Chapter 11: Engaging with Indeterminacy: Imagining Different Uses for Vertically Comparative Legal Reasoning

I. Pulling Together the Threads: Beyond Consensus as Compromise

I announced in Chapter 1 that part of my overall goal throughout this study on European consensus would be to demonstrate and criticise how, in at least two ways, it can be seen as a kind of *compromise*. The sense of compromise arose, first, with regard to the relationship between different kinds of normativity: because of its Janus-faced nature involving both the rein effect and the spur effect, consensus may seem an appropriate compromise between more stark positions such as the morality-focussed perspective (easily qualified as utopian, or not sufficiently democratic) and the ethos-focussed perspective insofar as it refers to individual national ethe (too apologetic, or not sufficiently internationalist to chime with a regional system of human rights protection). The notion of a pan-European ethos, so intuitively apt in the context of regional human rights law, makes the clash of incompatible epistemologies, idealisations, and positions underlying it disappear behind the compromise of consensus.

The preceding chapter explored the second sense in which consensus can be conceived of as a kind of compromise: it is regarded as the embodiment of both strategy and principle, thus making it seem like it is the appropriate way to accommodate non-ideal circumstances without losing too much ground in ideal theory. Indeed, at least in some cases one suspects that the ECtHR's judges might, in theory, have preferred to argue for a different outcome; perhaps they did not do so "out of a maxim of *strategic* action that suggests that it is almost always useful to compromise".[1689] The reference to European consensus provides one way of taking strategic action geared at compromise – making strategic concessions while rationalising them (and publicly justifying them) as part of an incremental development which respects the States parties' democratic processes. It can thus be thought of as "a way of finding acceptable compromises between the

1689 Koskenniemi, *From Apology to Utopia*, at 598 (emphasis added).

sovereign will of the ECHR signatories", to which the ECtHR must "show appropriate respect", and "the decision-making power of the Court".[1690]

While I have been making use of a heuristic distinction between ideal and non-ideal theory,[1691] the two kinds of compromise are related. Together, they chime with Frédéric Mégret's point that "international law naturally veers towards the mid-stream": compromises "may not in the end be logically sustainable within the liberal canon", but they "will at least appear to navigate these waters in a way that is more savvy and sustainable" than other positions.[1692] Taking both forms of compromise together, and situating them in relation to the kind of position which the ECtHR tends to take in substance, one might consider the use of European consensus one of the "compromises of left liberalism",[1693] or at least a centrist, sometimes vaguely left-leaning liberalism. The sense of objectivity or naturalness which often accompanies the use of consensus further entrenches this compromise as a form of legal or strategic rationality.

In the imperfect world we live in, and within human rights institutions such as the ECtHR as they currently exist, compromises are no doubt ubiquitous – we might even speak of a "world of compromises"[1694] – and they need not be injurious.[1695] They do, however, almost by definition detract attention from potentially more transformative alternatives – they orient us towards certain options and away from others, one might say.[1696] What I have been trying to emphasise throughout is that, because we thus become oriented one way or another, we need to retain the awareness that this orientation is not necessary and there *are*, in fact, alternatives. We should not, in other words, lose sight of the potentially critical and eman-

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1690 Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 13; on "compromise" in this context, see also Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 36.

1691 See in more detail Chapter 1, IV.4.

1692 Mégret, "The Apology of Utopia" at 460; see also Koskenniemi, *From Apology to Utopia*, at 597.

1693 Kennedy, *A Critique of Adjudication (fin de siècle)*, at 339.

1694 Koskenniemi, "What is Critical Research in International Law? Celebrating Structuralism" at 734; see also Ben Golder, "Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought," (2014) 2 *London Review of International Law* 77 at 113.

1695 For a positive notion of compromise, see Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 29.

1696 Phrasing this (and other points) as an issue of orientation owes much to Ahmed, *Queer Phenomenology*.

cipatory force of human rights by turning all too quickly towards European consensus.

Rather than concluding by way of a summary of previous chapters, in this chapter I aim to investigate how the potentially critical force of human rights could be developed rather than suppressed in the context of the ECtHR, and how this relates to the argument made over the course of this study. To approach this task, I begin by revisiting the framework of critical international legal theory already discussed in Chapter 1, and in particular by situating consensus in relation to the so-called "indeterminacy thesis".[1697] I have argued that, although it is often claimed to provide some form of "objectivity" which might mitigate the "vagueness" of the ECHR, European consensus forms part of the very structures of argument which render regional human rights law indeterminate. I will now aim to provide an account of why it is worth foregrounding indeterminacy in this way and how it relates to broader critiques of human rights, especially in their judicial form.

It goes without saying that the various forms of critique and the related yet distinct critical traditions which I will refer to so as to build my argument in these sections are by no means monolithic but rather much more diverse and internally contradictory than what I can present here. As Fleur Johns has very aptly summarised it, "it is far from clear that [critical international legal theory] exists in any consistently recognizable form", let alone under any particular label, and "[t]o the extent that it does, it is better grasped in the doing than in the description".[1698] My own "doing" in this chapter, then, borrows from different, partly contradictory traditions (and may indeed not be without its own contradictions[1699]) without any claim to comprehensiveness, let alone absoluteness.

A rough summary of the approach I will sketch might go as follows. Critique in the sense I am considering aims to denaturalise current social arrangements so as to open up imaginative space for social transformation, specifically social transformation that is relatively far-reaching compared to what seems possible within the dominant ideological framework of current arrangements or institutions. Highlighting the indeterminacy of re-

1697 See Chapter 1, IV.5. and V.

1698 Fleur Johns, "Critical International Legal Theory," in *International Legal Theory: Foundations and Frontiers*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224013>.

1699 See also Kennedy, *A Critique of Adjudication (fin de siècle)*, at 6.

gional human rights law forms part of such an approach by insisting on a disconnect between legal reasoning and the decisions which it is assumed to justify, hence opening up space to question prevalent understandings of what the law "says" and provide a point of entry for political critique (II.). This also chimes with those critiques of human rights which emphasise the limitations of human rights *law*, pointing out the way in which legal reasoning tends to depoliticise debates on how human rights could be understood and thus restrict rather than expand imaginative space. For all that human rights courts' judgments can and sometimes do provide helpful resources within broader political struggles, then, their role within processes of social transformation is ambivalent at best for those fundamentally dissatisfied with the status quo (III.).

One consequence of this is that the aim of this chapter which I mentioned above – to investigate how the potentially critical force of human rights could be developed rather than suppressed *in the context of the ECtHR* – is itself limited in that the ECtHR, qua human rights court tasked with legal interpretation, is hardly an institution on which we should place our hopes if the goal is far-reaching social transformation. Still, there might be value in reflecting on the role of the ECtHR against the backdrop of critical approaches, not only to identify aspects of its reasoning and broader adjudicatory culture which may be more or less amenable to political projects of social transformation, but also to explore whether it might be possible to rethink our understandings of law, courts, and judgment-giving in ways which render them more open-ended. While such an exploratory project points far beyond the scope of the present study, I will offer some tentative suggestions, particularly insofar as they relate to the use of European consensus and vertically comparative legal reasoning more broadly (IV.). I conclude with a brief outlook on the ECtHR in relation to future articulations of human rights (V.).

II. Indeterminacy and the Motivation for Critique

Besides intervening in relatively specialised debates on European consensus, the discussion of different kinds of normativity in the preceding chapters aimed to substantiate the claim I made in Chapter 1: that regional human rights law is indeterminate not only in the trite sense of containing "vague" language, but more radically in the sense that different perspectives on how human rights should be understood are based on diametrically opposed assumptions and idealisations and can consistently be used to

undermine each other. One can relate this claim to the formal structure of international legal argument more generally by describing it as a contradictory combination of ascending and descending argument, i.e. arguments based on or geared at overriding State will.[1700]

In terms of what I gathered under the banner of "ideal theory", I connected this framework to more substantively loaded positions, distinguishing between conceptions of human rights which see them as prepolitical, aiming to protect moral self-determination (morality-focussed perspective) and those which foreground civic self-organisation and political participation as the basis of shared interpretations of human rights (ethos-focussed perspective). Given the idealisations involved in both these conceptions, neither seems particularly attractive in its pure form – and in light of this, I argued, each seeks to incorporate elements of the other, thus introducing conflicting epistemologies and leading to the indeterminacy of legal reasoning of the ECtHR because any outcome it reaches can be challenged on the basis of morality-focussed or ethos-focussed considerations on the basis of their paradoxical relationship to one another.[1701]

The most basic point that follows from highlighting the paradoxes involved in and hence the indeterminacy of the ECtHR's reasoning is what Martti Koskenniemi has called "the 'gap' between the available legal materials (rules, principles, precedents, doctrines) and the legal decision".[1702] This in turn draws attention to the "political nature" of international law, in this case regional human rights law.[1703] One of the core tenets of critical legal studies and related traditions such as the New Approaches to International Law or critical international legal theory has long since been precisely this point: that law is "political" in the sense that it underdetermines results in individual cases,[1704] and hence that no legal decision or interpretation is inevitable since it would, in principle, always be possible to justify diametrically opposed results within the argumentative structures provided by (international) law.[1705] My argument has been that this point holds

1700 See Chapter 1, IV.2.
1701 See in particular Chapter 4, III. and Chapter 7, IV.
1702 Koskenniemi, *From Apology to Utopia*, at 601.
1703 Ibid.
1704 See Duncan Kennedy, "A Semiotics of Critique," (2001) 22 *Cardozo Law Review* 1147 at 1162-1163; for an overview of both critical legal studies and critical international legal theory, see Johns, "Critical International Legal Theory".
1705 In Koskenniemi's iconic wording, "international law is singularly useless as a means for justifying or criticizing international behaviour": Koskenniemi, *From Apology to Utopia*, at 67.

true in the context of regional human rights law as well, and that the paradoxical elements which generate law's indeterminacy not only form part of a formal argumentative structure but can be connected to underlying, contradictory values such as moral and ethical self-determination.

This paradoxical relationship between moral and ethical normativity, well-known in principle from the national level, acquires additional complexity in the transnational context of the ECtHR, where democratic structures as a way of expressing ethical normativity are largely lacking – hence the prominence of European consensus as a way of compensating, at least to some extent, for this fact. The vertically comparative reference to the legal systems of the States parties, viewed through the prism of collectivity, thus provides for a specifically regional form of ethical normativity which I dubbed a pan-European ethos. But this form of normativity forms part of the tensions within the argumentative structures of regional human rights law rather than resolving them. As a form of ethical normativity, it clearly involves idealisations diametrically opposed to those of the morality-focussed perspective and its focus on moral self-determination, and as a form of ethical normativity developed at the regional level it stands in contrast to national ethe, the traditional locus of ethical self-determination. Accordingly, while it may strike up allegiances with these forms of normativity due to its Janus-faced nature (in doctrinal terms: the invocation of the rein effect and the spur effect of European consensus), it can also be challenged by them and does not resolve the indeterminacy of regional human rights law. Indeed, I have argued that the tensions between the different forms of normativity involved are evident even in the way in which (lack of) European consensus is established in the first place and thus unsettle the very notion of what European consensus *is*.

In light of all this, my core argument is that European consensus cannot be detached from the tensions underlying the European project of regional human rights as a whole (and liberalism more broadly). Its Janus-faced nature gives it the appearance of an appropriate compromise between morality-focussed considerations and overly strong reliance on national ethe, but whether or not this compromise is accepted is a *political* decision in the sense just mentioned, i.e. underdetermined by pre-existing legal materials. European consensus, therefore, is "not an objective 'method' that yields clear conclusions about the proper scope of uniform international standards".[1706]

1706 Carozza, "Uses and Misuses of Comparative Law" at 1219.

It seems important to me to challenge the claims to objectivity of consensus – or related claims such as its "natural" application which is "inherent" to a system of human rights protection – not only because such claims are increasingly being made, but also because consensus is discursively constructed as a form of reasoning with a particularly strong claim to objectivity. Its relative formality and the way it can be presented as a form of "mere" counting or as a "mechanical" approach gives it a veneer of objectivity which would nowadays seem naïve to posit for other kinds of legal reasoning.[1707] The epistemic approach drives this point home with particular fervour by basing truth on consensus interpreted as statistical evidence,[1708] but the general sense of objectivity-through-formality is present in other arguments in favour of consensus as well.[1709] Emphasising the indeterminacy of regional human rights law because of the paradoxical nature of legal argument, *including* European consensus, points in precisely the opposite direction: the "gap" between legal materials (vertically comparative legal materials, in the case of consensus) and the ECtHR's decisions makes the latter political whether or not consensus is used.

This also means, however, that there is no *more* objective form of reasoning available as an alternative:[1710] while consensus forms part of the argumentative structures which render regional human rights law indeterminate, so do other forms of reasoning. The point of underlining the indeterminacy of regional human rights law is not – at least not at this stage of the argument[1711] – to establish any particular form of reasoning as preferable but simply to showcase the form legal argument takes and the disconnect between legal materials and legal decisions which follows from it. In and of itself, this is a largely descriptive exercise[1712] – it simply describes the structure of legal argument.[1713] If nothing else, one might consider this

1707 For the way in which connections are drawn between consensus and numbers, see Chapter 5, I.

1708 See Chapter 4, II.

1709 Besides Chapter 5, I. and V., see in particular Chapter 3, II. and Chapter 10, II.; see also O'Hara, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'" for an account of how consensus assumes the appearance of truth.

1710 See generally Martti Koskenniemi, "Letter to the Editors of the Symposium," (1999) 93 *American Journal of International Law* 351.

1711 But see infra, IV.2.

1712 Explicitly Koskenniemi, *From Apology to Utopia*, at 563-564.

1713 As the subtitle of *From Apology to Utopia* ("The Structure of International Legal Argument") indicates.

helpful as professional knowledge indicating how to use legal language so as to appear as a savvier lawyer.[1714]

What I am more interested in, however, and what I also take to be the underlying motivation in most critical projects, is the more normative and indeed self-avowedly political aspect of highlighting legal indeterminacy. As Susan Marks has summarised it, "the issue is not just whether we perceive indeterminacy, but what we do with it".[1715] Emphasising indeterminacy, in other words, is only ever a first step. It represents, in Koskenniemi's words, "a rather classical form of ideology critique whose point is to undermine the feeling of naturalness we associate with our institutional practices"[1716] – it denaturalises dominant interpretations and understandings of law and thereby makes law seem less "natural and inevitable" and more "contingent and contestable".[1717] The point of the indeterminacy thesis is thus not to claim that international law does not seem determinate in its "day-to-day reality",[1718] but precisely to open up space for questioning the positions which are projected onto law within that reality. Having established that legal decisions are political rather than predetermined by the law itself, it becomes possible to ask – and therein lies the second step of the argument – why they nonetheless were made the way they were. Differently put: the focus shifts from establishing truth (or some derivative of it, e.g. legal "correctness" or objectivity) to the power structures which shape what we understand to be true (legally correct, objective, etc.) in the first place – and, in consequence, whether and how we can challenge these power structures and change such understandings.[1719]

This is why, in Chapter 1, I described my argument as critical only in a weak sense.[1720] My primary focus throughout has been on the argumentative structures of regional human rights law with specific reference to European consensus, aiming to substantiate their indeterminacy. I have

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1714 See Jack M. Balkin, "A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason," in *From Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996) at 218; see also supra, note 1692.

1715 Marks, *The Riddle of All Constitutions*, at 144.

1716 Koskenniemi, *From Apology to Utopia*, at 601.

1717 Ibid., 538.

1718 Miles, "Indeterminacy" at 458 (arguing that this poses a "difficulty" to arguments based on structural indeterminacy).

1719 For an example attempting this shift from establishing truth to investigating how truth is established, see Theilen, "Pre-existing Rights and Future Articulations: Temporal Rhetoric in the Struggle for Trans Rights", at 208.

1720 Chapter 1, IV.2.

not, except occasionally in passing, put a spotlight on the structural biases which undergird the system as a whole. Koskenniemi once again: "For the 'weak' indeterminacy thesis to turn into a 'strong' one, it needs to be supplemented by an empirical argument, namely that irrespective of indeterminacy, *the system still de facto prefers some outcomes or distributive choices to other outcomes or choices*".[1721] It is resistance to this kind of structural bias which drives critique, because "something we feel that is politically wrong in the world is produced or supported by that bias" and the indeterminacy claim can be considered "a prologue to a political critique" of the status quo.[1722] At the risk of taking it out of context (as it so often is), a riff on Marx's eleventh thesis on Feuerbach perhaps most succinctly encapsulates the motivation for critique which I am endeavouring to describe here: the point is not only to interpret the world – or law as a part of our social world – but to *change* it.[1723]

Critique in this sense is driven, then, by the desire to denaturalise current social arrangements so as to open up imaginative space for social transformation, specifically *social transformation that is relatively far-reaching compared to what seems possible within the dominant ideological framework of current arrangements or institutions*.[1724] Using the example of human rights and specifically the ECHR in its interpretation by the ECtHR: I think it is fair to assume that nobody, whether conservative, liberal, radical, or otherwise, agrees with the ECtHR's case-law on each and every point. Many observers, however, would express overall satisfaction with that case-law; whatever relatively minor amendments they wish to propose could be easily accommodated within the system, by arguing on its own terms, as it

1721 Koskenniemi, *From Apology to Utopia*, at 606-607 (emphasis in original); for an argument that connects this point directly to "the particular form indeterminacy assumes", rather than a second argumentative step relatively independent from it, see Tzouvala, *Capitalism as Civilisation. A History of International Law*, at 215.

1722 Koskenniemi, *From Apology to Utopia*, at 607 and 609.

1723 For the original, see Karl Marx, "Thesen über Feuerbach," in *Karl Marx: Thesen über Feuerbach*, ed. Georges Labica (Hamburg and Berlin: Argument-Verlag, 1998) at 15; for a connection of this point to denaturalisation and wonder as a first step, see Theilen, "Of Wonder and Changing the World: Philip Allott's Legal Utopianism" at 345-346; on context for Marx's quote in relation to "critical knowledge", see Marks, *The Riddle of All Constitutions*, at 123-125.

1724 On the element of imagination in contrast to current orthodoxies, see Gerry Simpson, "Imagination," in *Concepts for International Law. Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar, 2019) at 414.

were.[1725] When one perceives a more fundamental disconnect between the status quo and one's political commitments, however, critique enters the picture since it becomes necessary to "call the system into question"[1726] by emphasising its contingency and its structural biases so as to make certain outcomes imaginable, much less potentially realisable.

I consider the structural biases underlying human rights law to have been convincingly established elsewhere, driven by political commitments which I largely share: although this kind of feminist, queer, Marxist or postcolonial critique often does not deal specifically with the ECHR,[1727] the points it makes are broadly transferable from the project of legal human rights as a whole to the ECHR in particular. If anything, some points of critique may be *more* applicable, for example in light of the way in which the ECHR largely neglects socio-economic rights,[1728] while giving particularly strong expression to the (supposed) human rights of corporations.[1729] The preceding chapters could thus be considered a retroactive

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1725 See Kennedy, *A Critique of Adjudication (fin de siècle)*, at 245.

1726 Knox, "Strategy and Tactics" at 200.

1727 See e.g. Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," (1991) 85 *American Journal of International Law* 613; Karen Engle, "International Human Rights and Feminism: When Discourses Meet," (1992) 13 *Michigan Journal of International Law* 517; Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," (2001) 42 *Harvard International Law Journal* 201; Balakrishnan Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003), chapter 7; Brown, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism"; Dianne Otto, "Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law," in *International Law and its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006); Upendra Baxi, *The Future of Human Rights*, 3rd ed. (New Delhi: Oxford University Press, 2008); Dianne Otto, "Queering Gender [Identity] in International Law," (2015) 33 *Nordic Journal of Human Rights* 299; Paul O'Connell, "On the Human Rights Question," (2018) 40 *Human Rights Quarterly* 962; Kapur, *Gender, Alterity and Human Rights*; in the context of the ECtHR, see e.g. Marie-Benedicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006); Damian A. Gonzalez-Salzberg, "The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights," (2014) 29 *American University International Law Review* 797.

1728 See Samuel Moyn, *Not Enough. Human rights in an Unequal World* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2018), at 189.

1729 Anna Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights," (2007) 7 *Human Rights Law Review* 511 at 535.

prologue to these forms of critique – a denaturalisation of the way in which legal argument is used by the ECtHR so as to provide for a point of entry for political critique.

III. The Role of Human Rights Courts

The moment of disorientation which follows from denaturalising existing social arrangements – for example by insisting on the indeterminacy of law and thus unsettling the feeling of necessity associated with dominant legal doctrines – is arguably particularly relevant in the context of international law and human rights. Perhaps because of a sense of enthusiasm for "the international", perhaps – relatedly – because of the way in which these areas of law are often discursively produced as morally favourable compared to, say, contract law or company law,[1730] the image of international law "as always already containing [an] ideal of the good society" persists.[1731] Similarly, human rights tend to be perceived in mainstream discourse as a good in and of themselves – mankind's last utopia, our "highest moral precepts and political ideals".[1732] In this context even more so than elsewhere, then, critique takes on a killjoy function[1733] precisely by aiming to disenchant human rights, to present them not as part of some kind of progress narrative,[1734] always already pointing towards a better world, but rather as "an arena where different visions of the world are fought out"[1735] – and thus to open up space for questioning whether human rights are quite as emancipatory as they are made out to be.

1730 See e.g. David Kennedy, "A New World Order: Yesterday, Today, and Tomorrow," (1994) 4 *Transnational Law and Contemporary Problems* 329; Anne Orford, "Embodying Internationalism: The Making of International Lawyers," (1998) 19 *Australian Yearbook of International Law* 1.

1731 Koskenniemi, *From Apology to Utopia*, at 613.

1732 Moyn, *The Last Utopia*, at 1; see Chapter 1, I.1.

1733 On the feminist killjoy, see Sara Ahmed, *Living a Feminist Life* (Durham and London: Duke University Press, 2017); and e.g. Sara Ahmed, *The Promise of Happiness* (Durham and London: Duke University Press, 2010), at 66: "Feminists do kill joy in a certain sense: they disturb the very fantasy that happiness can be found in certain places"; human rights might be considered one of those places.

1734 See Chapter 6, VI.

1735 Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" at 671.

Highlighting the "dark sides"[1736] of human rights and their use as an instrument of power and governmentality need not imply that they cannot *also* have emancipatory potential. There has been much debate in recent years as to whether human rights can be reimagined in a way compatible with political claims for radical social transformation in the wake of the various critiques mentioned above[1737] – a kind of "critical redemption of human rights"[1738] or "rights revisionism".[1739] Some see little to no value in this, insisting that the emancipatory potential of human rights has always been or has become so limited compared to their "dark sides" that it is not worth engaging with them and other languages of resistance should be found.[1740] Others emphasise instead that, for all their failings, human rights "hold possibilities to be used to gesture towards a future that is better than the present and the current oppressive use of power within it",[1741] and hence that the vocabulary of human rights remains useful for those interested in transformative politics.[1742]

Framing the debate as a dichotomy in this way, of course, involves a significant degree of oversimplification. For one thing, there is a broad spectrum of positions ranging from relatively enthusiastic reengagement with human rights while incorporating points of critique to wholesale rejection of any engagement, with various intermediate positions proposing, for example, different ways of engaging strategically with human rights given

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1736 David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton and Oxford: Princeton University Press, 2004).

1737 Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 25.

1738 Golder, "Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought" at 79.

1739 Costas Douzinas, "Adikia: On Communism and Rights", available at <http://criticallegalthinking.com/2010/11/30/adikia-on-communism-and-rights/>.

1740 Very clearly Golder, "Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought" at 113-114; tending in this direction also e.g. David Kennedy, "The International Human Rights Regime: Still Part of the Problem," in *Examining Critical Perspectives on Human Rights*, ed. Rob Dickinson, et al. (Cambridge: Cambridge University Press, 2013) at 34.

1741 Kathryn McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power* (London and New York: Routledge, 2018), at 6.

1742 E.g. O'Connell, "On the Human Rights Question" at 964; Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" at 516; see also Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" at 682, though now much more cautious e.g. in Kapur, *Gender, Alterity and Human Rights*, at 152.

their prominence within current global discourses.[1743] For another thing, and more importantly for present purposes, the language of human rights is clearly used in a myriad different ways by different actors in different contexts, and for all the connections that can be drawn between these different uses, it seems counterproductive to lump them all together without further consideration.[1744] It is this latter point which I would like to briefly dwell on in this section, with particular reference to the engagement with human rights in their *judicialized* form.

This is not a common area of critical reengagement of human rights, to say the least. Courts, as I noted at the end of the previous chapter, are hardly known for being revolutionary. Hopes for far-reaching social transformation are typically placed, accordingly, on social movements which make more radical political claims phrased, for example, as peasant rights or decommodification rights. Not only does this shift in focus allow for discussion of normative claims that imply more meaningful social transformation than those typically raised before courts, it also changes the way in which we think of both human rights and our own position within the struggle for social change. In this way, it becomes possible to stress, as Paul O'Connell has put it, "the centrality of social and political struggle in the formulation and defense of human rights".[1745] Legal interpretations of human rights by courts form an explicit counter-point to this way of engaging with human rights: "narrow, formalistic, and overly juridical concepts of what human rights are" need to be overcome so as to enable productive reengagement with the notion of human rights elsewhere.[1746] Or, to make a similar point from within a different framework: foregrounding different interpretations and understandings of human rights by social movements could be thought to support what Robert Cover calls "the jurisgenerative principle by which legal meaning proliferates"[1747] and which, in the words

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1743 See McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 4; on strategy more generally, see Knox, "Strategy and Tactics"; and on the prominence of the language of human rights through the topical lens of habituality, see von Arnauld and Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'", at 44-45.

1744 For a similar point in a different context, see Paul O'Connell, "Human Rights: Contesting the Displacement Thesis," (2018) 69 *Northern Ireland Legal Quarterly* 19 at 24.

1745 O'Connell, "On the Human Rights Question" at 964.

1746 Ibid.

1747 Robert M. Cover, "The Supreme Court 1982 Term. Foreword: Nomos and Narrative," (1983) 97 *Harvard Law Review* 4 at 40.

of Seyla Benhabib, "anticipates new forms of justice to come".[1748] Courts, however, are "jurispathic": their legal interpretation does not serve to generate new meanings but rather shrouds other understandings of human rights.[1749]

Having thus, albeit very roughly, situated human rights in their judicialized form against the backdrop of critical discussions of human rights more generally, it becomes possible to further flesh out the theme of indeterminacy and its connection to a quest for far-reaching social transformation, as sketched in the preceding section. The emphasis on legal indeterminacy, I argued there, appears important so as to denaturalise dominant legal narratives and thus provide a point of entry for political critique. It is precisely these legal narratives which also account in large part for the scepticism surrounding the judicialization of human rights in critical quarters. As Duncan Kennedy summarises the way in which judicialization functions to legitimate the status quo: "alternative ways of understanding are rendered invisible or marginal or seemingly irrational by the practice of withdrawing a large part of the law-making function into a domain governed by the convention of legal correctness and the denial of ideological choice",[1750] i.e. professional legal vocabulary. In a similar vein, many critical thinkers have criticised the increasing (jurispathic) judicialization of human rights as contributing to their depoliticization[1751] which, in turn, makes it more difficult to use them in such a way as to challenge current power structures.[1752] Emphasising the indeterminacy of legal argument aims to break open legal discourse to reveal the ideological choices it contains and allow for political contestation – which may, for example, take the form of foregrounding alternative uses of human rights by radical social movements.

1748 Benhabib, "Introduction: Cosmopolitanism without Illusions" at 15; see also Baxi, *The Future of Human Rights*, at 206; von Arnauld and Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'", at 47.

1749 Cover, "Nomos and Narrative" at 40.

1750 Kennedy, *A Critique of Adjudication (fin de siècle)*, at 236; see also Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" at 529.

1751 Mouffe, *The Democratic Paradox*, at 115.

1752 McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 80; Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 15 and 33.

This need not necessarily imply that human rights courts such as the ECtHR cannot be mobilized as part of a strategy for social transformation at all. Contestation always takes place in contexts which are already structured, albeit differently, by various power relations, so in a sense there is nothing unusual about this. Beth Simmons has argued that "[i]n the struggle against oppression from whatever source, it can be quite useful for one hegemony to be used to challenge another".[1753] Transposing this approach to the ECtHR, one might try to conceive of the ECtHR less as an institution providing fixed answers to the interpretation of human rights and rather as an institution which can be "triggered" by activists into providing judgments as resources for further activism at the national level,[1754] thus contributing to contestation of current power structures without itself setting the agenda for social transformation. From within this perspective, courts are perhaps best conceptualised as "marginal actors" in a broader "political struggle" for rights[1755] – marginal in a sense, but nonetheless potentially important given the practical import which the ECtHR's judgments, as statements with significant "expressive power",[1756] for better or worse, may have *in the context of a broader political struggle*.

A number of proposals have been made with regard to the ECtHR which could be read as tending in this direction, including some which make explicit reference to European consensus. In that vein, Thomas Kleinlein has argued for "a vision of the role of the Court"[1757] in which European consensus and the "procedural" approach to the margin of appreciation[1758] are combined in such a way as to generate judgments which "do not represent 'the last word' but can provide a trigger for democratic contestation and deliberation".[1759] Kleinlein is primarily concerned with the democratic legitimacy of the ECtHR, not with its role within processes

1753 Simmons, *Mobilizing for Human Rights*, at 371.

1754 See in more detail on the "triggering function" of human rights von Arnauld and Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'", at 45-47.

1755 Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, and Morals*, 1st ed. (Oxford: Oxford University Press, 1996), at vi, cited from Rajagopal, *International Law from Below. Development, Social Movements and Third World Resistance*, at 207.

1756 Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257.

1757 Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 881.

1758 See Chapter 8, III.3.

1759 Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 888.

of social transformation; but his approach nonetheless implies a conceptualisation of the ECtHR which sees it not as an autarkic court with unquestioned authority, but embedded within broader political processes in which contestation – including contestation of (what the ECtHR interprets as) European consensus[1760] – plays a vital role. The emphasis, as Conor Gearty has summarised it, is ultimately less on the Court itself and rather on "a rationally based local engagement with rights".[1761]

There is something to be said for such an approach, particularly in light of the fact that many (though of course by no means all) social movements do engage with courts in some way in practice. For those interested in far-reaching social transformation, however, it is also important to appreciate its limits. This goes back to the motivation for critique which I suggested in the previous section: if critique is aimed at opening up imaginative space for social transformation more far-reaching than what currently seems possible within a certain institution – such as the ECtHR – then the conceptualisation of the ECtHR's judgments as useful within a broader political struggle, and thus a tool for contestation, should not distract from what is *not* made available for contestation within the institutional setting of the ECtHR,[1762] nor from the way in which legal discourse tends to restrict rather than expand imaginative space.

IV. Justifying Concrete Norms in Regional Human Rights Law, Revisited

1. The Indeterminacy Thesis in the Judicial Context

I have so far said very little about how the ECtHR *should* decide the cases before it or justify the decisions it reaches. Given the rough overview of critical international legal theory and critical perspectives on human rights in the preceding sections, it becomes clear that this is hardly accidental. One might perhaps describe the difference between a structural critique of judicialized human rights and the question of how the ECtHR should de-

1760 Ibid., 881 and 893.

1761 Gearty, "Building Consensus on European Consensus" at 467.

1762 In that vein, I think there is much to be said for O'Hara's assessment that "queer freedom" (and other kinds of freedom) "may be better sought away from the European Court of Human Rights and its insistence on consensus": O'Hara, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'".

cide as a difference in emphasis[1763] – or, perhaps, as differently oriented.[1764] Critique operates on the meta-level:[1765] as Robert Knox has summarised critical international legal theory, it is "about the *structure* of law and legal argument, which is not concerned with [how] specific legal rules should be deployed or the outcomes of specific legal decisions, but is rather about the broader […] relationship between law and social phenomena".[1766] Differently put, where traditional legal scholarship is oriented "inwards" in an attempt at "problem-solving" from within the perspective of the conventions of legal discourse, critique aims to work "outwards" and provide different perspectives on how the problem is framed in the first place.[1767]

Unsurprisingly, this often seems unsatisfying or evasive to those engaging directly in legal debates in the context of particular institutions.[1768] This is perhaps particularly so in the case of courts such the ECtHR: after all, our starting point in Chapter 1 was that the ECtHR's judges are bound to provide an interpretation of the ECHR and, ultimately, either confirm or deny a human rights violation in any given case. If the goal is to justify such an interpretation, then the focus clearly lies on precisely the kind of "problem-solving" for which critique offers little guidance. The question thus remains, from this inwards-oriented perspective, what the implications of critique are for the way in which the ECtHR's judgments should be reached and justified, since the ECtHR does not have the academic privilege of restricting itself to a meta-level analysis without some concrete decision as to the cases before it.[1769]

The obvious starting point, particularly in light of the discussion of the indeterminacy of regional human rights law above, is that the law itself underdetermines the results which the ECtHR's judges can or should reach. As Jan Klabbers has put it, "critical legal studies is not the most ap-

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1763 See Marks, *The Riddle of All Constitutions*, at 132 and 138.

1764 Supra, note 1696.

1765 See also Chapter 1, IV. on structuralism.

1766 Knox, "Strategy and Tactics" at 203.

1767 See Marks, *The Riddle of All Constitutions*, at 131-132, building on Robert W. Cox, "Social Forces, States and World Orders: Beyond International Relations Theory," (1981) 10 *Millennium: Journal of International Studies* 126.

1768 On the politics involved in demanding different kinds of answers, see Pierre Schlag, "'Le hors de texte, c'est moi' - The Politics of Form and the Domestication of Deconstruction," (1990) 11 *Cardozo Law Review* 1631 at 1632.

1769 See also the distinction drawn by Kennedy, "A Semiotics of Critique" at 1163 between the decisionist as "responsible actor" (problem-solving) and the "decisionist as analyst" (critique).

propriate tool for analysing what the law says".[1770] Indeed, this is precisely the point, since critical international legal theory – as the indeterminacy thesis makes particularly clear – aims to shift the understanding of law *away* from the idea that the law "says" anything in particular, and to instead draw attention to the power structures which exclude certain positions from the scope of what it is commonly thought to say. Any suggestions as to how the ECtHR should proceed are thus, it bears repeating, *political* in the sense that they entail an element of decisionism rather than following from legal materials.

Aiming to open up legal decisions in this way carries both potential advantages and significant risks in the context of the judicial decision. Optimistically, one might argue that although critical international legal theory provides no "immediate solutions" to the "problems on which practicing lawyers are requested to give advice" – or judges to decide – it nonetheless "serves practice by producing critical reflection and self-awareness".[1771] I mentioned above that one implication of the indeterminacy thesis is that, by descriptively engaging with the structure of legal argument, it provides a resource for how professional legal vocabulary might be used in different ways.[1772] Once normatively saturated, this implies that it might "provide resources for the use of international law's professional vocabulary *for critical or emancipatory causes*".[1773] Taking these statements together, one might hope that the ECtHR's judges, having reflected on the structural biases underpinning legal argument in the context of the ECtHR, make use of their mastery of the language of regional human rights law to support such previously, perhaps inadvertently, disavowed causes.

But there is a difficulty here, most succinctly and rather self-evidently captured by the question of what constitutes "critical or emancipatory causes". The law cannot, in light of its indeterminacy, be regarded as providing answers to this question – and for good reason, since moving beyond the idea that it contains the "ideal of the good society" was part of the reason for critique in the first place.[1774] This also means, however, that we are thrown back to disagreement about moral matters or differences in

1770 Klabbers, *The Concept of Treaty in International Law*, at 11.
1771 Remarks by Martti Koskenniemi, cited from David Kennedy and Chris Tennant, "New Approaches to International Law: A Bibliography," (1994) 35 *Harvard International Law Journal* 417 at 427; on the limits of self-reflectivity, see Chapter 7, IV.
1772 Supra, note 1714.
1773 Koskenniemi, *From Apology to Utopia*, at 581 (emphasis added).
1774 Supra, note 1731.

"political preference".[1775] Since the indeterminacy of regional human rights law means that the outcomes of cases before the ECtHR cannot be crafted onto some understanding of law (or consensus[1776]) external to the Court,[1777] it underlines their responsibility for the decisions which they reach[1778] – but the flipside of this is a strongly subjectified framing of how the ECtHR should decide. The "personal perspective"[1779] of the judges gains immense weight – hence the repeated classification of critical international legal theory as "perspectivism",[1780] "virtue ethics"[1781] or, more pejoratively, "nihilism".[1782]

1775 Kennedy and Tennant, "New Approaches to International Law: A Bibliography" at 427.

1776 In academic commentary, this is sometimes (especially in the context of legitimacy-enhancement) expressed through the description of consensus as a "distancing device", building on Joseph Raz, "On the Authority and Interpretation of Cosntitutions: Some Preliminaries," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (Cambridge: Cambridge University Press, 1998) at 190; see e.g. Senden, *Interpretation of Fundamental Rights*, at 118 (tellingly in the context of "increas[ing] the objectivity of a particular decision"); Legg, *The Margin of Appreciation*, at 134.

1777 See Chapter 1, IV.5. and Chapter 5, V.

1778 See Chapter 1, I. and IV.5., and generally on human responsibility for law Koskenniemi, *From Apology to Utopia*, at 536-537 and 615; Jan Klabbers, "Towards a Culture of Formalism? Martti Koskenniemi and the Virtues," (2013) 27 *Temple International and Comparative Law Journal* 417 at 420; Philip Allott, "The Will to Know and the Will to Power. Theory and Moral Responsibility," in *The Health of Nations. Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002) at 33; Theilen, "Of Wonder and Changing the World: Philip Allott's Legal Utopianism" at 364-365; see also Sahib Singh, "Koskenniemi's Images of the International Lawyer," (2016) 29 *Leiden Journal of International Law* 699 at 709 for a productive probing of critical notions of responsibility.

1779 Korhonen, "New International Law: Silence, Defence or Deliverance?" at 24; see also Paavo Kotiaho, "A Return to Koskenniemi, or the Disconcerting Cooptation of Rupture," (2012) 13 *German Law Journal* 483 at 490: "jurists rather than positive rules become the law's nucleus".

1780 Korhonen, "New International Law: Silence, Defence or Deliverance?" at 24.

1781 Klabbers, "Towards a Culture of Formalism? Martti Koskenniemi and the Virtues" at 422; see also Singh, "Koskenniemi's Images of the International Lawyer" at 725 on "virtue as the last refuge against false promises and possibilities", and passim on the way in which critical international legal theory tends to invest in specific images of the (lawyerly) subject as the basis of its emancipatory politics; on this, see also Tzouvala, *Capitalism as Civilisation. A History of International Law*, at 216-217.

1782 See the discussion in Koskenniemi, *From Apology to Utopia*, at 535-536 and 539; see also Kennedy, *A Critique of Adjudication (fin de siècle)*, at 361.

Generally speaking, my sense is that the charge of nihilism reveals more about those who raise it than about critical international legal theory:[1783] we would live in an impoverished normative universe indeed if questioning legal normativity led directly to nihilism. For those interested in critique in the sense I outlined earlier in this chapter, of course, moving beyond the ideological baggage contained in legal discourse is precisely the point, so worries about legal normativity collapsing, in principle, fall flat. And yet, one might raise doubts about the implications of championing legal indeterminacy in the specific context of human rights courts such as the ECtHR.[1784] To be sure, highlighting indeterminacy in this context seems particularly necessary to open up imaginative space geared at understandings of human rights which differ from dominant judicial approaches and thus to support to kind of critical perspective on human rights sketched in the previous section. The implications of indeterminacy and the perspectivism which comes with it *within the institutional practice of courts as they currently stand*, however, are less clear.

Consider again the question of what counts as "critical or emancipatory causes". Within the ambit of critical international legal theory as a more or less consistently left-wing academic project,[1785] this question could no doubt be answered,[1786] albeit in broad strokes and with many differences in emphasis and indeed plenty of outright disagreement.[1787] Here, the imaginative space opened up by the indeterminacy thesis can be used for the kind of structural critique mentioned above. The ECtHR's judges, however, make their decisions in a very different institutional context and, given the various personal and procedural constraints which that context involves,[1788] are likely to approach their judgments from entirely different,

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1783 Just as the question of "What would you put in its place?" (i.e., in place of the rule of law or other objects of critique) reveals more about those who ask it than about those it is aimed at: see Richard Michael Fischl, "The Question that Killed Critical Legal Studies," (1992) 17 *Law and Social Inquiry* 779.

1784 For a brief discussion of the indeterminacy thesis with regard to specific contexts, see also Chapter 10, II.2.

1785 See Kennedy, *A Critique of Adjudication (fin de siècle)*, at 246 (primarily in the American context, but I think the point holds more generally).

1786 See also Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 6-7.

1787 For some of these broad strokes, see the critiques cited supra, note 1727.

1788 One obvious point (especially in contrast e.g. with social movements or other less institutionalised actors as mentioned above) is the nomination of the ECtHR's judges by representatives of the States parties in the CoE's Parliamen-

more conservative perspectives.[1789] There are no guarantees that increasing imaginative space in this context will lead to results considered beneficial by those who, like me, emphasise legal indeterminacy in an effort to further what we perceive as critical or emancipatory causes.[1790] Furthermore, one might question whether the subjectification of legal decisions and the de facto empowerment of judges which results from the lack of legal constraints once indeterminacy is acknowledged does not run counter to the spirit of critical perspectives on human rights discussed in the preceding section – an inadvertent invitation for judges to expand their jurispathic activities and pull ever-increasing subject-matters into the ambit of legal discourse.[1791]

Against this rather ambivalent backdrop, I would like to use the remainder of this chapter to make some tentative suggestions as to how the ECtHR's reasoning might be improved with an eye on legal indeterminacy and the Court's position in processes of social transformation. In light of all that I have said so far, it should have become amply clear that there are significant risks associated with this endeavour, and that it is not intended to counteract the well-founded scepticism about the role of courts within transformative politics as sketched in the previous section but rather, a cer-

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tary Assembly (Article 22 ECHR), which creates an easy way to filter out those with radical views from the outset. Another important point orienting the ECtHR towards conservatism may well be the focus on preserving its own institutional power (see Chapter 9, II.5.), which is part of why I think it is important to de-emphasise (sociological) legitimacy as a value in human rights adjudication (infra, IV.3.). However, ultimately none of the suggestions that follow can counteract the important insight that "possibilities are framed by circumstances", that "change unfolds within a context that includes systematic constraints and pressures" (Marks, "False Contingency" at 2) and that these constraints are particularly pronounced in the judicial context.

1789 See also Mégret, "The Apology of Utopia" at 495 on the difference between judges and litigators; for the related (though not identical) distinction between observers' and judges' standpoints, see Chapter 2, IV.; in that terminology, my point here is that from an observers' standpoint, the judicial context cannot be removed from the limits discussed above.

1790 Kennedy, *A Critique of Adjudication (fin de siècle)*, at 136-137; Tzouvala, *Capitalism as Civilisation. A History of International Law*, at 37-38.

1791 Ibid., 206-207, on the possibility that judges who embrace critique might "tyrannize us worse than they do already" but also making the more fundamental point that fear of this (hypothetical) consequence motivates the denial of critique; see also Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 8, more generally on the connection between indeterminacy and "the discretion of the judge or the technocrat".

tain tension notwithstanding, to complement it. My motivation for this part of the argument is twofold. For one thing, having argued that law is political, it seems all the more important to engage in political debate, which then includes debate as to how human rights in their legal form (e.g. as codified in the ECHR) should be interpreted – even if our expectations for truly transformative potential emanating from the ECtHR's judgements are very much muted. While this relates in large part to substantive debates on the interpretation of different rights which I must bracket here for lack of space, some general observations about different kinds of reasoning in relation to current power structures and the possibilities for social change might be made. Given the overall focus of this study, I will approach this task by putting European consensus back into the spotlight and questioning its merits with regard to a transformative politics (2.).

For another thing, and more foundationally, I think it is worth reflecting on how we think about the ECtHR's reasoning qua legal reasoning. After all, the difficulty in reengaging with the ECtHR or other courts following critique pertains not only to the substantive positions which they are likely to take, but also to the form of reasoning they deploy. If we accept that legal discourse with its tendency towards naturalisation and depoliticization constitutes an obstacle to transformative politics, as those who propose reengagement with human rights in their non-juridical form argue, then the subsequent reengagement with courts as potential enablers of social change may easily be liable to negate the effect of critique, *even if consensus was no longer accorded a prominent place within the ECtHR's reasoning*. But legal reasoning is itself neither monolithic nor set in stone[1792] – so perhaps we might start thinking about how to reimagine the very notions of law, courts, and judgment-giving[1793] in such a way as to make them less inimical to struggles for far-reaching social transformation (3.). As one pos-

1792 See Kennedy, *A Critique of Adjudication (fin de siècle)*, at 14: "We might have the benefits of judiciality without its current drawbacks".

1793 One source of inspiration here (and one which is well aware of the dangers of complicity in engaging reconstructively with judicial pronouncements) are the numerous feminist judgment projects which have been blossoming over the last few years – although, by and large, they do tend to focus on showing how decisions could have been made differently (which chimes with the indeterminacy thesis) but without being "overly experimental with the *form* of the rewritten judgments" in the interest of practical impact (Sharon Cowan, "The Scottish Feminist Judgments Project: A New Frontier" (Oñati Socio-legal Series, v. 8, n. 9 - Feminist Judgments: Comparative Socio-Legal Perspectives on

sible avenue to approaching this task, I propose we might return to the notion of vertically comparative legal reasoning – but we might use it, not as the basis for establishing European consensus or lack thereof, but rather to unsettle dominant concepts within European public culture and thus to contribute, in a sense, to the openness of regional human rights adjudication (4.).

2. European Consensus and the Perpetuation of Current Power Structures

Let me begin, then, by drawing together some themes from the previous chapters on European consensus in relation to what I have said above. The starting point must be to acknowledge that, if consensus does indeed form part of the argumentative structures which render human rights law indeterminate and there is, accordingly, a "gap" between the reference to both European consensus and other forms of reasoning, on the one hand, and the legal decision, on the other,[1794] then consensus *can be used in different ways*[1795] and there is no *necessary* connection between consensus as a form of reasoning and the outcomes which it is used to justify. Not only can it be given more or less weight within the overall reasoning of the ECtHR, it also incorporates the tension between moral and ethical normativity in such a way that whether consensus or lack of consensus is established depends in large part on how the issue is framed and from which angle the vertically comparative legal analysis is approached. I treated these issues by reference, in particular, to numerical issues involved in establishing (lack of) consensus, to the different sources of consensus such as domestic or (different kinds of) international law, and to the level of generality at which consensus is approached.[1796]

Drawing attention to the disconnect between argumentative structures within regional human rights law and the results they are used to justify, however, does not mean that certain forms of reasoning, *if their use in a certain way becomes prevalent*, cannot orient the ECtHR towards certain out-

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Judicial Decision Making and Gender Justice, 2018), at 1395, emphasis added; available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249609>); my approach here is to put the focus on practical impact aside in favour of voicing some more disruptive suggestions.

1794 Supra, note 1702.

1795 See Chapter 1, IV.2. and IV.5.

1796 See in particular Chapters 5 to 7.

comes.[1797] In that vein, although the manifold issues involved in establishing (lack of) European consensus involve a much greater amount of malleability than is commonly acknowledged, the key characteristics of consensus which I posited in Chapter 1 nonetheless give it some shape and render it intelligible as a form of argument the frequent use of which can be politically evaluated.[1798] For another thing, a certain rather formulaic way of using consensus not only appears in some of the ECtHR's judgments, but is also increasingly being advocated for by academic observers of the ECtHR and thus constructed as the paradigmatic case of "European consensus":[1799] based in large part on concerns about the ECtHR's legitimacy, a picture of consensus emerges in which it is constructed primarily by reference to domestic law, ideally to a large number of States parties, approached at what I dubbed the "Goldilocks level of generality", and endowed with strong normative force.[1800] Such an approach chimes with calls that consensus should be used more consistently and predictably,[1801] and would, accordingly, make the notion of consensus more tangible still. It is this restricted conception of consensus which will form the primary subject of my evaluation in this subsection, though I would posit that the gist of my remarks also applies, albeit less starkly, to European consensus as an expression of a pan-European ethos more generally.

How, then, might one evaluate the ECtHR's use of European consensus from the perspective of a politics oriented towards social transformation? To my mind, one might summarise as follows. By virtue of the way European consensus assigns normative force to the legal systems of the States parties as they currently stand, foregrounding it within the ECtHR's reasoning not only carries a noticeable *conservative lilt*[1802] but also *points away from critical engagement with current power structures* both intra-nationally and transnationally within Europe. Let me develop both of these points in slightly more detail by contrasting the implications of foregrounding European consensus with the critical reengagements with human rights mentioned above.

1797 See Chapter 8, IV.
1798 Chapter 1, III.
1799 See the dynamic described by Větrovský, "Determining the Content of the European Consenus Concept: The Hidden Role of Language" at 127-128.
1800 See Chapter 9, II.4.; for the Goldilocks level of generality, see Chapter 7, I.
1801 See Chapter 5, I.
1802 Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 15.

I have already cited Kathryn McNeilly's argument that, once reimagined in a different form from currently dominant understandings, human rights "hold possibilities to be used to gesture towards a future that is better than the present and the current oppressive use of power within it".[1803] She develops the notion of "human rights to come" – a "fundamentally *futural* conception of human rights" linked to alterity and aiming to disrupt current understandings of human rights.[1804] McNeilly's framework is particularly explicit on this point, but other critical scholars have made similar proposals: Costas Douzinas, for example, builds on Ernst Bloch's notion of the "not yet" to conceptualise human rights as "future looking".[1805] Upendra Baxi foregrounds the "extraordinarily complex constitutive notion of *potentiality*" of human rights.[1806] He emphasises both the exclusionary aspects of the currently "existing world of human rights" and the "possibility of decreating this world in the process of recreating new worlds for human rights" so as to give voice to "the stateless, the refugee, the massively impoverished human beings, the indigenous peoples of the world, and peoples living with disabilities".[1807]

There are two related aspects in these reimagined conceptualisations of human rights I would like to foreground here in contrast to European consensus.[1808] The first lies in the temporal mode from within which human rights are approached. The critical engagements just quoted are oriented towards the future, always seeking to keep human rights open for different

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1803 Supra, note 1741.

1804 McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 26 (emphasis in original).

1805 Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), at 145 and 245; for Bloch's notion of the "not yet", see Bloch, *Hoffnung*, e.g. at 83; Theilen, "Of Wonder and Changing the World: Philip Allott's Legal Utopianism" at 341.

1806 Baxi, *The Future of Human Rights*, at 2 (emphasis added), building on Giorgio Agamben, *Potentialities. Collected Essays in Philosophy*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 2000).

1807 Baxi, *The Future of Human Rights*, at 2.

1808 The points raised here bear some resemblance to criticism made from within the morality-focussed perspective (for which, see Chapter 2, II.), which perhaps attests to how uncomfortably close critical accounts can inadvertently be to the liberal frameworks they aim to contest. However, I do think that the critical mindset sketched above implies a fundamentally different perspective, motivated by different concerns and aiming to ask entirely different questions. Accordingly, as the further argument will make clear, the point of criticising consensus cannot simply be to switch to the morality-focussed perspective and call it a day.

interpretations and engagements yet "to come".[1809] If one subscribes to the critique of human rights which regards them as implicated in power structures and not inherently emancipatory,[1810] then this kind of open, futural approach seems important so to gain the "promise of a better future" not from human rights law as such, let alone in its current form, but from the "sense that it is possible to do things *differently*".[1811] European consensus, by contrast, is oriented backwards, towards the way things *actually are in the present* – specifically, by virtue of its vertically comparative approach, towards the shape the States parties' legal systems currently take. This element of "conservatism"[1812] inherent in consensus has long since been noted, of course: as Paul Martens has put it, European consensus "appears to favour the status quo".[1813]

The second aspect I would like to emphasise is the focus on alterity in the critical conceptualisations of human rights cited above. This clearly relates to the previous point in that the futural mode of human rights serves to promote an openness towards precisely those who cannot yet articulate their claims within human rights as they are currently understood:[1814] as Ratna Kapur has put it, human rights are "radical tools for those who have never had them".[1815] The examples which Baxi provides of those currently given insufficient voice highlights the importance of this point.[1816] Yet once again, European consensus points us in the opposite direction: because the ECtHR tends to establish (lack of) consensus by applying a prism of commonality to vertically comparative legal reasoning "without examining the reasons for the consensus" which it thus constructs,[1817] there is a

1809 See also supra, note 1748.
1810 Supra, III.
1811 McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 40 (emphasis in original).
1812 Brems, "The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights" at 285; James A. Sweeney, "A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights," (2007) 34 *Legal Issues of Economic Integration* 27 at 48.
1813 Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus" at 57.
1814 McNeilly would dub this an "excess linked to alterity": McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 25.
1815 Kapur, "Human Rights in the 21st Century: Take a Walk on the Dark Side" at 682.
1816 Supra, note 1807.
1817 Martens, "Perplexity of the National Judge Faced with the Vagaries of European Consensus".

lack of critical engagement with the power structures which lead to exclusion, marginalisation and oppression in the present and hence a lack of engagement with voices who fall outside the current understandings of human rights. If consensus forms a dominant part of the ECtHR's reasoning, it becomes more difficult for the ECtHR to use its position as an authoritative player within European human rights law to "support preferences that are not normally heard"[1818] since such preferences, almost by definition, do not form part of the dominant consensus.[1819]

Based on all this, the compatibility of European consensus with critical perspectives on human rights seems rather minimal. It is also important to keep in mind, however, that alternative forms of reasoning – at least those associated with the conventions of legal argument before the ECtHR – may fare only marginally better. Reliance on national ethe rather than a pan-European ethos, while potentially pointing towards "local engagement with rights",[1820] also makes it even more difficult to question the status quo within the respondent State than reliance on European consensus does.[1821] Turning instead to the morality-focussed perspective may involve more of a "critical edge" vis-à-vis the respondent State and the other States parties,[1822] but it runs the risk of entrenching a view of human rights as moral-cum-legal truth which naturalises current understandings of human rights[1823] and is thus liable to inhibit far-reaching social transformation by presenting human rights as "antipolitics".[1824]

One aspect which has repeatedly come up in previous chapters is that, given the differing idealisations involved in any one of these various forms

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1818 Koskenniemi, *From Apology to Utopia*, at 602.

1819 See O'Hara, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'"; see also Chapter 3, V. on the tendency of consensus towards homogenisation.

1820 Supra, note 1761.

1821 On both aspects, see Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 29.

1822 See Chapter 2, II.3.

1823 These understandings may also to a significant extent be tied up with the more substantive aspects of the morality-focussed perspective. For example, its focus on moral self-determination of the individual chimes neatly with the liberal subject of human rights – a rational unitary being with the capacity to choose (and to consume); see Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" at 522-523; see also infra, note 1908.

1824 See Chapter 4, IV.

of normativity, there may be a benefit to the oscillation between them.[1825] In light of the ever-present possibility of challenging any position by reverting to a different perspective, the structure of legal argument might be considered to provide "a sort of natural system of checks and balances as it were on others and even on itself".[1826] Unrelated to the context of legal argument, Chantal Mouffe has argued that the interaction between morality-focussed and ethos-focussed perspectives, although or rather precisely because it is paradoxical, results in an "important dynamic" with potentially "positive consequences".[1827]

In that vein, a rather counter-intuitive advantage of including European consensus in the ECtHR's processes of justification might be that, by providing a way of challenging the universalising approach of the morality-focussed perspective and by referring back to the political decisions which shaped the States parties' legal systems, it at least helps to reveal, as Carozza has argued, "the contingency and particularity of the political and moral choices inherent in the specification and expansion of international human rights norms that are sometimes too facilely assumed to be 'universal'".[1828] There is something to be said for this (and I will return to the underlying idea of rendering human rights law more openly political in a moment), but I am sceptical whether European consensus can be thought to fulfil this role in a manner beneficial to transformative politics. For one thing, there is the sense of consensus as compromise which I have repeatedly referred to.[1829] Because its Janus-faced nature allows it to mediate between the morality-focussed perspective and the reliance on national ethe and thus to seem more "savvy and sustainable" than other forms of reasoning,[1830] giving prominence to European consensus within the ECtHR's reasoning runs the risk of *preventing* the dynamic which might otherwise re-

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1825 Ibid.

1826 Mégret, "The Apology of Utopia" at 460.

1827 Mouffe, *The Democratic Paradox*, at 44-45; see also on human rights and agonism, building on Laclau and Mouffe, McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, Chapter 5; Kathryn McNeilly, "After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights," (2016) 27 *Law and Critique* 269 at 277-278; see Chapter 1, IV.3.

1828 Carozza, "Uses and Misuses of Comparative Law" at 1219; on the oscillation between universalism and particularism in human rights, see also Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, at 178-179.

1829 See in particular supra, I. as well as Chapter 1.

1830 Supra, note 1692.

sult more fully between different forms of reasoning, and thus depoliticise rather than politicise.

For another thing, the more general downsides of consensus noted above – its conservative lilt and its lack of critical engagement with current power structures – remain relevant. Thus, even if consensus is used to challenge, say, the morality-focussed perspective, it remains a rather bland way of doing so because little transformative momentum can be gained by foregrounding European consensus. Even in cases involving the ostensibly "progressive" spur effect,[1831] consensus merely reproduces the dominant position at the pan-European level rather than providing a counter-hegemonic rationale for the ECtHR's decision; and the premise of grouping together the States parties' legal principles to establish commonality makes it difficult to use consensus for anything else.

The ECtHR's case-law holds manifold examples of this kind of acritically progressive judgment based (at least in part) on consensus. The Court might establish, for example, a right to legal gender recognition,[1832] but subject to certain preconditions,[1833] and without truly challenging dominant gender norms;[1834] a right to same-gender partnerships,[1835] but no same-gender marriage,[1836] and no serious questioning of how and why the law tends to privilege some kinds of partnership over others;[1837] a right to choice of religious attire in some situations,[1838] but not in many others,[1839] and insufficient attention to (or indeed perpetuation of) anti-Muslim

1831 See Chapter 2, III.

1832 ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*.

1833 ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*; ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*.

1834 See Theilen, "Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition" at 254; Gonzalez-Salzberg, "The Accepted Transsexual and the Absent Transgender" at 826; Ralph Sandland, "Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights," (2003) 11 *Feminist Legal Studies* 191 at 201.

1835 ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others*; ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*.

1836 ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 194; ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*.

1837 See e.g. Aeyal Gross, "Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law," (2008) 21 *Leiden Journal of International Law* 235 at 246-247; Kapur, *Gender, Alterity and Human Rights*, chapter 2.

1838 ECtHR, Appl. No. 41135/98 – *Ahmet Arslan and Others v. Turkey*, Judgment of 23 February 2010; ECtHR, Appl. No. 57792/15 – *Hamidović*.

1839 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*; ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*; ECtHR, Appl. No. 64846/11 – *Ebrahimian*.

stereotypes;[1840] rights which mitigate some extreme forms of punishment like life imprisonment,[1841] but no abolition of life imprisonment as such,[1842] to say nothing of challenging the prison-industrial complex on a more fundamental level;[1843] and so on. Both the sense of consensus as compromise and the limited critical engagement which goes hand in hand with it come through very clearly here.

To conclude: in light of the flexibility of European consensus and the "gap" between legal materials – of which consensus forms part – and the legal decision, I do not think there is much sense in arguing that European consensus should not be used at all. In light of its conservative lilt and its fundamentally acritical stance vis-à-vis current power structures, however, I believe it is fair to claim that giving strong weight to European consensus limits the potentiality of human rights and, as such, is inimical to a transformative politics. As Kathryn McNeilly has summarised it, "an approach to human rights which aims towards consensus cuts off the promise of the 'to come' and is incapable of facilitating conflictual engagements with the alterity constitutive of current rights concepts and regimes of power more generally".[1844]

1840 See generally e.g. Peroni, "Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising"; Kapur, *Gender, Alterity and Human Rights*, chapter 4.

1841 ECtHR (GC), Appl. No. 74025/01 – *Hirst*; ECtHR (GC), Appl. Nos. 66069/09, 130/10 and 3896/10 – *Vinter and Others*.

1842 Confirmed e.g. in ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at para. 74.

1843 See critically on the "alignment of human rights advocates with the carceral state" Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights," (2015) 100 *Cornell Law Review* 1069 at 1126; in the context of the ECtHR's case-law, the danger of "coercive overreach" through such an alignment has increasingly been noted: see e.g. Natasa Mavronicola, "Taking Life and Liberty Seriously: Reconsidering Criminal Liability Under Article 2 of the ECHR," (2017) 80 *Modern Law Review* 1026 at 1037.

1844 McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 76, on consensual approaches to human rights in general, not specifically on European consensus; on the latter, see O'Hara, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'".

3. A More Openly Political Court?

Suppose, then, that the ECtHR were to give less weight to European consensus and to attempt instead, with an awareness of the responsibility which follows from the indeterminacy of regional human rights law, to orient its case-law towards support for "critical or emancipatory causes" and to question current power structures. As noted above, it is by no means clear in which direction this would take the ECtHR's judges in practice, since their understandings of what constitutes "critical or emancipatory causes" surely differ both among themselves and from the (likewise diverse) understandings prevalent in (certain parts of) legal academia.[1845] It is likely, however, that at least some of their judgments would become more experimental, less oriented towards the "middle-ground"[1846] of consensus as compromise.

If we accept, as argued above, that human rights are already deeply implicated in current power structures, then taking a critical stance by no means always speaks in favour of finding a violation of human rights: more human rights may well entrench rather than challenge power structures.[1847] Simultaneously, however, it follows from the discussion of alterity and potentiality in the preceding subsection that, if human rights are to gain critical force, they need to constantly be developed and rethought. As Koskenniemi has put it, "[w]e need new rights, [or] new interpretations of old rights. Routine kills […] rights-regimes".[1848] Assuming, then, that the ECtHR were to take this approach to heart when moving away from European consensus, it would imply that it should, at least in some cases, find human rights violations where it previously saw none.[1849]

But this brings us back to the problem already alluded to above: by encouraging far-reaching judicial decisions, are we not also encouraging precisely the kind of legal expansionism and depoliticization which we previ-

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1845 Supra, notes 1785-1790.

1846 See Koskenniemi, *From Apology to Utopia*, at 597.

1847 Von Arnauld and Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'", at 43.

1848 Koskenniemi, "Human Rights, Politics and Love" at 153; see also Koskenniemi, *From Apology to Utopia*, at 550 on the connection between routine and roles, which brings us back to the need to rethink not only rights themselves, but the roles of actors such as the ECtHR: hence the ruminations which follow, and those at the end of the preceding chapter.

1849 See Kennedy, *A Critique of Adjudication (fin de siècle)*, at 334; for examples, see the cases cited above, notes 1832-1843.

ously took to task as presenting a "narrow, formalistic, and overly juridical [understanding] of what human rights are"?[1850] I take this to be the central dilemma for any attempt to make use of regional or international human rights law for critically informed projects of social transformation, especially in the context of judicial interpretations of human rights: on the one hand, if human rights law is to do more than legitimate the status quo by means of non-intervention,[1851] then there is a need for far-reaching findings of human rights violations in at least some cases to challenge current power structures and the myriad forms of injustice which they perpetuate. On the other hand, it is precisely such far-reaching findings of human rights violations which will further strengthen the reach of legal discourse and judicial power, thus drawing an ever-increasing range of subject-matters into a domain in which ideological choice is blanketed by the law's supposed objectivity and impeding future contestation of dominant positions.

Perhaps one way of approaching this dilemma (without denying that it *is* a dilemma) would be to consider ways in which human rights courts such as the ECtHR could be rendered *more openly political* as a way of counteracting or at least mitigating the tendency of legal discourse to naturalise dominant ideologies. This opens up a huge host of issues of which I can only touch upon all too few in the present context, but I would like to foreground two aspects. First, mostly for the avoidance of misunderstandings, I will briefly sketch how this proposal relates to the indeterminacy thesis and, second, I will provide a few indications of how it would impact on the (self-)image and reasoning of the ECtHR.

With regard to the first aspect, the main point to note is that openly politicising the ECtHR by no means follows inevitably from the indeterminacy thesis. The latter, as part of its descriptive claims, shows that legal argument *is* indeterminate and hence that law *is* political. As Koskenniemi has argued, "[i]f the law is already, in its core, irreducibly 'political', then the call for political jurisprudence simply fails to make sense".[1852] It seems to me, however, that this question is distinct from how any given decision is *presented* by legal actors, i.e. as more or less *openly* political. In a sense, this is the flip side of the distinction made in Chapter 10 between objectivity and an *impression* of objectivity in the ECtHR's processes of justifica-

1850 Supra, note 1746.
1851 See Chapter 10, IV.
1852 Koskenniemi, *From Apology to Utopia*, at 601-602.

tion.[1853] Where many academic commentators argue that such an impression of objectivity is a worthwhile goal (and that use of European consensus can help to achieve it), my point here is precisely the opposite: what would happen if the ECtHR deliberately eschewed and even counteracted efforts at creating an impression of objectivity?

The much-feared consequence – what those who argue in favour of consensus as legitimacy-enhancement seek to avoid – may well be, of course, an increase in "backlash", i.e. criticism of and opposition to the ECtHR and its decisions.[1854] A substantial part of the criticism geared at the ECtHR already accuses it of "judicial activism", understood as a derogatory term.[1855] More experimental and potentially far-reaching judgments would do little to attenuate such criticism, and representing the ECtHR's judgments in anything other than the language of "formal authority, defined by its claim to universality and neutrality" which we expect from courts would no doubt seem like "a professional mistake"[1856] and fan the flames of backlash, as it were.

If the goal is to prevent a hegemony of legal discourse and the increasing depoliticization which tends to go with it, however, then this need not be a bad thing. Consider again Thomas Kleinlein's conceptualisation of the ECtHR as part of broader democratic processes in which its judgments which "do not represent 'the last word' but can provide a trigger for democratic contestation and deliberation".[1857] Against this backdrop, he argues that there may be benefits to backlash: "backlash provoked by progressive judgments – a phenomenon feared by many liberal scholars – is a welcome means of maintaining the democratic responsiveness of constitutional meaning".[1858] In brief, resistance by the States parties can also be under-

1853 Chapter 10, II.2.

1854 I use the term here as an informal umbrella term for resistance to the ECtHR and its decisions; contrast Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 198.

1855 See again Chapter 10, II.2., and in summary e.g. Peat, *Comparative Reasoning in International Courts and Tribunals*, at 141.

1856 Koskenniemi, "Letter to the Editors of the Symposium" at 358 and 360; see also Koskenniemi, *From Apology to Utopia*, at 550.

1857 Supra, note 1759.

1858 Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 888.

stood as part of democratic discourse in the absence (mostly) of transnational deliberative fora.[1859]

From this perspective, then, the negative connotation associated with backlash in the context of debates on the ECtHR's legitimacy is overblown.[1860] Indeed, it is precisely the focus on the ECtHR's *legitimacy* which, by aiming to *pre-empt* criticism of the Court, saps emancipatory potential from both the ECtHR's judgments and potential backlash since it prevents critical engagement with power structures. As Koskenniemi has put it, legitimacy is "not a standard external to power, against which power might be assessed but a vocabulary produced and reproduced by power itself through its institutionalised mechanisms of self-validation".[1861] Foregrounding consensus as legitimacy-enhancement based on incrementalism thus not only makes the ECtHR less likely to engage critically with the status quo, as I argued in Chapter 10, it also seeks to bolster the ECtHR's *own* power rather than opening the Court up to resistance which might prompt critical self-reflection. It would be more productive, then, to engage with backlash without the mediation of legitimacy-enhancement.

But perhaps all this is in any case an exaggerated picture of what more openly political processes of justification might entail. Some of the ECtHR's judgments already cause controversy and the reasoning seems a less likely cause than the result.[1862] Conversely, the depoliticization involved in judicial pronouncements on human rights may well be so institutionally entrenched that the ECtHR's reasoning makes little difference.

1859 See also Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, "Resistance to International Courts. Introduction and Conclusion," (2018) 14 *International Journal of Law in Context* 193 at 195; Petkova, "The Notion of Consensus as a Route to Democratic Adjudication"; see also more generally Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 169-170 on human rights law as "an ongoing conversation".

1860 It goes without saying that some of the current backlash against the ECtHR is based on xenophobia and racism (see e.g. some of the examples mentioned in Chapter 9, III.) and, as such, not in the least worthy of support. Reducing backlash to these instances, however, paints a too one-sided picture: see in the context of populist resistance to international law Christine Schwöbel-Patel, "Populism, International Law and the End of Keep Calm and Carry on Lawyering," (2018) *Netherlands Yearbook of International Law* 97; a less narrow approach would go hand in hand with a focus on actors other than States understood as monolithic and represented by their government: see also Chapter 10, III.3.

1861 Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism" at 373.

1862 See in more detail Chapter 9, II.4. and III.

Indeed, for all the differences among courts in terms of their style of reasoning or adjudicatory culture,[1863] the underlying Western image of courts is so fixed and the distinction between law and politics so entrenched that it is difficult to imagine what "more openly political" legal reasoning might look like.[1864]

One possible starting point might be to consider once again the critical reconceptualisations of human rights discussed above, specifically the way in which they are future-oriented and seek to be as open-ended as possible.[1865] Such approaches stand in stark contrast to the way in which we think about legal and especially judicial iterations of human rights. Thus, Costas Douzinas contrasts "the messy and open practice of human rights" with "the juridification and internationalisation of human rights" which "has led to attempts to impose a logic of closure",[1866] and Kathryn McNeilly describes her conceptualisation of human rights as "futural, unsettled and always resisting conclusion" as offering "important possibilities to move human rights and their politics away from the structures and thinkabilities of law".[1867]

These "thinkabilities of law" tend to include not only a sense of closure, paradigmatically in evidence in the case of judgments which settle what the law "says", but also a coherentist form of reasoning geared at the justification of precisely that moment of closure. I touched on the downsides of coherentist approaches in Chapter 7, arguing that they tend to underestimate and hence obscure the tensions and paradoxes involved in legal reasoning – in a sense, yet another kind of compromise. Koskenniemi sug-

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1863 See Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium".

1864 It is perhaps easier to specify what I do *not* mean, e.g. not "more openly political" understood (only) as anti-formalism (see Koskenniemi, *From Apology to Utopia*, at 601); rather, I am interested in how one might begin to think beyond "the traditional structure of international legal argumentation" which "stay[s] embedded within the same liberal theory of politics" (Kotiaho, "A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture" at 494) – although the radical potential of such an approach is very much limited by the judicial context in which I am discussing it here (see supra, IV.1.).

1865 Supra, notes 1803-1811.

1866 Douzinas, *The End of Human Rights*, at 175; see also Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights" at 523.

1867 McNeilly, *Human Rights and Radical Social Transformation: Futurity, Alterity, Power*, at 159.

gests the following: "A better view [than coherence] is to take one step backwards, accept the irreducible indeterminacy of interpretation and the contradictoriness of legal argument […], and build on the way legal argument brings out into the open the contradictions of the society" – or societies, in the case of regional courts such as the ECtHR – "in which it operates".[1868]

This brings us back to the distinction between critique and problem-solving[1869] – the prior analyses the relationship between law and broader societal structures (paradoxical, outwards-oriented), the latter provides legal interpretations and justifications within the dominant discursive framework and hence normative solutions to individual cases (coherentist, inwards-looking). Indeed, it has sometimes been suggested that coherentist and paradoxicalist approaches involve "divergent practical perspectives", with paradoxicalist approaches well-suited to describe "the outlook of ordinary citizens" (or, one might add, social movements and academics engaging with them) and coherentist approaches being more suited to capture "the outlook of judges".[1870] This is surely an accurate description of the distribution of these different approaches in practice, especially insofar as the coherentist approach is concerned: as Duncan Kennedy has put it, we might "interpret the social construction of the figure of the Judge as the place where we most clearly develop the collective fantasy of overcoming the endless sense of internal doubleness or contradiction" by seeking coherence.[1871] In terms of how things *could be*, however, I think it also lets judges off the paradoxicalist hook a tad too easily – after all, if there are good reasons to be sceptical of coherentist approaches, then it makes little sense to succumb to them simply because we are used to judges justifying their decisions in a certain way.

There might be value, then, in bringing an explicit awareness of the paradoxicalist elements of legal reasoning into the ECtHR's processes of justification so as to denaturalise the logic of closure involved in the act of judgment-giving – to achieve what Carozza suggests consensus might do, but which I have argued it does not, and "reveal the contingency and particularity of the political and moral choices inherent in the specification

1868 Koskenniemi, "An Essay in Counterdisciplinarity" at 19.

1869 Supra, note 1767.

1870 Green, "On the Co-originality of Liberalism and Democracy: Rationalist vs. Paradoxicalist Perspectives" at 216 (emphasis omitted); for a traditional account of the "judicial perspective" which makes the connection to "problem-solving" very clear, see e.g. Alexy, *Theorie der Grundrechte*, at 26-27.

1871 Kennedy, *A Critique of Adjudication (fin de siècle)*, at 208.

and expansion of international human rights norms".[1872] Attempting to create an open-endedness by emphasising paradox and contradiction would not form a justification of the ECtHR's decision in a strict sense since it would not point towards any particular conclusion, but that might be its very strength: it might lead to a form of reasoning which aims to open up imaginative space not only for the judges making a decision in the case at hand, but also makes the move from interpretation to imagination[1873] explicit, renders the judgment more openly political, and thus carries the challenge of imagination forward into the processes of contestation which follow the judgment.

4. Vertically Comparative Law as a Reflective Disruption of Equilibrium

All this is not only highly hypothetical and of uncertain consequence, but also very abstract. The prior points are, I think, unavoidable in the kind of exploratory approach taken in this chapter;[1874] but in the remainder of this section, I would like to render the suggestions made above somewhat more tangible by way of an example which also relates to previous chapters. To do so, I will discuss a way of using vertically comparative legal reasoning which distances itself from the closure-oriented notion of European consensus and instead aims to highlight contradictions within and among the legal systems of the States parties and thereby bring elements of open-endedness into the ECtHR's processes of justification.

One way of developing the way of using vertically comparative legal reasoning which I have in mind is to revisit the notion of reflective equilibrium and its limitations. I noted in Chapter 7 that reflective equilibrium runs the risk of simply reproducing dominant aspects within European public culture.[1875] This does not mean that it precludes any kind of change: to the contrary, given the constant adjustment decisions made in the process of searching for reflective equilibrium, it "combines conservatism with reform".[1876] Given this combination, however, the kind of reform associated with reflective equilibrium tends to be relatively marginal;

1872 Supra, note 1828.
1873 As Koskenniemi, *From Apology to Utopia*, at 557 puts it.
1874 Supra, I. and IV.1.
1875 Chapter 7, IV.
1876 Joseph Raz, "The Claims of Reflective Equilibrium," (1982) 25 *Inquiry* 307 at 329.

the way in which reflective equilibrium remains stuck in "the way things are" makes it of limited use for transformative politics, or even hostile to them.[1877]

Davina Cooper has described this problem through a conceptual lens: "Trying to build progressive normative concepts out of dominant social practices remains mired in the effects such practices have on the concepts generated – a stuckness that may prove as hard to identify as it is to remove."[1878] One way of trying to work towards social transformation, then, might be to rethink concepts. Cooper does so by focussing on the "small-scale progressive social sites" which she calls everyday utopias.[1879] Others have similarly moved beyond reflective equilibrium by turning away from dominant social practices towards the views and practices which they exclude.[1880] My complementary suggestion here is to further interrogate dominant social practices themselves – but rather than aiming to build on them with only minor modifications, as a coherentist approach would do, one might *foreground their internal inconsistencies so as to unsettle the concepts which they generate*. This would not only point away from the kind of "stuckness" which Cooper identifies, it would also serve to generate the kind of open-endedness which might politicise legal reasoning by subverting expectations of closure.

In the context of the ECtHR, this would mean using vertically comparative law as a way of unearthing contradictions within European public culture.[1881] As mentioned above, this would be a use of vertically comparative law which moves away from European consensus, particularly from the way in which a prism of commonality is applied to comparative materials so as to establish either consensus or lack of consensus, leading to the rein or spur effect.[1882] It moves away, in other words, from the connection between European consensus and ethical normativity in the form of a pan-European ethos, because it is aimed at exposing the contradictions inher-

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1877 Davina Cooper, *Everyday Utopias. The Conceptual Life of Promising Spaces* (Durham and London: Duke University Press, 2014), at 28.

1878 Ibid., 29.

1879 Ibid., 30.

1880 E.g. Brooke A. Ackerly, *Universal Human Rights in a World of Difference* (Cambridge: Cambridge University Press, 2008), at 59-60.

1881 For the notion of European public culture, see Chapter 7, III.2.

1882 As Føllesdal notes, "this is not the ordinary way that [consensus-based reasoning is] used": Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 208; on characteristics of European consensus, see Chapter 1, III.; and on its "use", see Chapter 1, IV.2.

ent in concepts within European public culture without necessarily pointing towards a certain substantive outcome. If then applied in the service of certain transformative political agendas,[1883] one might think of this as a way of mobilising the status quo against itself;[1884] but at a minimum, the idea would be to put into question concepts otherwise left unexamined, and thus set the scene for more imaginative and transformative agendas regardless of the ECtHR's own decision by creating a sense of openness rather than closure. To highlight the contrast to the coherentist approach of reflective equilibrium, we might think of this as a reflective *disruption* of equilibrium.

Let me work towards an example of this way of using vertically comparative law by building on several statements from within the ECtHR's case-law and academic commentary. These examples are not oriented towards disruption and openness in the strong sense just outlined, but they do serve to demonstrate that the discourse surrounding vertically comparative reasoning is not *entirely* taken up by narrow understandings of European consensus and that there is, rather, a sliding scale of approaches which range from only slight modifications of the way in which we think of European consensus to the use of vertically comparative law in a way which leaves the idea of "consensus" behind. The latter, I suggest, could be further developed in an attempt to render them more disruptive.

A relatively minor amendment to dominant notions of European consensus can be found in the occasional suggestion that vertically comparative law might be operationalised in such a way as to "refut[e] claims that certain social arrangements are inevitable".[1885] This approach questions current social arrangements by using vertically comparative law to denatu-

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1883 On the importance of this point, i.e. moving beyond *only* showcasing inconsistencies, see e.g. Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" at 1297-1299.

1884 I am taking inspiration here, albeit loosely, from an aspect of the (related) traditions of Marxism, ideology critique and utopianism: see e.g. Bloch, *Hoffnung*, at 168-169; Marks, "International Judicial Activism and the Commodity-Form Theory of International Law"; Carol J. Greenhouse, *A Moment's Notice. Time Politics across Cultures* (Ithaca: Cornell University Press, 1996), at 99; Theilen, "Of Wonder and Changing the World: Philip Allott's Legal Utopianism" at 350-351; see also B.S. Chimni, "Third World Approaches to International Law: A Manifesto," (2006) 8 *International Community Law Review* 3 at 26 on "exploiting the contradictions that mark the international legal system" as part of "[i]maginative solutions" and reconstruction following critique.

1885 Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" at 927 (in footnote 121).

ralise them – to show that they are not inevitable – but its purview is quite limited. In *Sørensen and Rasmussen v. Denmark*, for example, the ECtHR found that "only a very limited number of Contracting States […] continue to permit the conclusion of closed-shop agreements",[1886] and used this fact to argue that "their use in the labour market is not an indispensable tool for the effective enjoyment of trade union freedoms".[1887] While the wording does indicate a certain sensitivity to denaturalisation of the social arrangements within the respondent State, the thrust of this argument remains quite close to the usual use of consensus in favour of the applicant as an indicator of the spur effect, in which a pan-European ethos trumps the national ethos of the respondent State. There is perhaps a slight difference in emphasis, then, but vertically comparative law continues to be used by reference to European consensus and the prism of commonality that comes with it.

Other examples retain the dynamic underlying the ECtHR's reasoning in *Sørensen and Rasmussen* even if they move away, to some extent, from necessarily requiring a supra-majoritarian consensus in favour of the applicant. In the case of *Cossey v. the United Kingdom*, Judge Martens opined in a dissenting opinion that (what the ECtHR interpreted as) *lack* of consensus among the States parties should not necessarily lead to a wide margin of appreciation. Instead, responding to the United Kingdom's argument that "technical difficulties" stood in the way of a right to legal gender recognition, he argued, inter alia, that "other legislatures had shown that in a democratic society this problem can be regulated".[1888] Ian Cram has recently made a similar point even more explicitly: arguing against the ECtHR's use of the rein effect of consensus in *Animal Defenders International v. the United Kingdom*, based on a lack of consensus in the area of paid political advertising,[1889] he holds that "the very lack of consensus on politi-

1886 ECtHR (GC), Appl. Nos. 52562/99 and 525620/99 – *Sørensen and Rasmussen*, at para. 70.

1887 Ibid., at para. 75; see also ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, dissenting opinion of Judge Pinto de Albuquerque, at para. 32, where he substantiates at length an "international trend" in favour of abolishing life imprisonment and holds that "[n]one of those systems has collapsed or experienced a marked increase in crime, showing *de facto* […] that this type of punishment is unnecessary in a democratic society" (emphasis in original).

1888 ECtHR (Plenary), Appl. No. 10843/84 – *Cossey*, dissenting opinion of Judge Martens, at paras. 3.6.1. and 3.7.

1889 ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123.

cal advertising could have been deployed as the basis of a proportionality argument *against* the UK's position by evidencing that other 'well-functioning' democracies in Europe had managed to uphold the integrity of their political systems without resort to such draconian bans on political expression".[1890]

This way of using vertically comparative reasoning is helpful in that it problematises the stark distinction between the rein effect and the spur effect by inverting the usual consequences of lack of consensus, and thus alerts us to the possibility of using vertically comparative law in ways which go beyond (and indeed stand in contrast to) European consensus. I would sound two notes of caution with regard to the examples just cited, however. First, differing implications can be drawn from this use of vertically comparative reasoning. One might simply see it as a counter-argument to claims of inevitability raised by the respondent State, without further normative force of its own in any given direction.[1891] One might also view it as a strong argument in favour of the applicant,[1892] or at least as placing a burden on the respondent State to show otherwise.[1893] Especially in the latter case, it is important to note that this kind of argument is very much implicated in the triangular tensions discussed throughout: in particular, (normatively speaking) its over-use could easily lead to the kind of inter-State homogenisation which I have already criticised in the context of European consensus,[1894] and (descriptively speaking) the respondent State will usually try to shift the focus back to its national ethos by arguing that its situation or political choices are distinct from other European States.[1895] Differently put, even when vertically comparative legal reasoning is used in this way, it all too easily collapses back into reasoning geared at normativity rather than disruption, at closure rather than openness.

1890 Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" at 494 (emphasis in original).

1891 Shany, for example, merely speaks of "refuting claims": Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" at 927.

1892 Most explicitly Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" at 494.

1893 As also mentioned ibid., referring to ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, dissenting opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque, at paras. 15-17 (connecting the different regulations in other States parties to the less restrictive means test within proportionality).

1894 Chapter 3, IV.4. and V.

1895 See e.g. Chapter 8, III.3.

The second point relates to the scope of what is potentially denaturalised by this use of vertically comparative law. In the examples just given, this is limited to a certain social arrangement within the respondent State (e.g. allowing closed-shop agreements, a strict ban on paid political advertising, a complete lack of legal gender recognition). I would argue that this relatively limited scope follows not only from the overall focus of the ECtHR on the issue before it,[1896] but also from the use of vertically comparative law – as on the standard account of European consensus – at the same level of generality as that issue (the "Goldilocks level of generality"). Hence my above suggestion that we might approach the issue through a *conceptual* lens: concepts tend to be of relatively broad reach, and unsettling them therefore does more to open up possibilities and potentialities of human rights than a focus on the more specific issue at hand does.[1897]

I am not aware of any example for the kind of argument I have in mind from within the ECtHR's case-law, but let me attempt to give an example from a different context so as to make this more tangible. I am thinking of Dean Spade's study of the possibilities and preconditions for gender reclassification across jurisdictions and agencies within the United States, which revealed policies varying extensively on several points such as the degree of self-identification or deference to medical authority, or the differing demands made in relation to bodily modification:[1898] a distinct lack of consensus with regard to relatively specific regulations, one might say. Spade suggests that "an examination of this rule matrix shows that the assumption of gender cohesiveness and stability is mythical", that "legal uses of gender distinctions are built upon inconsistent foundations", and that this "reveals the way that the administrative classification of identities does invisible work of naturalizing categories of classification".[1899] In other words, the use of vertically comparative law at relatively specific levels of generali-

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1896 See e.g. ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, at para. 92: "In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it"; similarly e.g. ECtHR (Plenary), Appl. No. 4451/70 – *Golder*, at para. 39; ECtHR (GC), Appl. No. 43494/09 – *Garib v. the Netherlands*, Judgment of 6 November 2017, at para. 136.

1897 On reimagining concepts, see also Simpson, "Imagination" at 415.

1898 Dean Spade, "Documenting Gender," (2008) 59 *Hastings Law Journal* 731 at 734-735 for a summary.

1899 Ibid., 738; see also Toby Beauchamp, "Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11," (2009) 6 *Surveillance & Society* 356 at 361.

ty puts into question the much more general concept of gender and its commonly assumed stability, thus opening up space for contestation.

Spade's study, of course, makes use of comparative reasoning which, though arguably vertical at least in part, is conducted within the context of a federal State rather than focussed on the comparison of different States within a continent, as in the case of the ECtHR's vertically comparative reasoning.[1900] Still, a similar approach might be conceived of in that context, too: when faced with a lack of consensus pertaining to legal gender recognition, the ECtHR need not (necessarily) see this as a trigger for invoking the rein effect and shifting to a deferential stance, nor (necessarily) as a sign that the respondent State's position should be changed to adhere to other States' positions, but simply as an occasion to reflect on the contradictory assumptions underlying the concept of gender (and, for that matter, on the law's role in reaffirming it[1901]).

The ECtHR would ultimately still reach a decision on the facts of the case, but it would – or so one might hope – differ in several respects from a decision reached on the basis of European consensus or other forms of more traditional legal rationality. First, the destabilisation already during the ECtHR's processes of discovery[1902] might influence the judges' decision by virtue of disrupting the sense of self-evidence with which the status quo is so often approached, and thereby rendering transformative judgments more likely. Engaging with vertically comparative law in the way suggested, in other words, may constitute a "learning experience" which in turn may demand "a change in a person's cognitive status quo",[1903] thus prompting the kind of self-reflectivity or "stepping back" which critique seeks to instil.[1904] More importantly, the inclusion of this moment of "stepping back" within the ECtHR's processes of justification might mitigate the depoliticization involved in legal discourse. For one thing, the moment of openness or disruption created by unsettling concepts otherwise left unquestioned could be of use in processes of contestation following the ECtHR's judgments, regardless of the substantive position taken by the Court. And for another, that position would itself be more open to question because the ECtHR's decision to support it would be rendered

1900 See generally Chapter 1, III.

1901 See e.g. Judith Butler, "Gender Regulations," in *Undoing Gender* (New York and London: Routledge, 2004) at 40.

1902 See Chapter 1, IV.5.

1903 Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" at 413; see also at 446-447.

1904 Supra, notes 1771 and 1868; but see note 1190 on its limits.

more openly political: unsettling foundational concepts, after all, brings the element of decisionism involved in then interpreting them in any given way to the foreground.

My example has focussed on the concept of gender, but a similar dynamic could be achieved with regard to a variety of other concepts that hold relevance for the ECtHR's case-law: marriage,[1905] family,[1906] or religion, secularism, and public order,[1907] to name but a few. Ultimately, different aspects of European public culture might even be used to challenge the very notion of the "human" underlying human rights – another "largely taken-for-granted concept" within human rights law, the ostensible self-evidence of which belies the fact that notions of subjectivity and individuality are themselves produced in ways which "cohere with liberal, capitalist regimes".[1908] Again, this need not point towards a particular outcome in any given case, at least not without further political commitments – but it might broaden the open-endedness and hence the potentiality of human rights as much as possible in the context of regional human rights adjudication.

1905 See Damian A. Gonzalez-Salzberg, "Confirming (the Illusion of) Heterosexual Marriage: *Hämäläinen v Finland*," (2015) 2 *Journal of International and Comparative Law* 173 (though more in relation to the ECtHR's own case-law than vertically comparative law).

1906 See e.g. Lourdes Peroni, "Challenging Culturally Dominant Conceptions in Human Rights Law: The Cases of Property and Family," (2010) 4 *Human Rights and International Legal Discourse* 241 at 261-262 on how "a world of divorce and remarriage, single parenting, and opposite- and same-sex partnerships" has "increasingly undermined" the concept of family implying (only) a nuclear family model.

1907 The ECtHR itself has laid the groundwork for this approach, though it sees the contradictions within European public culture as a reason to operationalise the rein effect: see Chapter 7, IV.; see more generally e.g. Nehal Bhuta, "Two Concepts of Religious Freedom in the European Court of Human Rights," (2014) 113 *The South Atlantic Quarterly* 9 at 11, discussing "how diverging histories and theories of state and subject coexist within the capacious language of freedom of conscience" and how one might read this as "an unsteady and unstable circumstantial casuistry of historically embedded political concepts such as democracy, secularism, freedom of conscience, and public order".

1908 McNeilly, "After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights" at 271.

V. Outlook: Future Articulations of Human Rights

In this chapter, I have examined how the potentially critical force of human rights could be developed rather than suppressed in the context of the ECtHR, specifically by reference to European consensus and other uses of vertically comparative legal reasoning. Within critical traditions, this focus is well-known (although not usually directed at courts, except insofar as it pertains to their role in suppressing far-reaching social transformation). Within the academic discourse surrounding the ECtHR, by contrast, it is far from self-evident: indeed, it remains a matter of controversy whether facilitating social transformation could and should be a purpose of the Court at all, or whether its primary purpose lies elsewhere (in providing a safeguard against authoritarianism,[1909] for example, or more generally in entrenching certain normative standards rather than developing them[1910]). If one adopts a different starting point, then the above suggestions to politicise the Court will likely seem curious or even dangerous.

Regardless of the purpose(s) one assigns to the ECtHR, however, I would suggest that it is of crucial importance to foster an awareness not only of the potentially emancipatory aspects of human rights, but also of how they in many ways legitimate an unjust status quo by *not* critically engaging with it – and hence to gain a sense of what we lose by not considering them in relation to social transformation. Strongly foregrounding European consensus, I have argued, is one way in which this sense of what we lose is rendered more difficult to grasp, especially when (certain understandings of) consensus are normalised as the most appropriate approach to human rights by presenting them as "objective" or "natural", or by deriding alternative approaches as "unrealistic". The use of European consensus in this way orients us towards certain compromises but away from meaningful social transformation. Its prominence is, perhaps, partly a result of and partly productive of the fact that the ECtHR "is not willing to

1909 See Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," (2000) 54 *International Organization* 217.

1910 Besson, "Human Rights and Democracy in a Global Context: Decoupling and Recoupling" at 29; for a positive spin on the ECtHR maintaining the status quo without negating "dynamic value", see also Merris Amos, "The Value of the European Court of Human Rights to the United Kingdom," (2017) 28 *European Journal of International Law* 763 at 783.

be the catalyst for change",[1911] and the Court "us[es] consensus reasoning to avoid imposing radical change".[1912]

At the same time, however, I think it is important to keep in mind the more general scepticism about judicialized human rights in relation to far-reaching social transformation, as sketched above, and hence to not over-emphasise the importance of any one form of reasoning. Since consensus is not the only way in which human rights are implicated in current power structures nor the only way in which the status quo is or can be reaffirmed within human rights law, putting into question the use of European consensus and only European consensus would, in a sense, present a distorted and misleading picture. Rather, there is a need to rethink human rights on a more fundamental level, perhaps to shift dominant understandings away from what Arabella Lyon calls "human rights as law, a textual truth" – or consensual truth, or other kinds of legal rationality – towards human rights as "performative deliberative practices leading to the constitution of a new form of life".[1913] Or, as Frédéric Mégret has put it, we need to "dissociat[e] the aspiration to human rights from the strict legal forms that purport to constrain it"[1914] – to realise the openness and emancipatory potential of human rights which far surpasses what can be achieved within legal discourse and current regional and international institutions.

To foreground such emancipatory potential, Judith Butler has argued that "keeping our notion of the human open to a future articulation is essential to the project of international human rights discourse and politics".[1915] Given the way our image of the role of courts tends to be oriented towards closure rather than openness, this is particularly difficult in the context of judicialized human rights.[1916] Courts in general, and regional human rights courts such as the ECtHR in particular, are of course situated in certain contexts, implicated in power structures, and faced with expectations as to the kind of decisions they should reach, the kind of justifi-

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1911 Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 279.

1912 Ibid., 280.

1913 Arabella Lyon, *Deliberative Acts. Democracy, Rhetoric, and Rights* (University Park, PA: Pennsylvania State University Press, 2013), at 5.

1914 Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes" at 31.

1915 Butler, "On the Limits of Sexual Autonomy" at 36; see also supra, note 1908; I have tentatively developed this line of thought in Theilen, "Pre-existing Rights and Future Articulations: Temporal Rhetoric in the Struggle for Trans Rights".

1916 On the importance of roles, see supra, note 1848.

cation they should offer, and the kind of image of a human rights court they should live up to.[1917] The enthusiastic support of European consensus as legitimacy-enhancement within academic commentary puts the anxieties involved in (openly) moving "beyond objectivism"[1918] into stark relief and highlights the difficulty of even imagining law, courts and judgment-giving in a way which subverts such expectations.[1919]

I have attempted to sketch a use of vertically comparative legal reasoning which might help to create at least brief moments of openness by deliberately creating a reflective disruption of equilibrium. Such an approach would stand in direct contrast to European consensus: where the latter reinforces or only incrementally develops the status quo, the prior showcases its contradictions; where the latter pulls the past into the present by giving normative force to the legal systems of the States parties as they currently stand, the latter aims to open up space for future articulations of human rights; and where the latter aims for (an impression of) legal objectivity, the prior aims to politicise. But a reflective disruption of equilibrium also stands in contrast to other forms of legal reasoning currently used by the ECtHR, for legal reasoning as we traditionally conceive of it is geared at closure rather than at creating moments of disorientation and the "hope of new directions" which comes with them.[1920]

Risking what we have so far achieved within the legal European human rights regime in the face of an uncertain future is no doubt a "terrifying process".[1921] Judith Butler has stated of unknowable futures that many people "recoil" from them, "fearing that the new which is not predictable will lead to a full-scale nihilism".[1922] Indeed, she acknowledges that this is a "risky moment in politics" and that what follows "will not be necessarily good or desirable" – but she immediately goes on to remind us that "it is equally true that nothing good or desirable will arrive without the

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1917 See Chapter 10, IV.

1918 Koskenniemi, *From Apology to Utopia*, at 513.

1919 See Chapter 10, III.2.

1920 Ahmed, *Queer Phenomenology*, at 158.

1921 Kay Lalor, "Making Different Differences: Representation and Rights in Sexuality Activism," (2015) 23 *Feminist Legal Studies* 7 at 22 (on embracing uncertainty and unknowability in rights activism more generally, not specifically in the judicial context).

1922 In Judith Butler and William Connolly, "Politics, Power and Ethics: A Discussion Between Judith Butler and William Connolly," (2000) 4 *Theory & Event* (n.p.); the parallel to anxieties about legal nihilism in the context of critical international legal theory (supra, IV.1.) are immediately apparent.

new".[1923] If human rights do indeed constitute humankind's "last utopia",[1924] then we owe it to those whose oppression and marginalisation is not yet intelligible within that utopia to look forwards, to future articulations of human rights, rather than backwards – even in the judicial context.

1923 Ibid.
1924 Moyn, *The Last Utopia*, at 1.