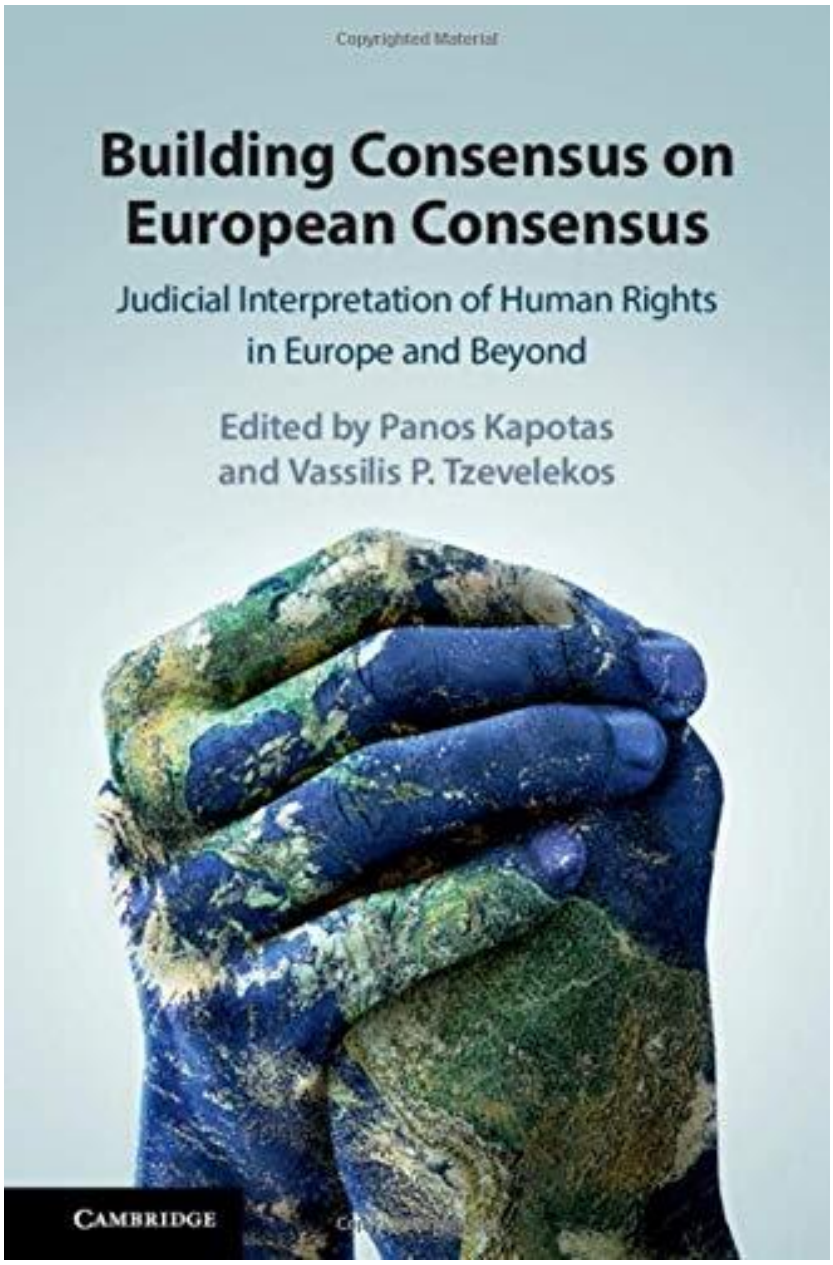

Djeffal, C. (2019). Consensus, Stasis, Evolution: Reconstructing argumentative patterns in the context of static and evolutive interpretations. In P. Kapotas & V. P. Tzevelekos (Eds.), *Building consensus on European consensus: Judicial interpretation of human rights in Europe and beyond* (pp. 71–95). Cambridge University Press. https://doi.org/10.1017/9781108564779.005

4

Consensus, Stasis, Evolution

Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence

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4.1 Introduction

Sometimes, it is helpful to try to look at things as if we were seeing them for the first time. Reading about the concepts of consensus and the living instrument approach of the European Court of Human Rights (ECtHR) for the first time might provoke an intuitive feeling that both approaches fit well, but also that there is a tension. If there is a real consensus – one might argue – there should not be a contentious case before a court as this could be taken to contradict the consensus. Yet, on the other hand, the notion that consensus can inform the application of the law ties the law to the actual consensus and might explain why the law is 'living'. This chapter clarifies the notion of consensus as it is used in the Court's living instrument approach. In order to achieve this aim, it distinguishes between definition, function, ascertainment and outcome. Some issues will appear in different contexts. One of those issues is the question of whether universal agreement is necessary to establish a consensus. If it is possible to identify consensus in the absence of universal agreement, there needs to be some form of justification. There might be normative reasons lying outside the exact numbers that inform the determination of whether a consensus exists or not.

As it proceeds from the foregoing, this chapter departs from the consensus doctrine used by the ECtHR. The aim is to reconstruct consensus, that is, to reformulate it in a way that brings out hidden aspects and exposes its structure more clearly.[1] This will be done in the

[1] For further explanation and further references on reconstruction, see C. Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge: Cambridge University Press, 2015), pp. 71–6; For an analysis from a democratic perspective, see

context of the Court's living instrument approach.[2] This approach was coined in the *Tyrer* case, in which the Court stated:

> the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the 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.[3]

This excerpt is a good example of how the Court establishes consensus when it is faced with questions of stasis and evolution. It cannot be assumed *a priori* that there is a particular relationship between the 'living instrument' approach and the notion of 'consensus'. Yet an examination of stasis and evolution reveals certain questions and problems.

4.2 Definition

Consensus is a concept that has a common and general meaning, but has also been regularly used in specific contexts such as in Roman law, diplomacy or within the organs of international organisations. The ECtHR's use of consensus is special in that it denotes several forms of consensus that differ as concerning the participation of states.

4.2.1 Literal Meaning

Consensus is a word of Latin origin. In the authentic languages of the Convention, French[4] and English,[5] consensus is associated with either an actual agreement, public opinion or a specific process establishing a common agreement. Take, for example, the definition of l'Académie française:

> (1)*__CONSENSUS__ (*en* se prononce *in* ; *s* final se prononce) n. m. XIX^e^ siècle. Mot latin signifiant « accord », de *consentire*, « être d'accord ». DROIT. Accord exprès ou tacite établi entre les membres d'un groupe,

A. von Ungern-Sternberg, 'Die Konsensmethode des EGMR: Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens und das innerstaatliche Demokratieprinzip' (2013) 51 *Archiv des Völkerrechts* 312–38.

[2] For the link see K. Dzehtsiarou, 'European consensus and the evolutive interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1730–45.

[3] *Tyrer* v. *the United Kingdom* (Appl. no 5856/72), judgment, 25 April 1978, para. 31.

[4] LaRousse, *consensus*. www.larousse.fr/dictionnaires/francais/consensus/18357?q=consensus#18253.

[5] Oxford University Press, *Oxford English Dictionary: The Definitive Record of the English Language*, www.oed.com.

> d'un parti, d'une conférence diplomatique, sur l'action à mener, la politique à suivre. *La reconnaissance du consensus évite le recours au vote.* Par ext. Accord tacite de la majorité des citoyens d'un pays sur certains questions. *Consensus social. Cette réforme devrait recueillir un large consensus.*[6]

This definition gives evidence of the different layers of meaning as outlined previously. The first layer signifies an agreement, that is, a meeting of minds. Yet, consensus also denotes a procedure towards an agreement through tacit consent. In the third understanding, consensus corresponds to a broad common understanding of a social group.

4.2.2 Legal Context

These different meanings can be traced in the legal context. In Roman law, consensus was considered the 'unanimous will of the parties of a contract (contractus)'.[7] The term was developed outside the *ius civile*, that is, the law between Roman citizens. It established a contract between Roman and non-Roman citizens enforceable by good faith.[8] While this principle was initially applied to four types of contracts, including contracts of sales and leases, it was later applied in different circumstances. The word consensus also played a role in other contexts, the most prominent possibly being in Cicero's famous and often quoted definition of a state (*res publica*) in which he defined a people as being established by *iuris consensu* and *utilitatis communione*.[9] *Iuris consensu* in this context might be translated as a common understanding and opinion of the law. It is interesting that the academic consensus, which was often called *opinio iuris doctorum*, historically played an important

[6] 'Consensus' in *Dictionnaire de l'Académie française*, 9th edn: This could be translated as follows: nineteenth century. Latin word meaning 'agreement', from *consentire*, 'to be in agreement'. LAW. Express or tacit agreement between the members of a group, a party, a diplomatic conference, on the action to be taken, the policy to be followed. The recognition of consensus avoids the use of voting. By ext. tacit agreement of the majority of the citizens of a country on certain issues. *Social consensus. This reform should be based on a broad consensus*'.

[7] G. Schiemann, 'Consensus', in H. Cancik, H. Schneider, C. F. Salazar et al. (eds), *Brill's New Pauly: Encyclopaedia of the Ancient World* (Leiden: Brill Online, 2016).

[8] Ibid.

[9] The whole definition reads: *Est igitur, inquit Africanus, res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus.*

role and was even considered to be a material source of law.[10] As is well known, this notion is still reflected in the sources of international law: According to Article 38(1)(d) of the Statute of the International Court of Justice, the teachings of the most highly qualified publicists are still considered a subsidiary means for the identification of the law.

In the international legal context, it is possible to find the broad notion of consensus relating to commonly held views, as well as the rather narrow notion pointing to a process establishing the agreement between different actors. The word consensus has, for example, been frequently used when expressing that there is a need for rules of interpretation common to all interpreters – which relates to a wider notion of consensus.[11] Yet in the international legal context, consensus is probably mostly used to designate a process of reaching a decision, for instance, at diplomatic conferences or within organs of international organisations. In these contexts, consensus is often associated with a procedure establishing agreement in the absence of any objections.[12] This is expressed in a report of the US State Department as follows:

> In practice, consensus means that the decision is substantially acceptable to delegations and that those which have difficulties with certain aspects of the resolutions are willing to state their reservations for the record rather than vote against it or record a formal abstention. Consensus must be distinguished from unanimity, which requires affirmative support of all participants. Essentially, consensus is a way of proceeding without formal objection. Yet the result is virtually the same: a resolution is adopted with the support of all states present, albeit frequently with recorded statements of reservation or interpretation.[13]

[10] E. V. Heyen, 'Opinio Doctorum', in E. V. Heyen (ed.), *Historische Soziologie der Rechtswissenschaft* (Frankfurt am Main: Vittorio Klostermann, 1986), pp. IX–XVII; S. Lepsius, 'Communis Opinio Doctorum', in A. Cordes (ed.), *Handwörterbuch zur deutschen Rechtsgeschichte: HRG*, 2nd edn (Berlin: Schmidt, 2008), pp. 875–7.

[11] E. S. Yambrusic, *Treaty Interpretation: Theory and Reality* (Lanham [u.a.]: University Press of America, 1987), p. 3; H. M. Adler, 'The interpretation of treaties' (1900) 26 *Law Magazine and Review: A Quarterly Review of Jurisprudence* 62 at 63; P. J. Liacouras, 'The International Court of Justice and development of useful rules of interpretation in the process of treaty interpretation' (1965) 59 *ASILProc (American Society of International Law Proceedings)* 161–9 at 166.

[12] S. Kadelbach, 'Interpretation of the Charter', in B. Simma, D. Khan, G. Nolte and A. Paulus (eds), *The Charter of the United Nations – Commentary*, 3rd edn, 2 vols. (Oxford: Oxford University Press, 2012), p. 86; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker & Humblot, 1984), pp. 90–1.

[13] US Digest 1978, S. 157, reprinted in Verdross and Simma, Universelles Völkerrecht, p. 91.

It is interesting that this definition distinguishes consensus from unanimity in a clear manner. Unanimity requires active consent. This definition makes it very clear that consensus is reached in the formal absence of objections, although it is possible that those not objecting are in fact against the proposal and may also have communicated their objection. This is also reflected in Art. IX:1 of the World Trade Organisation Agreement, which refers to the definition of consensus under GATT 1947, which states:

> The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.[14]

Yet the concept of unanimity is sometimes contested. To give one rather recent example, the rules of procedure of the Final UN Diplomatic Conference on the Arms Trade Treaty required consensus. One hundred fifty-four states voted in favour, twenty-three states abstained, and Iran, North-Korea and Syria objected.[15] The issue that arose later was whether consensus in those circumstances exists, irrespective of the objections. When a blog post reported that incident, a similar discussion among scholars and practitioners ensued.[16] Furthermore, in the rules of procedure on the Third UN Conference on the Law of the Sea, the consensus procedure was amended so that an objection could lead to a majority vote.[17] The very interesting definition at the 1974 World Population Conference framed consensus as 'general agreement without vote, but not necessarily unanimity'.[18] Acknowledging the several different meanings of consensus in international law, Anthony D'Amato distinguished 'four possible kinds of consensus: complete unanimity, near-unanimity with a few abstentions, near unanimity with one or more active dissents, and majority opinion with substantial minority disagreement'.[19]

[14] Art. IX:1, WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994). www.wto.org/english/docs_e/legal_e/04-wto_e.htm#fnt-1.

[15] D. Akande, What is the meaning of 'consensus' in international decision making?, www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making.

[16] See the comments to the blog post, ibid.

[17] See R. Wolfrum and J. Pichon, 'Consensus', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), p. 674.

[18] *Report of the UN World Population Conference: [Bucharest 19–30 August 1974] UN Doc E/CONF.60/19*; ibid, p. 674.

[19] A. A. d'Amato, 'On consensus' (1970) 8 *Canadian Yearbook of International Law* 104–22 at 106.

Generally speaking, consensus can be defined as agreement within a social group.[20] Yet the meanings differ regarding the required participation. There is a narrow understanding requiring unanimity and a broader understanding requiring a majority, despite abstentions or dissent. While the term is generally used as signifying unanimity in international law, there are also examples employing the wider meaning.

4.2.3 Forms

When talking about consensus, the European Convention on Human Rights (ECHR) also uses the phrases 'common accepted standard' or 'European approach'.[21] The Court has not treated the question of whether there is a consensus in a binary fashion, but instead, has defined different levels of consensus. The lowest level is 'no consensus' due to a 'diversity or practice' or 'little common ground'.[22] This could be taken as a ground for the court not to change its jurisprudence. It also indicates that there is a wide margin of appreciation.[23] The weak forms identified by the Court are 'emerging consensus',[24] 'tendencies'[25] and 'international trends'.[26] The Court has also used the term 'virtual consensus' when it has counted the inaction of states, such as the omission to execute the death penalty, even though it was legally possible to do so.[27] In so far as the question of unanimity is concerned, the ECtHR has only seldom found a consensus that encompassed all the Member States of the ECtHR.[28]

[20] A. Kovler, 'Introduction', in European Court of Human Rights (ed.), *Dialogue between Judges* (Strasbourg: Council of Europe, 2008), p. 8.

[21] K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015), p. 11. For an example, see only footnote 22, paras 40–1.

[22] *Cossey* v. *the United Kingdom* (Appl. no. 10843/84), judgment, 27 September 1990, para. 40.

[23] See further references in L. R. Helfer, 'Consensus, coherence and the European Convention on Human Rights' (1993) 26 *Cornell International Law Journal* 133–65 at 136–8.

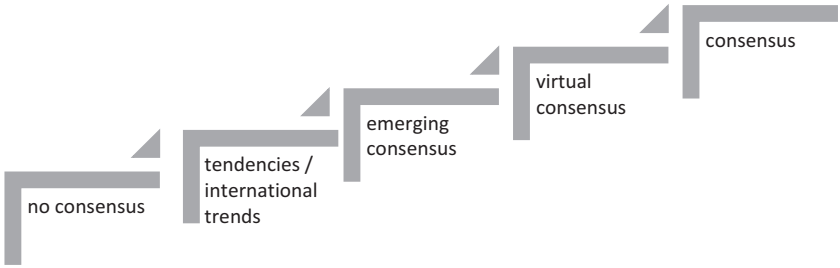
[24] *Christine Goodwin* v. *the United Kingdom* (Appl. no. 28957/95), judgment, 11 July 2002, para. 84.

[25] *Schalk and Kopf* v. *Austria* (Appl. no. 30141/04), judgment, 24 June 2010, para. 105.

[26] *Vallianatos and Others* v. *Greece* (Appl. nos. 29381/09 and 32684/09), judgment, 7 November 2013, para. 91.

[27] *Soering* v. *the United Kingdom* (App. no. 14038/88), judgment, 7 July 1989, Series A no. 161, paras 101–02.

[28] For one rare example see *Stoll* v. *Switzerland* (Appl. no. 69698/01), judgment, 10 December 2010, para. 44.



In the process of drafting the Convention, the European Movement included one clause in a draft that has been described by Ed Bates as a 'freezing clause'.[29] It aimed at securing the current state of human rights protection as it was in the Member States of the Council of Europe. Moreover, it provided that future increasing standards could also not be retracted. The idea behind the clause was that no regression in national human rights protection was to be allowed. Such a clause must – in the historic circumstances in which it was put forward – build on the assumption that there is a satisfactory level of protection of human rights in all the Member States. In different terms, this implies consensus. This leads to a second implicit understanding of consensus in the context of the ECHR. It can be argued that the ECHR itself is a form of consensus. As a human rights instrument, it contains human rights guarantees that are expressed in broad terms that are open to interpretation. The states have agreed to those terms and to their interpretation by the institutions established by the Convention. Yet they do not have to agree to the interpretations rendered in every judgment.

4.2.4 Normative Elements

An interesting question is whether the term consensus is merely descriptive or whether it also entails normative elements. In the descriptive sense, consensus is a shared practice of the parties to the treaty in some respect. Normative reasons can influence the assessment of a consensus

[29] E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010), p. 55. The clause is reprinted in Djeffal, *Static and Evolutive Treaty Interpretation*, p. 185.

even in the absence of a clearly ascertainable consensus. This question cannot be answered solely on a textual basis looking at the usage of the word. It should be borne in mind that the notion potentially contains elements that transgress a mere description of state conduct. This can play out particularly when there is no universal agreement and the question of whether there is a consensus is hard to answer. In those situations, normative considerations such as the object and purpose of the treaty can tip the balance in favour of a consensus or against it.

4.3 Function

4.3.1 Context of Usage

The consensus doctrine is used in two sets of circumstances: first, in the context of interpretation proper and, second, in the context of balancing. What seems to be a rather subtle distinction in the first place is effectively the description of two very different situations. Interpretation is widely understood as determining the meaning of a text. One example is the verb 'to marry'. It could mean that a woman and a man enter into a permanent relationship as prescribed by law; yet this concept could also be extended to same-sex relationships. Resolving the question of which of the two versions is correct essentially requires a certain meaning to be attributed to the word 'marry'.

Balancing is fundamentally different in that it describes a decision process that is predetermined but entails a wide discretion for the decision maker. Take, for example, the test of whether a certain measure is proportionate. If the judge engages in a proportionality test, s/he asks whether the measure and the interference with the human rights affected are proportionate in relation to the aim of the measure. The interpreter then must balance the considerations affected by the measure with the considerations underlying the end.[30] In the context of the Court's living instrument doctrine, the process of balancing is used in four sets of circumstances:[31] first, when the Court determines whether the interference with a right is justified by a legitimate aim and a proportionate measure; second, when the court determines whether there is an

[30] For an analysis of proportionality, see M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012).

[31] For a further explanation also on the case law, see Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 278–9.

unjustified discrimination under Article 14 ECHR; third, when the Court must decide whether a positive obligation exists;[32] fourth, in the case of very vague terms referring to a case-by-case determination such as the notion of severity as enshrined in Article 3 ECHR.

What makes the distinction between interpretation and balancing relevant is the use of the consensus doctrine as opposed to the use of the Vienna Convention on the Law of Treaties (VCLT).[33] In the context of the Court's living instrument doctrine, the VCLT is used mostly when there are problems of interpretation.[34] The consensus method, which looks for the internal and external practice of the Member States, is used in the context of balancing.[35] The famous and controversial *Demir* case is one instance in which the ECtHR used the consensus method openly and explicitly in the context of interpretation.[36] This important feature of the context of usage does not explain how consensus is used.

4.3.2 *Technique*

The consensus doctrine can be described as a technique, that is, as a formal tool aiding the court in the resolution of legal disputes. Consensus does not entail looking for any material value, such as democracy or freedom. In this sense, the doctrine is rather neutral towards its outcomes. It has been described as a comparative method in specific circumstances.[37] The court looks at the internal and external practice of

[32] If there is a positive obligation with which the state has not complied, there is still the possibility of a justification. When it comes to the question of proportionality, the Court can then look for a consensus as described in the first case.

[33] See, for examples, *Sitaropoulos and Giakoumopoulos* v. *Greece* (Appl. no. 42202/07), judgment, 15 March 2012, para. 45; *Marckx* v. *Belgium* (Appl. no. 6833/74), judgment, 4 March 1988, Series A, no. 31, p. 40.

[34] The Court has linked the use of the techniques of interpretation as enshrined in Art. 31 (3)(b) & (c) VCLT to the consensus doctrine. Thereby, it was mainly applying the VCLT. See *Bayatyan* v. *Armenia* (Appl. no. 23459/03), judgment, 27 October 2009, para. 102.

[35] *T* v. *the United Kingdom* (Appl. no. 24724/94), judgment, 16 December 1999, paras 70–2; *Schwizgebel* v. *Switzerland* (Appl. no. 25762/07), judgment, 10 June 2010, paras 86–92; *X. and others* v. *Austria* (Appl. no. 19010/07), judgment, 19 February 2013, para. 147.

[36] *Demir and Baykara* v. *Turkey* (Appl. no. 34503/97), judgment, 12 November 2008, para. 65.

[37] P. Mahoney and R. Kondak, 'Common Ground', in M. Andenæs and D. Fairgrieve (eds), *Courts and Comparative Law* (Oxford: Oxford University Press, 2015), pp. 118–40; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, pp. 74–6.

states. It inquires into how the question it is addressing is regulated in domestic law and in international law. It looks at whether similar or identical situations in other countries are dealt with in a specific way. If consensus exists on a specific question, this indicates that the Court should follow it. However, the Court is not required to do so. It can also hold that other arguments are more important.[38] Such arguments can stem from the techniques mentioned in Article 31 of the VCLT,[39] yet in the process of balancing, there is generally no limit on the kinds of considerations that can be taken into account.

4.3.3 *Distinction from Other Doctrines*

A substantial tension exists between the consensus doctrine and other doctrines, and its resolution requires careful treatment. Yet for the purposes of this inquiry, it is possible and necessary to distinguish consensus from other doctrines, at least formally. Most importantly, one must distinguish between means and results. A result of interpretation is the meaning the term is given after the process of interpretation. The means of interpretation aid the interpreter to achieve a result in a structured way. If an interpreter wishes to understand the notion of 'family' in Article 8 ECHR, s/he can use different means, such as the ordinary meaning of the term 'family' or the subsequent practice of the Member States to the Convention. In the end, s/he can arrive at the result that a father and his child born in wedlock can form a family. This is the interpretative result. The ordinary meaning of the text of the treaty, the object and purpose, and subsequent practice are the means of interpretation in this case.

An evolutive interpretation is an interpretative result in which the meaning of the text is changed through interpretation, that is, without changing the text. This result can be achieved through different means of interpretation, such as the techniques enshrined in Article 31 VCLT. Especially in the process of balancing, the use of the consensus doctrine is merely one among several possible means.

[38] The ECtHR, in one case, found that even an isolated position would not necessarily imply a violation of the ECtHR, see *Vallianatos and others* v. *Greece*, para. 92.

[39] The means are the ordinary meaning of the text of the treaty or the object and purpose.

In contrast, the margin of appreciation as well as the autonomous interpretation of the Convention amount to specific interpretative results. The autonomous character of the ECHR essentially means that the terms used in the treaty can carry independent meanings and are not necessarily linked to the definition of those terms in domestic law. There is no automatic reference to the meaning the same terms would have in domestic law.[40] The doctrine of the margin of appreciation is an act of judicial deference. It signifies that a question is within the scope of the ECHR, but the Member States have room for more than one possible answer. Especially in the case of the margin of appreciation, the consensus doctrine is one important technique to determine whether a margin exists and its scope or breadth.

4.3.4 *Relationship to the VCLT Rule of Interpretation*

Can the consensus doctrine be considered as a means of interpretation, or is it restricted to balancing when deciding upon the margin of appreciation? I would argue that from the perspective of the Convention, both options are possible. Yet from an international law perspective, it might be advisable to restrict the consensus method to the process of balancing in order to determine the existence of a margin of appreciation. There are two reasons for this. The first is that in the process of interpretation, the Court can make the same arguments that it makes through the consensus method by simply using the interpretative techniques enshrined in Article 31(3) VCLT. Employing consensus adds no advantage. It would convey the message, however, that the Court is moving further away from its longstanding and traditional acceptance of the international legal method of interpretation.

The consensus method, as applied by the ECtHR, can be represented by the techniques of interpretation enshrined in the VCLT. The technique of subsequent practice (Article 31(3)(b) VCLT) represents the internal practice that can establish consensus, while the relevant rules and subsequent agreements as enshrined in Article 31(3)(a) and (c)

[40] For a detailed treatment, see W. J. Ganshof van der Meersch, 'Le caractère "autonome" des termes et la "marge d'apprécation" des gouvernments dans l'interpretation de la Convention européene des Droits de l'Homme', in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension: Studies in Honour of Gérad J. Wiarda* (Köln [u.a.]: Carl Heymanns Verlag, 1988), pp. 201–20.

VCLT can cover external practice.[41] It is not convincing to argue that the VCLT is too restrictive in that regard, as there is agreement that the VCLT leaves some leeway to the interpreter.[42]

Articles 31–33 VCLT contain much guidance for interpreters, yet they also allow discretion about how to interpret a treaty. Thus, the ECtHR can take its own stance on how the VCLT ought to be interpreted. It has done so in many respects and has framed the VCLT in a way that the application of the consensus doctrine would not have resulted in different outcomes. The ECtHR also considers international soft law.[43] Taking a liberal and broad approach, the Court decided that it is not necessary for all of the Member States to be parties to a treaty for it to be taken into account in the process of interpretation. While it is true that the ECtHR's approach has at times provoked criticism,[44] the International Law Commission has pointed out that the VCLT offers courts some flexibility beyond the confines of Article 31 VCLT.[45] Article 32 VCLT opens the rule of interpretation to a significant extent. Even if a consideration would not fall under Article 31(3) VCLT, it could still be covered by Article 32 VCLT.

So, the application of the consensus method instead of the VCLT might only result in the overturning of the ECtHR's long tradition of applying the VCLT and its influence on other courts and tribunals in that regard. Since *Golder*, the ECtHR has consistently used the rule of interpretation as enshrined in Articles 31–33 VCLT and the underlying customary international law, even though the ECHR falls outside of the temporal scope of the VCLT according to Article 4 VCLT.[46] The ECtHR applied the VCLT long before the International Court of Justice did,[47]

[41] In as far as consensus is only used in order to signify that there is subsequent practice or that there are certain relevant rules, the use of the word consensus is well in line with the VCLT. It neither takes away nor adds anything.

[42] G. Nolte, 'Introduction', in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013), p. 2.

[43] For a detailed account see Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 332–3.

[44] G. Gaja, 'Does the European Court of Human Rights Use its Stated Methods of Interpretation', in F. Capotorti (ed.), *Divenire sociale e adeguamento del diritto: Studi in onore di Francesco Capotorti* (Milano: A. Giuffrè, 1999), pp. 215–27.

[45] See draft conclusion 4(3) in International Law Commission, Subsequent agreements and subsequent practice in relation to the interpretation of treaties, Draft Conclusions adopted by the Commission in its sixty-fifth session. AC/CN.4/L.813.

[46] *Golder* v. *the United Kingdom* (Appl. no. 4451/70), judgment, 21 February 1975, para. 29.

[47] See S. Torres Bernárdez, 'Interpretation of Treaties by the International Court of Justice following the Adoption of the 1969 Vienna Convention on the Law of Treaties', in G. Hafner (ed.), *Liber amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of His*

and it is acknowledged that the ECtHR has coined its own influential approach concerning the way in which it applies the VCLT. It is also interesting that the Court in *Golder* established a backdoor for it to follow its own rules of interpretation by referring to the *lex specialis* rule for international organisations in Article 5 VCLT.[48] One instance in which the ECtHR could be seen as distancing itself from the VCLT was *Demir and Baykara*, in which the Court said that it would 'mainly' be guided by the VCLT[49] in looking for the consensus emerging from international instruments and the practice of the contracting states.[50] The European Court of Justice has shown that it is possible to establish an autonomous order and not to adhere to the VCLT. Whether it would be advisable for the Court to apply the consensus method as an alternative to the VCLT is clearly beyond the scope of this chapter. Yet some of the consequences have been addressed: using the consensus method as an additional method of interpretation would add nothing to the possibilities afforded by Articles 31 and 32 of the VCLT. It would imply that the ECHR is an autonomous system to which the rules of general international law no longer apply.

4.4 Ascertainment

4.4.1 Sources

If one were to look for the roots of the sources of consensus, it would be possible to go back to the speech given by Max Sørensen at a colloquy held in 1975 celebrating the twenty-fifth birthday of the Convention.[51] In this speech, he termed the European Convention as a '[l]iving legal instrument'.[52] After arguing that it should be possible to update the

80th Birthday: In Honour of His 80th Birthday (The Hague [ea.]: Kluwer, 1998), pp. 721–48.

[48] *Golder* v. *the United Kingdom*, para. 29.

[49] *Demir and Baykara* v. *Turkey*, para. 65.

[50] Ibid, paras 65–85.

[51] M. Sørensen, 'Do the Rights Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?', in Council of Europe (ed.), *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights: Organised by the Ministry of Foreign Affairs of Italy and the Secretariat General of the Council of Europe; Rome, 5–8 November 1975* (Strasbourg: Council of Europe, 1975), pp. 83–109. For a further analysis, see Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 275–7.

[52] Sørensen, 'Do the Rights Set Forth', p. 103.

Convention, he identified two ways to do so: first, by looking to international treaties[53] and, second, to the case law and practice of the Member States.[54] The way Sørensen framed his idea matched the idea of a consensus between the Member States. The consensus doctrine mainly relies on state practice. However, this practice can either be internal, that is, legal practice within the domestic legal order, or external, that is, legal practice in the context of international relations.[55] Examples of internal practice include acts of parliament,[56] court decisions,[57] as well as acts of the executive.[58] External consensus is mostly derived from international treaties, yet the Court at times cites soft law instruments, especially soft law established within the Council of Europe.[59] Consensus has also been derived from referral to comparisons of other bodies, such as the European Commission for Democracy through Law (known as the Venice Commission).[60]

Expert consensus is also mentioned in the context of the consensus doctrine.[61] Yet its operative use differs from the use of state practice. Expert consensus can establish and illuminate the facts of a case, and this can be acknowledged by the courts when they must engage, for instance, in a proportionality test in which they determine a question on the facts. Yet expert consensus itself has no normative force other than establishing the facts.

It is true that the Court also looks into the practice of the respondent state and that this can also be viewed in the context of the consensus doctrine.[62] Yet the internal practice of a single state can, under no circumstances, be considered as consensus. The Court uses this more in the spirit of a *venire contra factum proprium* argument in the sense that even though the state formally or partially objects to a

[53] Ibid, p. 92.
[54] Ibid, p. 93.
[55] See for example Mahoney and Kondak, 'Common Ground', p. 127.
[56] *M. C.* v. *Bulgaria* (Appl. no. 39272/98), judgment, 4 December 2003, paras 158–60.
[57] *Demir and Baykara* v. *Turkey*, para. 81.
[58] *M. C.* v. *Bulgaria*, para. 162.
[59] *Sitaropoulos and Giakoumopoulos* v. *Greece*, para. 44.
[60] *Sukhovetsky* v. *Ukraine* (Appl. no. 13716/02), judgment, 28 March 2006, para. 70.
[61] Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, pp. 55–6.
[62] Ibid, pp. 49–55.

certain position, other developments in the same state might lead to the conclusion that this point is moot.

4.4.2 Numbers

If one were to look at the quantitative aspects of consensus, there is no specific percentage of Member States that must be met. Yet some trends can be identified. To give just one example: the practice of twenty-nine out of thirty-three Member States will be relevant.[63] A lack of consensus exists when only a minority of states has developed the relevant practice, such as when there were only sixteen states out of forty-seven.[64]

It is interesting that in the case of external practice, the Court is ready to consider international treaties as relevant practice, even though the Member States parties to those treaties are in the minority. A very apt example is the European Convention on the Legal Status of Children Born out of Wedlock. The terms of this treaty were considered in 1979,[65] when four out of twenty members were parties to the said convention, in 1987,[66] when nine out of twenty-one states were members, and in 2009,[67] when twenty-two out of forty-seven states were members. In all cases, whether the respondent state had signed or ratified the relevant treaty played no role for the Court.[68]

4.4.3 Sampling

Associated with the quantitative analysis is the question of sampling. This is because, in some instances, the practice of states might be considered as neutral and as not adding either to a consensus or to the absence of a consensus. The question of whether to choose a wider or narrower sample has an important impact on the actual numbers. Take, for example, the *Vallianatos* case. In this case, the Court had to determine whether the introduction of a civil union beyond marriage excluding same-sex couples was to be considered as discrimination. In search of

[63] *Sitaropoulos and Giakoumopoulos* v. *Greece*, para. 45.
[64] *Schwizgebel* v. *Switzerland*, paras 27.
[65] *Demir and Baykara* v. *Turkey*, para. 40.
[66] *Inze* v. *Austria* (Appl. no. 8695/79), judgment, 28 October 1987, para. 41.
[67] *Brauer* v. *Germany* (Appl. no. 3545/04), judgment, 28 May 2009, para 40.
[68] See Djeffal, *Static and Evolutive Treaty Interpretation*, p. 319.

a consensus, the Court looked at the states that had implemented a civil union and found that a 17:2 majority had also opened those civil unions to same-sex couples.[69] If one were to compare the states affording any kind of legal recognition for same-sex couples to those states affording no legal recognition, the numbers would have been 27:20 in favour of those states with no legal recognition. The question is whether this sample is accurate. Is it possible to disregard the states that have not introduced a civil union at all, especially if they do not allow for same-sex marriage? Or would it be appropriate to at least show the numbers in relation to those states? This argument is not made to assert that the consensus doctrine was not correctly applied or that the decision was wrong but simply to show how the choice of a sample can substantially influence the result. The Court has shown great sensitivity in its comparative efforts. This is also necessary when choosing the correct samples. Whether the samples are correct is often disputed. Consequently, the Court should explain more fully why it frames a question in a specific way.

4.4.4 *Additional Features: Purpose or* Opinio Iuris Hominis

In the absence of universal consensus without abstention or opposition, certain normative concepts might help the Court to establish a consensus despite the existence of opposing state practice. I suggest that in those situations, the Court could rely on the object and purpose of the treaty and the concept of *opinio iuris hominis*. Problems about which a universal consensus exists among the Member States of the Council of Europe will rarely be contested in the Court. The instances in which the ECtHR uses the consensus doctrine will almost always entail a minority of states not following what is conceived as a consensus. It is hard to say in those cases whether the Court has an active or a declarative role. It might be said that the Court reflects and finds consensus or that it imagines and creates it. The Court sometimes attests a movement and development and also expresses a certain direction in which state practice is progressing. We have seen that the consensus doctrine is essentially based on comparative legal argumentation and that the sources to which the Court refers are not exclusively based on or related to domestic constitutional law. In some cases, the Court has found a consensus or a move towards a consensus in the absence of universal agreement and when some states

[69] *Vallianatos and Others* v. *Greece*, para. 91.

are even employing an opposing practice.[70] Can a normative element help to establish consensus even when the number of states agreeing suggests the opposite?

The latter problem, regarding consensus in the face of disagreement, might be resolved by the object and purpose of the Convention. The object and purpose cannot be considered only in the process of interpretation, but should also be taken into account in the process of balancing. A similar situation in which the object and purpose overrides consent can be found in Article 19(c) VCLT. This provision states that a reservation not compatible with the object and purpose of the treaty is not valid.[71] A state is, therefore, unable to qualify its consent when the reservation runs counter to the agreed object and purpose of the treaty. The object and purpose works as a factor to establish consent even when one state has disagreed explicitly by making a reservation. As the object and purpose is used in different circumstances, it can also be used in the process of balancing.

Furthermore, the object and purpose can, in itself, entail a dynamic element.[72] Especially when it becomes apparent that there are consequences with a substantial impact upon an individual, the object and purpose of an instrument might dictate the mitigation of those consequences, even though they were previously unforeseen. The object and purpose of a treaty might help to overcome dissent, and it might also be useful to argue that there is a trend for state practice to move in a certain direction.

Second, in the case of internal as well as external practice, the Court often refers to ordinary norms such as acts of parliament, judicial decisions or quite specific international treaties. It has been rightly observed that the Court could run the risk of being guided by generally followed practice in deciding human rights cases.[73] Can the court be guided by

[70] See for example *Sitaropoulos and Giakoumopoulos* v. *Greece*, para. 45.

[71] C. Walter, 'Art. 19', in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin, Heidelberg: Springer, 2012), pp. 239–86, at § 255 et seq; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff Publishers, 2009), p. 268.

[72] G. Fitzmaurice, 'Hersch Lauterpacht - the scholar as judge - part III' (1963) 39 *British Year Book of International Law* 133–88 at 141; V. Crnic-Grotic, 'Object and purpose of treaties in the Vienna Convention on the Law of Treaties' (1997) 7 *Asian Yearbook of International Law* 141–74 at 158; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), p. 344.

[73] D. J. Harris, M. O'Boyle, E. Bates and C. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, 3rd edn (Oxford: Oxford University Press, 2014), p. 11.

practice simply because it is generally followed? It is here suggested that there ought to be a difference between unqualified practice and practice that evidences a link to human rights law. If state practice evidences a clear link to human rights law, it should carry more weight in determining consent in the absence of universal consent. The term *opinio iuris hominis* is suggested as a criterion marking the difference between human rights practice and 'simple' state practice.

To give an example: it is one thing that all states allow for collective bargaining, yet another that collective bargaining is protected by all legal orders as part of the freedom of association. In accordance with the consensus doctrine, such practice can also be linked to domestic human rights and not necessarily to the ECHR. It is not submitted here that a consensus can only exist where such an *opinio iuris hominis* exists. Yet where such an *opinio iuris hominis* exists, a consensus carries much more weight. As in the case of customary international law, whether this *opinio iuris* is to be considered as a subjective or an objective element[74] is a moot question as long as it is clear how it is identified. This identification is successful if it is shown that the practice is based on and mandated by human rights considerations. The Court might be more convincing in its comparative analysis if it shows a link to human rights law, which has been described here as *opinio iuris hominis*.

4.5 Outcome

4.5.1 Legal Consequences

Even if the Court establishes a consensus, this does not automatically mean that the Court will decide accordingly. The case law of the Court indicates a strong correlation between the answer to the question of consensus and the outcome of the process of balancing. This means that, for questions concerning static and evolutive interpretations, the absence of a consensus points against change and in favour of a margin of appreciation,[75] while a consensus on a certain question favours change.

[74] For this dispute, see, among others, d'Amato, 'On consensus', 111; B. Cheng, 'United Nations resolution on outer space: "Instant" international customary law?' (1965) 5 *Indian Journal of International Law* 23–112 at 35–48.

[75] *Schwizgebel* v. *Switzerland*, para. 92; *Haas* v. *Switzerland*, (Appl. no. 36983/97), judgment, 13 January 2004, para. 55. See the analysis of G. Nolte, 'Second Report for the ILC Study

Yet on one occasion, the Court held that even when a country was in an 'isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention'.[76] In line with this, one could also argue that a lack of consensus is not to be equated with an objection. The Court has noted that '[. . .] even if no common European approach to the problem can be discerned, this cannot of itself be determinative of the issue'.[77] When the Court balances several considerations, in the context of a proportionality test, for instance, consensus seems to be a weighty and important argument. One could express this importance as a presumption in favour of the result of a consensus.[78] Yet in light of the jurisprudence of the Court, as well as generally, presumptions seem to be of little use in the context of balancing. First, the strength of the consensus argument depends on the facts of the case, that is, not only on the majority but also on how fitting the comparison is and whether an *opinio iuris hominis* can be shown. The weight of the consensus is relative, so it is hard to understand why every consensus could trigger the presumption. Second, in the process of balancing, a presumption seems to be of little use because any consideration can be trumped by another consideration. Presumptions regularly work when there is a position of last resort in the absence of any other positive argument. They are, for example, helpful when it comes to evidence.

As the doctrine of consensus is perceived to be '[. . .] sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive, sometimes decisive, sometimes contingent',[79] one might think that there is a lack of formalisation and too much flexibility. Yet it is

Group on Treaties over Time: Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice', in G. Nolte (ed.), *Treaties and Subsequent Practice* (Oxford: Oxford University Press, 2013), pp. 256–7; and Helfer, 'Consensus, coherence and the European Convention on Human Rights', 136–38.

[76] *Vallianatos and others* v. *Greece*, para. 92.

[77] *Hirst* v. *the United Kingdom (No.2)* (Appl. no. 74025/01), 6 November 2005, para. 81; see P. Paczolay, 'Consensus and Discretion: Evolution or Erosion of Human Rights Protection', in European Court of Human Rights (ed.), *Dialogue between Judges* (Strasbourg: Council of Europe, 2008), pp. 78–9.

[78] K. Dzehtsiarou and V. P. Tzevelekos, 'International custom making and the ECtHR's European consensus method of interpretation' (2016) 16 *European Yearbook on Human Rights* 313–44.

[79] P. Martens, 'Perplexity of the National Judge Faced with Vagaries of European Consensus', in European Court of Human Rights (ed.), *Dialogue between Judges* (Strasbourg: Council of Europe, 2008), p. 54.

submitted here that the ECtHR's method is sound, even when it does not meet rigid academic standards. The Court forms arguments from comparative law and weighs them in the process of balancing. The whole process of balancing applies on a case-by-case basis. Flexibility is all important. Automatic conclusions do not fit within the nuanced approach of determining consensus.

4.5.2 *Devolution*

In a discussion paper prepared for the 2008 Judicial Dialogue on Consensus, a group of judges stated that 'the existence of common ground cannot be invoked to weaken Convention guarantees'.[80] They touched upon the controversial topic of whether a 'devolution' or regression of the Convention was possible.[81] While the judges, in their own opinions, have objected to the admissibility of devolution,[82] there are indeed some instances in which it could be claimed that a devolution took place without relying on a consensus of the Member States.[83] Yet in *Scoppola No. 3*, the ECtHR showed its readiness to lower the standard of human rights protection because of consensus. This case concerned prisoners' voting rights, wherein the applicant was disenfranchised following a criminal conviction. The United Kingdom, as a third-party intervener, argued that the findings in the former case *Hirst No. 2* were wrong and ought to be revisited. The Court considered 'the relevant international and European documents' as well as 'comparative information', and found the opposite trend. The way in which the Court approached the

[80] A. Kovler, V. Zagrebelsky, L. Garlicki, D. Spielmann, R. Jaeger and R. Liddell, 'The Role of Consensus in the System of the European Convention on Human Rights', in European Court of Human Rights (ed.), *Dialogue between Judges* (Strasbourg: Council of Europe, 2008), p. 19.

[81] On that topic, see P. Mahoney, 'Judicial activism and judicial self-restraint in the European Court of Human Rights: Two sides of the same coin' (1990) 11 *Human Rights Law Journal* 57 at 66; L. Wildhaber, 'Rethinking the European Court of Human Rights', in J. Christoffersen and M. R. Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), p. 215; Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 309–14.

[82] *Witold Litwa* v. *Poland* (Appl. no. 26629/95), Concurring Opinion of Judge Bonello, 4 April 2000; *Gorou* v. *Greece (No. 2)* (Appl. no. 12686/03), Partly Dissenting Opinion of Judge Casadevall, 20 March 2009, p. 8.

[83] *Stoll* v. *Switzerland*, para. 102; Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 309–14.

question reveals that if there had been a consensus lowering the standards, the Court would have been open to doing so.

The case law of the Court shows that devolution is a real possibility.[84] It is hard to see why the consensus doctrine as used by the Court could result in lowering the standards of human rights protection. Some think that the consensus doctrine runs against the counter-majoritarian nature of human rights.[85] While this is generally not problematic if the consensus furthers human rights protection,[86] devolution adds another dimension to the problem. As in the ascertainment of customary international law, a changing consensus will require some 'rule-breakers' that turn out to be rule makers. As with customary international law, this does not rule out that consensus can change, even in a way that previously would have been considered as illegal.

While devolution through consensus does not seem to be impossible, it can be barred in specific circumstances. The Court has stressed that it is impossible to 'create a new "exception" or "justification" which is not recognised in the Convention'.[87] Yet the decision about whether an exception is new or old is itself subject to interpretation and is far from clear. In the process of balancing, it would be possible to outweigh a 'devolutive' consensus if it went against the object and purpose of the Convention. To sum up, whether a devolution through consensus is possible is contested. Because there are indications that it may be, the counter-majoritarian problem becomes relevant. On a more practical level, the Court has different tools to overcome a 'devolutive' consensus. One option might be to rely on the object and purpose of the Convention.

4.5.3 *Magical Mirror: Precedent Creation and Formation*

The consensus doctrine has the practical effect of establishing the ECtHR as a centre of comparative human rights law in Europe.[88] As

[84] Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 310–13.
[85] E. Benvenisti, 'Margin of appreciation, consensus, and universal standards' (1998–1999) 31 *New York University Journal of International Law and Politics* 843–54 at 852.
[86] Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, pp. 168–72.
[87] *Austin and Others* v. *the United Kingdom* (Appl. nos. 39692/09, 40713/09 and 41008/09), judgment, 15 March 2012, para. 53. This exception, however, rather works in the context of interpretation.
[88] Paczolay, 'Consensus and Discretion', pp. 73–4.

an international institution with resources and professional lawyers from all the Member States, it is in a unique position to compare the law in an effective and informed manner. These comparisons are very useful for judges all over Europe who are dealing with human rights questions. This holds true in the first place when it comes to informing about legal facts. Not every court that must apply Convention rights has the capacity to conduct such comparative investigations. Thus, the consensus doctrine can help domestic courts on a technical level.

Yet the consensus doctrine goes beyond determining the existence of consensus. It identifies trends and developments, while it frames legal developments from a temporal perspective and at times also identifies a certain direction. In this way, a certain teleology is given to the developments that should move in one direction. Sometimes, the Court effectively creates 'narratives' of progress in human rights adjudication. Especially when identifying trends, the Court is generally not doing this in an absolute and authoritative manner. It is mostly domestic authorities, such as domestic courts, which can react to the suggested narrative, either by adding to or by rejecting the suggested trend. The ECtHR, thereby, creates a discursive space, a basis for European and international judicial dialogue. The fact that the Court is looking for consensus also means that it is informed by domestic and international developments and is receptive to their input. Yet by not automatically following the consensus, the ECtHR also ensures that it retains its own voice in the international human rights law discourse. Viewed from this angle, the consensus doctrine is also an incentive for international and judicial dialogue.

Yet we have also seen that some mechanisms help the Court to tip the balance in a certain direction, that is, to give some direction and movement to a development and to do something between creating and evidencing a consensus. If one were to view the ECHR as a consensus on human rights protection in Europe, the Court, as the authoritative interpreter of the Convention, determines what this consensus is. Were the Court to take an active stance, it would create a consensus. Were it purely passive, it would only reflect the existing consensus. Especially in cases in which there is no universal agreement, normative reasons might help to find a consensus, despite opposition. The nuanced approach of the Court indicates that it is somewhere in the middle. This productive tension within the ECtHR might be expressed by a metaphor the historian *Friedrich Meinecke* borrowed from *Johann Wolfgang von Goethe*

when he said that the historian was a creative mirror.[89] The tension expressed here between the subjective and the objective, the creative and the exact also applies to the ECtHR when it uses the consensus doctrine.[90] The reason for using this metaphor in this context is the inherent tension of the notion of consensus in that it signifies an agreement that is not based on the actual consent of all the affected parties.

One interesting aspect is that the ECtHR can have an active role in creating consensus in the long run. While a judgment of the Court only has an effect *inter partes*, the judgments of the Court influence the behaviour of states. Once the Court has found a consensus, states with a differing practice are under pressure to adapt. If states indeed change their practice, the Court has created a consensus by finding a consensus.

4.5.4 *Reflection on the Court: Power, Pace and Perception*

Describing the consensus doctrine of the ECtHR helps in reflecting on the ECtHR as an actor. This can be done using the indicators of power, pace and perception.[91] Power prescribes the actor's dimension and signifies whether the decision maker can exercise legal supremacy through her/his decision. In that regard, the consensus doctrine takes a middle ground. Generally, the ECtHR has empowered domestic authorities to influence Convention law through the consensus doctrine. Yet the fact that a consensus can exist in the absence of universal consent empowers the court itself. The same can be said about pace, which is the speed of changes within the living instrument, that is, the ECHR. The consensus doctrine, in many instances, links pace to the pace of change in the internal and external relations of the Member States. Yet by pointing out trends or an emerging or virtual consensus, the Court manages to speed up developments at times. Most interesting in this regard is the issue of perception, that is, the question of the extent to which the Convention is open to considerations of circumstances and facts not represented in any legal document. A rather closed system would exclusively recognise legal practice, such as the

[89] F. Meinecke, *Schaffender Spiegel: Studien zur deutschen Geschichtschreibung und Geschichtsauffassung* (Stuttgart: Koehler, 1948), p. 7.

[90] C. Djeffal, 'The 'Iron Rhine' case: A treaty's journey from peace to sustainable development' (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 569–86 at 586.

[91] A research methodology using those indicators to describe the stance of different courts is developed in Djeffal, *Static and Evolutive Treaty Interpretation*, pp. 208–13.

practice of the domestic courts. A more open system would also look at relevant societal practice.[92]

In comparative law, there are different views on whether and to what extent comparative findings ought to influence the law of the comparing judge.[93] The approaches taken towards that question rest on different assumptions about the relationship of the different legal orders. This depends on the relevant legal order, how it situates itself and how it constructs the relationship to the other legal orders. A strong reliance on comparative law in respect to certain legal orders suggests that there is a strong connection between them. A legal order can also consider itself as independent from others. Certain areas within a legal order, such as human rights law, might be more receptive to influences. When it comes to the openness of the Convention, the consensus doctrine is very telling. It evidences the general openness of the Court towards the internal and external practice of the Member States.

4.6 Conclusion

The aim of this chapter was to reconstruct the notion of consensus as it is used by the ECtHR, to deepen the understanding of what the Court does and to reveal the internal logic of its consensus doctrine in the context of the Court's 'living instrument' approach. This was done in four steps, paying attention to the definition, the function, the ascertainment and the outcome of the consensus doctrine.

There is no generally accepted use of the word consensus. The definitions extend from perfect agreement to public opinion and differ on the issue of whether dissent is allowed. The ECtHR does not treat consensus as signifying universal consent. It also allows for other forms, such as trends or virtual consensus. From a functional perspective, consensus can be considered a technique, that is, it helps point out a certain form of argument. The ECtHR seems to apply the consensus doctrine, in most

[92] In relation to the respective persons, this openness is reflected by P. Häberle, 'Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und 'prozessualen' Verfassungsinterpretation' (1975) 30 *Juristenzeitung* 297–305 and taken up by G. Nolte, 'Faktizität und Subjektivität im Völkerrecht: Anmerkungen zu Jochen Froweins "Das de facto-Regime im Völkerrecht" im Licht aktueller Entwicklungen' (2015) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 715–32 at 730.

[93] See only P. de Cruz, 'Comparative Law: Functions and Methods', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), §§ 34–41.

cases, as a means of balancing and not as a rule of interpretation. In contrast, the Court uses the rule of interpretation as enshrined in the VCLT either explicitly or implicitly. There is no substantial difference between some means of the VCLT and the consensus doctrine, yet replacing the VCLT could be understood as a rhetorical move away from general international law.

The sources of consensus lie in the internal and external practice of states. While a consensus exists if there is a clear majority of states, there is no exact percentage in that regard. The choice of the sample influences the result of the analysis. In the search for a consensus, two additional normative features could be considered: the object and purpose could tip the balance in certain questions. One criterion for determining the argumentative weight of the practice is *opinio iuris hominis*. This criterion would signify whether the practice relates to a human rights question. The Court could use these normative elements more openly in explaining why it has reached a consensus in the absence of a universal agreement in practice.

The internal logic of the consensus doctrine as used by the ECtHR facilitates some suggestions for the further use of the consensus doctrine in a sound, workable, good and responsible way. The first suggestion is that the consensus doctrine should be limited to situations in which the Court balances different considerations in the context of assessing the proportionality of a specific case, and not to treaty interpretation. Situations in which the Court interprets the ECHR should be dealt with by the rules of treaty interpretation as enshrined in Articles 31–33 VCLT. The second suggestion is that the ascertainment of a consensus cannot only be based on a descriptive process of counting. It necessarily contains value judgments such as choosing samples for comparison. Decisions of the ECtHR will be more convincing in the long run if the Court also gives normative reasons for its value judgments. The concept of *opinio juris hominis* could be a good way to make arguments for a consensus stronger. When the vast majority of parties to the treaty not only concur as to how a certain situation is to be treated legally, but also concur in regarding this as mandatory from a human rights standpoint, this is evidence of *opinio juris hominis*.