one topic one day and on another the next day. So for them [Research Division staff and stagiaires] it is very very difficult to be experts in all these different fields."

On the future comparative research as an answer to the criticism on the current research

TULKENS: "We need comparative research. Especially when it's a Grand Chamber. When there is a Grand Chamber, we need comparative research almost all the time. That's a difficult problem now for the Court. How can we do this comparative research in the best way? There are some reform propositions or some ideas to do it better. Firstly, the creation of a special relation with universities. Because of course comparative research done by a university is much better. The Research Division of the Court has approximately 5 or 6 permanent staff members, who try to do the work with the staff or with some stagiaires. Another possibility is reliance on the comparative research of third party interveners. In many cases we have third intervention. Very often, the third intervention presents comparative research to the Court. That is very interesting because if there is a third intervention for a particular topic, the interveners are experts on this topic. So they can help us a lot concerning that."

On the comparanda

TULKENS: "It's not comparative research from the university level or scientific level. The comparative research most of the time is restricted to European countries, which is good but not good, you know. That [comparison of the situation in the European countries] is important for the European consensus, but sometimes we need information

coming from outside Europe of course. That's more or less the situation. In comparative research it is not only the legislation that is taken into account. Of course it is also the activity of other international tribunals, other supreme courts, from South Africa, Canada, the United States. It is not only about the comparative research of legislation but also of jurisprudence. Also, we have to take into account other international instruments of human rights of course. The Inter-American Court of Human Rights, the International court of Justice,…. And soft-law is also important: we put into comparative law also soft law and that is very very important: soft law from the countries of Europe but also outside the countries of Europe, in the UN or in other institutions. That is in a nutshell what I can say about the comparative law dimension."

Based on the comparative research undertaken, comparative reports are drawn up. However, only a selection of these reports is reflected in the judgment. This could enhance the legitimising role of consensus. Do you think that it is possible the Court will publish these reports in the future?

On the Court's reluctance to publish the comparative law reports

TULKENS: "That's a question that has been raised very often. Consensus is a very important safeguard of course. Now to put all this material in public, yes, I realise that the Court is reluctant to do that, because it could be the premise to have many discussions about which material we have to use. It will start a long discussion with people coming from all over Europe saying that we have to do that in another way or that we are incomplete. I think that's the main argument why the Court is a little bit reluctant to publish. She only puts in the judgment the material the Court uses in the judgment, in the reasoning. But I know it's not perfect, the solution. On that I fully agree."

On the importance of publishing the comparative law report and the lack of causality between comparative law and European consensus

TULKENS: "I fully agree that comparative law is an instrument to decide if we have or if we don't have a European consensus. But, European consensus is a fragile notion. You cannot simply make a causality link between comparative material and European consensus. European consensus is a qualitative instrument as well. Of course we use it for that, but sometimes not. Look at the *Goodwin* case. We could not say that the legislation or the situation in the different countries was in agreement or in the same direction. Nevertheless, the Court said ok, now we can say that from other instruments yes, there is a European consensus in order to accept that transsexuals could have a right to marry, or the right to have their private life recognised in the civil state. There is no technical, arithmetical or mathematical relation between comparative law and consensus. That's very important to me, because otherwise you know, if we just have to follow mathematics in European consensus there will be consensus in one direction and

one in the other. Look at the *Van Der Heijden* case for instance. In the dissenting opinion we raised this problem about European consensus. Also in *S. H. and others*. It's important to say something about European consensus. In these cases the European consensus argument was completely artificial."

What are the functions of European consensus?

On the functions of European consensus, the Brighton Declaration and the need for progress

TULKENS: "To see a trend. It's an instrumental concept, European consensus. We use it sometimes to build an evolutive interpretation. Consensus is related to interpretation. Of course some people say that if you just follow European consensus, you are not very progressive. That I fully agree. That's why for me it is important to keep this notion flexible, because otherwise European consensus could say that now it's time to reinstall the death penalty. Ok shall we do that? No, of course not. We cannot blindly follow European consensus. Not at all. Next so seeing whether there is a trend, of course, but that is more technical, that you know, according to the European consensus we decide to have a broad or limited margin of appreciation. The margin of appreciation is often related to the European consensus. In the interpretation, there is a link with the margin. I have to say that I am a little bit critical about that. The margin of appreciation is a very difficult and dangerous concept that we have to decide case by case. Now the risk with that is that with the Brighton Conference, the margin of appreciation will be put on the preamble of the Convention. We will see. Everything depends on the way the Court will use this."

Do you expect that European consensus will be referred to more often due to the inclusion of the margin of appreciation in the Convention's preamble? What is your opinion about this inclusion?

On the consequences of including the margin of appreciation in the preamble

TULKENS: "Of course. That is the risk. It is the first time in history of the Convention that something is put in the preamble, which is a symbolic part of the Convention. It leads not to enhanced human rights, but to the contrary, it limits them. This should be very carefully monitored in the years to come. It is very very important how the Court will react to that. Maybe the Court will do nothing with that. It's better that it is in the preamble than in the Convention itself. At the beginning the idea was to include the margin of appreciation in the Convention. By putting it into the Convention itself, it would become an obligation for the Court to use it. By putting it in the preamble, it is a general principle of interpretation, which is different. It is a big difference. Of course, I have no problem with subsidiarity as that is the philosophy of the Court, but it is different for the margin of appreciation."

What do you think about the relative weight that should be given to the different types of consensus? Do you think that it is acceptable that the Court valued internal consensus more than European consensus in A, B, C v. Ireland?

On the Court giving its external control out of hands

TULKENS: "That's exactly what is problematic in *A, B, C*. If we take into account internal consensus, that's a bit the end of the external control of the Court. In *A, B, C*, for me, that was really really really problematic. If we enter into this idea of internal consensus, than we keep the situation as it is. The Court also did this in *S. H. and Others*. It's really a slippery slope. What is really fantastic now is that in Ireland itself they want to change the legislation."

What are the biggest concerns in the Court relating to European consensus?

On the criticism on the Court and the resort to the margin of appreciation and European consensus

TULKENS: "You have to take into account the context. The fact that now in the UK, Netherlands and even in Belgium a little bit, the Court is heavily criticised: 'the Court is going too far', 'it is going to put obligations on the states that they didn't accept in the fifties' and so on. Look at the political criticism in the United Kingdom, the philosophical criticism in the Netherlands, with Thierry Baudet and the judicial criticism in Belgium with the president of the Constitutional Court. Is it possible to say that the Court is completely insensitive to that? Of course the Court will listen to the criticism. The risk for me is that the Court will use the margin of appreciation more and will hide itself more behind consensus. It is not the aim of the Court to reply to that criticism, but gradually, you cannot say that it has no effect. For me that is the risk. Now we are not in a good situation for human rights. The winds are against us. The risk for me is that. The risk is for me to say that we need to take into account internal problems etc. Then the Court for me will miss it's task. It's a very important problem. It goes together a little bit with the idea that was discussed ten years ago but now again discussed concerning the fact that the individual application is not possible anymore. Now we have to choose our cases: *enfin* the American system. These two elements together could be a real danger to the Court to my mind. When we think that an evolution is necessary, we have to do that in a pedagogical way. Of course, that is very important, we cannot do it so. But at the same time, we have to go. We have to enter into that. Look at *Dudgeon v. the UK*. Also the transsexual case in an excellent example of that. The time was right in 2000 to change the case law on that. So we have said to the states: we have to take this into consideration. Nothing happened yet, but now it's time to go. In Belgium and Greece that was the same: the time was right to address the problem concerning asylum. Of course we can say: 'that's a matter for the States, margin of appreciation, European consensus, bla bla bla'. But sometimes

we have to say 'now!'. That's what a judge is for. It's more than a feeling. We see the social, political, legal evolution, and we say: 'now it's time *d'aller en avant*'. In the *Taxquet* case concerning the motivation of the Belgian Assize Court it was also like that. That case was so clear for me. The problem was there for many years in Belgium and the time was right to go. *Voilà*."

What are the origins and the legal basis of European consensus? Is it implicitly based on a Vienna Convention article?

On the emergence of the European consensus argument in the Court

TULKENS: "No, because in the Vienna Convention I don't think we have any provision allowing for that. The treaty says that the interpretation should be based on the ordinary meaning and that we have to give the provisions an *effet utile*. That's very important because all the interpretation methods of the Court: teleological interpretation, evolutive interpretation, are grounded in these provisions. But I don't know where European consensus came from. The margin of appreciation is the same. You don't see that in any text or convention. It is a pure construction by the case law. The genealogy of consensus would be interesting to research."

14. Nederlandse samenvatting overeenkomstig Artikel 2.5.3. van het Reglement 'Masterproef in de rechten'

De rol van Europese consensus in de rechtspraak van het Europees Hof voor de Rechten van de Mens

De rol van rechtsvergelijkend onderzoek in de rechtspraak van het Europees Hof voor de Rechten van de Mens (hierna: "het Hof) wordt alsmaar belangrijker. Dat blijkt uit een trendonderzoek van de rechtspraak tussen 1999 en 2012. Het rechtsvergelijkend onderzoek wordt gevoerd door de Onderzoeksdivisie van het Hof en is de voornaamste bron voor het identificeren van Europese consensus. Dit laatste concept is multifunctioneel van aard. Het Hof verwijst naar Europese consensus bij onder meer het evolutief interpreteren van het Europees Verdrag voor de Rechten van de Mens (hierna: "het Verdrag"), bij het meten van de statelijke appreciatiemarge en bij het interpreteren van vage begrippen.

Consensus is een abstract begrip dat noopt tot een abstracte definitie. Het begrip kan worden uitgelegd als de instemming van een bepaalde hoeveelheid actoren met een gemene deler die kan worden geïdentificeerd tussen instemmende en tegenstemmende actoren. De hoeveelheid van instemmende actoren nodig voor het identificeren van consensus is afhankelijk van het doel waartoe het begrip wordt aangewend. Consensus dient te worden onderscheiden van trend, een begrip dat eveneens binnen het begrippenkader van het Hof valt. Een trend kan worden beschouwd als de convergentie tussen de leden van een bepaalde groep, waarbij de intensiteit van deze convergentie afhankelijk is van het doel waartoe het concept trend wordt aangewend. Het Hof laat zich evident sterker leiden door het bestaan van Europese consensus dan door een opkomende trend.

De twee toepassingen van consensus die worden behandeld in dit proefschrift, de statelijke *appreciatiemarge* en het verdrag als *levend* instrument, wijzen op het allesbehalve mechanische karakter van het concept. Een mechanische toepassing van het begrip consensus zou op gespannen voet staan met de constante ontwikkelingen binnen de samenleving. Bijgevolg bestaat er dan ook geen causaal verband tussen het rechtsvergelijkend onderzoek uitgevoerd door de Onderzoeksdivisie en het identificeren van een Europese consensus door het Hof. Desondanks is het vergelijkend onderzoek de belangrijkste bron voor het Hof ter identificatie van Europese consensus. Europese consensus is geen mathematisch, doch een *kwalitatief* concept.

Het Hof neemt haar toevlucht tot Europese consensus om verscheidene redenen. De meest aangehaalde reden is dat het concept een democratische legitimering biedt voor de arresten van het Hof. De uitvoerbaarheid van de arresten wordt niet wettelijk geregeld en is dus vooral afhankelijk van legitimiteitsperceptie. De referentie naar Europese consensus bij de interpretatie en toepassing van het Verdrag wordt dan ook vaak beschouwd als een

legitimerende democratische factor. Een vraag die in dit opzicht kan gesteld worden is of dergelijke legitimering daadwerkelijk nodig is. De preambule van het Verdrag voorziet namelijk in de verdere realisatie van het Verdrag. Bovendien worden de rechters van het Hof op enigszins democratische wijze aangesteld, aangezien zij per Verdragsluitende Staat worden voorgesteld en worden verkozen door de parlementaire vergadering van de Raad van Europa. Niettegenstaande de discussie omtrent het al dan niet democratisch legitimerende karakter van Europese consensus heeft het concept ook andere functies. De referentie naar wetgeving en rechtspraak van de Verdragsluitende Staten, verdragen van internationale organisaties en de huidige stand van de wetenschap zorgen er onder meer voor dat de arresten gemakkelijker verteerbaar zijn en dat het Hof als goed geïnformeerd wordt aanzien. Dat laatste verhoogt bovendien het aanzien van de rechters op internationaal niveau.

Er kunnen verschillende types van consensus worden geïdentificeerd in de rechtspraak van het Hof: consensus tussen de Verdragsluitende Staten, internationale consensus, wetenschappelijke consensus en interne consensus. Hoewel hier in de rechtspraak van het Hof vooralsnog geen regeling over bestaat, is het wenselijk dat de verschillende vormen van consensus zich in een onderling hiërarchische verhouding tegenover elkaar bevinden. Dat het Hof in zaken zoals *A, B, C* v. *Ireland* en *S.H. and Others* v. *Austria* interne consensus meer waard achtte dan Europese consensus staat haaks op de doelstelling van het Hof om door middel van harmonisatie in de rechtspraak bij te dragen tot een ééngemaakt Europa.

Het Europees Verdrag voor de Rechten van de Mens vertegenwoordigt de kleinste gemene deler van mensenrechtenbescherming sedert de Tweede Wereldoorlog. Om het nuttig en bloeiend te houden, interpreteert het Hof het Verdrag in het licht van de huidige maatschappelijke omstandigheden. In dat kader fungeert Europese consensus als een licht dat op groen springt voor ‘moderne’ verdragsinterpretatie. Wat betreft de dynamiek van Europese consensus in de evolutieve interpretatie van het Verdrag, lijkt het Hof in de loop der jaren te zijn afgestapt van een Europees consensusbegrip dat een meerderheidsopvatting in de wetgeving en rechtspraak van de Verdragsluitende Staten vereiste. Het begrip wordt thans veelal ingevuld als een (veel minder strikte) vereiste van gemeenschappelijke opvattingen in de samenleving.

Naast de interpretatie van het verdrag als *levend* instrument, ontwikkelde het Hof de *margin of appreciation* doctrine als toepassingsmethode. Deze doctrine biedt de Verdragsluitende Staten ‘speelruimte’ voor de toepassing van het Verdrag. De statelijke appreciatiemarge die aan de Verdragsluitende Staten wordt gelaten bevestigt zo de soevereiniteit van die Staten en de subsidiariteit van het Hof. De tweede toepassing van Europese consensus die wordt besproken in dit proefschrift is dan ook die van meetinstrument voor het bepalen van de statelijke appreciatiemarge. Er bestaat een omgekeerde evenredigheid Europese consensus en

de *margin of appreciation*. Indien Europese consensus kan worden geïdentificeerd, zal de 'speelruimte' van de Verdragsluitende Staat worden beperkt.

In haar huidige vorm is het Europese consensus begrip een sluier voor willekeur. Dit is de conclusie die kan worden getrokken uit de vele problemen gerelateerd aan de huidige opvatting van het concept. Het consensusbegrip leidt er op vandaag toe dat het Hof toegeeft aan de meerderheid, hoewel het precies de minderheid is die vaak het slachtoffer is van mensenrechtenschendingen. Het begrip ontbeert bovendien voorspelbaarheid en legitimiteit, gelet op het feit dat het begrip noch duidelijk omschreven, noch goed afgebakend is. De voornaamste bron voor de identificatie van Europese consensus is vergelijkend onderzoek, dat op vandaag hooguit kan worden bestempeld als een vergelijkende *beschrijving*. Zulke beschrijving laat evenwel niet toe conclusies te trekken over het al dan niet bestaan van Europese consensus. Het ontbreekt de onderzoeksresultaten die op vandaag worden aangeleverd door de Onderzoeksdivisie aan kwaliteit, om reden van onderbemanning en gebrek aan specialisatie. De ongecontroleerde keuze van bronnen ter identificatie van Europese consensus, en het gebrek aan duidelijke hiërarchie tussen de verschillende types van consensus, zijn slechts enkele pijnpunten bij de identificatie van Europese consensus. Aangezien het vergelijkend rapport opgesteld door de Onderzoeksdivsie niet openbaar is, ontbeert het begrip transparantie, wat bijdraagt tot de bevinding dat Europese consensus in zijn huidige opvatting in strijd is met het principe van de rechtsstaat: de *rule of law*. Het grootste probleem van het concept Europese consensus in zijn huidige opvatting is wellicht dat het leidt tot het aannemen van de laagste gemene deler met betrekking tot mensenrechtenbescherming in Europa.

Opdat het Hof het arbitraire aspect van het consensus concept achter zich zou kunnen laten kunnen twee wegen worden bewandeld. De eerste weg verlaat het domein van Europese consensus maar behoudt rechtsvergelijkend onderzoek als bron voor het Hof. Dergelijk onderzoek biedt het Hof namelijk een scala van mogelijke oplossingen voor mensenrechtenproblemen.

De tweede weg behoudt het Europese consensus concept als indicator van het juiste moment voor evolutieve interpretatie en als meter voor de statelijke appreciatiemarge, maar past de modaliteiten van het concept aan. Het verdient aanbeveling dat het Hof vertrekt vanuit een tekstuele en structurele interpretatie van het Verdrag vooraleer op het consensusbegrip terug te vallen. Verder zou een heldere en consistente rechtspraak over de toepasbaarheid van het consensus concept met betrekking tot de verschillende verdragsrechten de voorzienbaarheid ten goede komen. De beste optie voor het garanderen van kwalitatief rechtsvergelijkend onderzoek is dit uit te besteden aan universiteiten. Om de objectiviteit te bewaren dienen de universiteiten en onderzoekers belast met dit onderzoek zorgvuldig te worden uitgekozen. Een tijdslimiet verbonden aan het onderzoek lijkt bovendien noodzakelijk. Het invoeren van

specifieke bewijsregels inzake het bestaan van Europese consensus is een volgende stap. Indien de bewijslast wordt verdeeld volgens het *affirmanti incumbit probatio* principe kan het Hof zichzelf ontlasten en is het aan de bewerende partij om het bestaan van Europese consensus aan te tonen. Hiertoe kan een samenwerking met door het Hof aangeduide universiteiten en onderzoekers worden opgelegd. De bewijsnorm dient vervolgens duidelijk te worden geïdentificeerd op grond van het verdragsrecht in kwestie en het gevoelige karakter van het probleem dat voorligt.

De kritiek op het Hof als zou het een '*gouvernement des juges*' zijn is zo oud als de straat. De laatste jaren bereikte deze kritiek evenwel ongekende hoogten. Zowel uit politieke, filosofische als gerechtelijke kringen gingen stemmen op dat het Hof zijn boekje te buiten ging door het beschermen van rechten die niet expliciet werden aanvaard bij de ondertekening van het Verdrag. Hoewel een diepgaande analyse zich hier opdringt, is het aannemelijk dat deze kritiek verband houdt met het toegenomen nationalisme op het Europese continent. Deze kritiek dient bovendien te worden gerelativeerd, aangezien zij afkomstig is uit een minderheid van de Verdragsluitende Staten en de media deze kritiek bovendien vaak uitvergroot.

De Brighton Verklaring inzake de toekomst van het Europees Hof voor de Rechten van de Mens van april 2012 luidde een nieuw tijdperk in, waarin nog meer terughoudendheid wordt verwacht van het Hof. Het opnemen van de statelijke appreciatiemarge in de preambule van het Verdrag werd in het vooruitzicht gesteld en houdt een duidelijk verzoek tot meer terughoudendheid van het Hof in. Het opnemen van de *margin of appreciation* in de preambule leidt gelukkig slechts tot het ontstaan van een algemeen interpretatiebeginsel en legt dus geen verplichting tot toepassing op aan het Hof. Het Hof is echter niet ongevoelig voor kritiek en zal de vraag naar meer terughoudendheid zeker in het achterhoofd houden. Het kan dus worden verwacht dat de statelijke appreciatiemarge, met Europese consensus in haar kielzog, een nog prominentere rol zal innemen in de mensenrechtenrechtspraak in de komende jaren.

Het huidige mensenrechtenklimaat in Europa zal de opheffing van de 'sluier der Europese consensus' derhalve niet vergemakkelijken. Integendeel, deze sluier laat het Hof toe om zich te verstoppen of critici de mond te snoeren.

Het Europese consensusbegrip is vanuit een juridisch perspectief allesbehalve perfect. Vanuit een idealistisch oogpunt, dient het Hof zicht evenwel te verschuilen achter haar 'sluier der Europese consensus' - ten minste tot de bedreiging van het supranationale toezicht op de mensenrechten is overgewaaid.