Chapter 1: Justifying Concrete Norms in Regional Human Rights Law: The Uses of European Consensus in the Court's Processes of Justification

I. Human Rights Adjudication: High Stakes and Little Guidance

The European Court of Human Rights (ECtHR) finds itself, it must be said, in a rather awkward position. It receives applications from any person claiming to be the victim of a human rights violation by one of the States parties.[1] Provided that the admissibility criteria for such applications are fulfilled, the Court is bound to provide an interpretation of the European Convention on Human Rights (ECHR) which resolves the matter, either confirming or denying a human rights violation. And the stakes are high: human rights are, after all, the "last utopia", commonly regarded as "the highest moral precepts and political ideals" and aiming to set "an agenda for improving the world, and bringing about a new one in which the dignity of each individual will enjoy secure international protection".[2] This kind of utopian mindset may sometimes fade into the background in the everyday bureaucracy of a notoriously overworked court, but it is never entirely absent. One court, comprised of forty-seven judges, is responsible for giving legally binding judgments on the particulars of the last utopia in the European context.

There is, then, an enormous responsibility resting on the shoulders of the ECtHR's judges. Legal interpretation, in the words of Robert Cover, "takes place in a field of pain and death".[3] The violent implications of law perhaps become particularly clear in the case of human rights – but their utopian connotations make them appear not only as a field of pain and death, but also as a field of hopes and dreams. The ECtHR must navigate its way through these fields by adjudicating on a breath-taking array of issues. Are civil servants entitled to form trade unions and to engage in col-

1 Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2 Samuel Moyn, *The Last Utopia. Human Rights in History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2012), at 1.

3 Robert M. Cover, "Violence and the Word," (1986) 95 *Yale Law Journal* 1601 at 1601.

lective bargaining?[4] Do various practices of mass surveillance conflict with the right to private life?[5] Are States obliged to provide for a way of obtaining gender confirmation surgery?[6] Is it permissible to hang up crucifixes in State-school classrooms,[7] or to prohibit the wearing of a headscarf in universities?[8]

In terms of formal legal sources, most commentators agree that there is little guidance provided to the ECtHR in adjudicating questions such as these. Like constitutional courts at the national level,[9] the ECtHR cannot refer to an intricate web of laws to apply; instead, its formal reference point is exclusively the ECHR. The human rights there enshrined, furthermore, are formulated as norms at a very high level of generality: accordingly, "the core activity of international human rights treaty application involves subsuming particulars under generals in the domain of the relationship between the State and the individual".[10] The ECHR itself may constitute an uncontroversial starting point, at least insofar as it is clearly the ECtHR's mission to interpret it,[11] but it is generally perceived as vague,[12]

4 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara v. Turkey*, Judgment of 12 November 2008.

5 ECtHR, Appl. Nos. 58170/13, 62322/14 and 24960/15 – *Big Brother Watch and Others v. the United Kingdom*, Judgment of 13 September 2018.

6 ECtHR, Appl. No. 27527/03 – *L. v. Lithuania*, Judgment of 11 September 2007.

7 ECtHR (GC), Appl. No. 30814/06 – *Lautsi and Others v. Italy*, Judgment of 18 March 2011.

8 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin v. Turkey*, Judgment of 10 November 2005.

9 See Robert Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1994), at 501.

10 Başak Çalı, "Specialized Rules of Treaty Interpretation: Human Rights," in *The Oxford Guide to Treaties*, ed. Duncan B. Hollis (Oxford: Oxford University Press, 2012) at 531.

11 Articles 19 and 32 ECHR.

12 E.g. Janneke Gerards, "Judicial Deliberations in the European Court of Human Rights," in *The Legitimacy of Highest Courts' Rulings*, ed. Nick Huls, Maurice Adams, and Jacco Bomhoff (The Hague: T.M.C. Asser Press, 2009) at 416; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2010), at 361; Angelika Nußberger, "Hard Law or Soft Law - Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR," in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc (Oxford: Oxford University Press, 2018) at 50; Aileen McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights," (1999) 62 *Modern Law Review* 671 at 679; see also Sandra Fredman, "For-

and thus "the trouble starts" when specifying its contents at a more specific level.[13]

And yet, the ECtHR must, in every case before it, make this troublesome conversion from the general to the specific: for one thing, it must interpret the guarantees of the ECHR so as to decide whether they have been violated in specific cases or not and, for another, it must justify the result it reaches.[14] A great variety of considerations might play a role within these processes of interpretation and justification. To provide but a few examples: in some cases, the ECtHR's own case-law might point in a certain direction – but new issues might crop up, or older cases might be considered outdated or wrongly decided in the first place. The ECtHR's function as a court established to protect the human rights of individuals might prod it towards broad interpretations – but more human rights need not equal better human rights, and democratic processes within individual States might be thought of as the better way of deciding where to draw the boundary lines. States might signal, deliberately or not, that they will react badly to certain expansive rulings – but should this be a consideration to take into account, or would it not run counter to the ECtHR's role of protecting the individual from the State?

From what we can gleam from the justifications which the ECtHR offers for its judgments, a form of reasoning to which it attaches considerable importance relies on the positions taken collectively by the States parties to the ECHR. This way of reasoning has become known as "European consensus" (or simply "consensus"). As the Court itself put it in the landmark case of *Demir and Baykara v. Turkey*:

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eign Fads or Fashions? The Role of Comparativism in Human Rights Law," (2015) 64 *International and Comparative Law Quarterly* 631 at 632-633; see further infra, IV.5.

13 Saladin Meckled-García, "Specifying Human Rights," in *Philosophical Foundations of Human Rights*, ed. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Oxford: Oxford University Press, 2015) at 300; see also, in the context of European consensus, Panos Kapotas and Vassilis Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 4.

14 Article 45 (1) ECHR; Rule 74 (1) lit. h Rules of the Court; see generally on the abstract and the concrete in the ECtHR's judgments Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019), at 31 et seqq.

> The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[15]

This formulation is particularly revealing since it very clearly identifies the main function of European consensus as a mechanism of mediating between the general norms contained in the ECHR ("the provisions of the Convention") and the individual judgments which the ECtHR must render ("specific cases"). The Court thus needs to move from a general norm to a concrete norm;[16] and it is in the process of that move that European consensus potentially becomes relevant ("may constitute a relevant consideration").[17]

The basis of my interest in European consensus lies in the fact that it seems to constitute a relevant consideration, indeed arguably *the* relevant consideration, in a number of high-profile cases – especially when compared to comparative reasoning by other courts, it seems to be invested with normative force in an unusually strong manner.[18] Quantitatively speaking, it may not be the kind of reasoning most frequently deployed by the ECtHR – indeed, according to Kanstantsin Dzehtsiarou over 95% of its judgments make no reference to it.[19] But those cases in which it *does* pop up are often Grand Chamber cases of considerable importance, or other judgments dealing with particularly controversial and potentially far-reaching issues – cases in which "the Court develops and clarifies the standards of human rights protection of Europe".[20] Moreover, despite an outpouring of academic criticism ever since the ECtHR first started making

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15 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 85.

16 In Kelsenian terminology: see e.g. Hans Kelsen, *Reine Rechtslehre*, 2nd ed. (Vienna: Deuticke, 1960), at 243-244.

17 See Esin Örücü, "Whither Comparativism in Human Rights Cases?," in *Judicial Comparativism in Human Rights Cases*, ed. Esin Örücü (London: UKNCCL, 2003) at 239.

18 Jens T. 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," in *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 394.

19 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015), at 21.

20 Ibid., 23; Sionaidh Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos

use of European consensus, many commentators have greeted it with "effusive enthusiasm".[21] Within the array of controversial and conflicting considerations for interpreting the ECHR set out above, European consensus is seen by many as a reasonable compromise and a promising solution – a form of guidance for the ECtHR which seems relatively clear-cut as well as both justifiable and acceptable.

In contrast to this, my intuition is that European consensus constitutes, one might say, *too much* of a compromise in at least two different senses, which I introduce below and then elaborate upon in much of what follows: first, that it mediates between different kinds of normativity and thereby makes the contradictions of legal argument disappear from view and, second, that it provides a way in which principled and strategic considerations can be brought together in a way which disguises the tensions between them. By providing this kind of compromise and distracting from the tensions inherent in the argumentative structures of regional human rights law, a strong focus on consensus orients the ECtHR away from potentially more transformative results and forms of reasoning. Before turning to these aspects, the present chapter serves first and foremost to lay the groundwork for what follows by providing more detail on the ECtHR's use of European consensus. I begin by discussing a few examples from the Court's case-law (II.) and elaborating on what I take to be the key characteristics of European consensus (III.). I will then introduce the theoretical framework which will guide the remainder of my inquiry, developing it in relation to critical international legal theory and different perspectives on human rights (IV.), and finally provide a brief outline of the chapters to come (V.).

II. Introducing European Consensus

I define European consensus as a form of comparative legal reasoning which refers vertically to the positions taken by the States parties to the ECHR, viewed through the prism of collectivity. Before elaborating on this definition, I would like to provide a few examples from the ECtHR's

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Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 176.

21 Paolo G. Carozza, "Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights," (1998) 73 *Notre Dame Law Review* 1217 at 1218.

case-law so as to give a feel for the way in which the Court makes use of consensus.

Early references to European consensus can be found even in cases now four decades old. Though less formalised and substantiated than current references would typically be, these cases already capture the spirit of European consensus. For example, in *Marckx v. Belgium*, the ECtHR considered the distinction between "legitimate" and "illegitimate" children. It noted that the ECHR "must be interpreted in the light of present-day conditions" and, with regard to the case at issue, that

> the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".[22]

The Court proceeded to hold that the distinction at issue lacked a reasonable justification, and found a violation of Article 14 in conjunction with Article 8 ECHR. In a similar vein, when ruling two years later on the criminalisation of consensual gay sex in Northern Ireland, it noted that it "cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States".[23]

For a more recent case, consider the ECtHR's judgment in *Schalk and Kopf v. Austria*, which no longer concerned criminalisation, but rather partnership rights of same-gender couples. The increased professionalisation of the Court's comparative endeavours becomes quite clear here:[24] under the general heading of "The Facts", the judgment contains a section entitled "Comparative Law".[25] It refers, first, to the right to marriage found in Article 9 of the Charter of Fundamental Rights (CFR) of the European Union (EU) and to the Commentary on that article, as well as several EU directives. It then gives an overview of the "state of relevant legislation in Council of Europe member States". Although this section does not explic-

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22 ECtHR (Plenary), Appl. No. 6833/74 – *Marckx v. Belgium*, Judgment of 13 June 1979, at para. 41.

23 ECtHR (Plenary), Appl. No. 7525/76 – *Dudgeon v. the United Kingdom*, Judgment of 22 October 1981, at para. 60.

24 Paul Mahoney and Rachael Kondak, "Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?," in *Courts and Comparative Law*, ed. Mads Andenas and Duncan Fairgrieve (Oxford: Oxford University Press, 2015) at 119 and 126.

25 On consensus as factual, see Chapter 2, II.3.; and on its relation to comparative law, see infra, III.

itly cite specific laws or provisions of domestic law, it is nonetheless fairly detailed. For example, after enumerating those States that grant same-gender couples access to marriage and to other registered forms of partnership, it also mentions ongoing reforms, the rough temporal framework for past reforms, and the main legal consequences deriving from various forms of partnership. States are presented in groups depending on the common positions between them, in relation to the States parties to the ECHR as a whole: for example, the ECtHR mentions that "six out of forty-seven member States" grant same-gender couples equal access to marriage and that thirteen of them provide for other forms of registered partnership.[26]

In developing its argument for the conclusion which it reaches in the judgment (the section entitled "The Law"), the Court then repeatedly refers back to the comparative references in has thus introduced. The first prong of the case concerned Article 12 ECHR (the right to marry) – essentially determining whether that right can be claimed by same-gender couples. The ECtHR notes that the applicants' case rests not so much on a textual or historical interpretation of Article 12, but "on the Court's case-law according to which the Convention is a living instrument which is to be interpreted in the light of present-day conditions". As in *Marckx*, it then connects the living instrument doctrine to European consensus, arguing that despite "major social changes" in the way marriage is conceptualised, "there is no European consensus regarding same-sex marriage" since "no more than six out of forty-seven Convention States" allow it. Article 9 CFR is also discussed in this context, with the ECtHR noting its deliberately broad wording (no reference to "men and women", as in Article 12 ECHR) but also the caveat that the right to marry is "guaranteed in accordance with the national laws" governing its exercise, and the agnostic position taken in the Commentary on the CFR with regard to same-gender marriage. The ECtHR concludes from this – "[c]onsequently" – that Article 12 ECHR is applicable to the applicants' complaint but that, "as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State" – and hence that there was no violation of Article 12.[27]

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26 ECtHR, Appl. No. 30141/04 – *Schalk and Kopf v. Austria*, Judgment of 24 June 2010, at paras. 24-34.

27 Ibid., at paras. 57-64; this part of the ECtHR's reasoning in particular has, understandably, generated much confusion: see e.g. Loveday Hodson, "A Marriage by Any Other Name? Schalk and Kopf v Austria," (2011) 11 *Human Rights Law Review* 170; Sarah Lucy Cooper, "Marriage, Family, Discrimination & Contradic-

A similar dynamic emerges in the Court's discussion of the second prong of the case, which concerned a potential violation of Article 14 in conjunction with Article 8 ECHR. The ECtHR refers back to its comparative analysis at several points. First, it establishes the applicability of Article 14 by bringing same-gender relationships within the scope of Article 8 not only by reference to "private life" but also – in contrast to its previous case-law[28] – to "family life". Its argument is based on "a rapid evolution of social attitudes towards same-sex couples" as reflected in legal recognition afforded in "a considerable number of member States" as well as "a growing tendency to include same-sex couples in the notion of 'family'" in "[c]ertain provisions of European Union law".[29]

Having thus established the applicability of Article 14 in conjunction with Article 8 ECHR, the ECtHR moves on to discuss whether they were complied with. Lack of same-gender marriage was not considered a violation any more than it was under Article 12; the more controversial aspect of this prong of the case was whether Austria should have provided an alternative means of registered partnership earlier than it did.[30] In this respect, the judgment discusses at length the margin of appreciation to be accorded to Austria; its scope is established by reference to several factors, including "the existence or non-existence of common ground between the laws of the Contracting States".[31] The ECtHR notes "an emerging European consensus towards legal recognition of same-sex couples" which "developed rapidly over the past decade". However, it also holds that:

> Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation […].[32]

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tion: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights," (2011) 12 *German Law Journal* 1746.

28 ECtHR, Appl. No. 56501/00 – *Mata Estevez v. Spain*, Decision of 10 May 2001.

29 ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at paras. 92-95.

30 Austria's Registered Partnership Act came into force on 1 January 2010, i.e. before the ECtHR's judgment in June of that year; from that point onwards, this aspect of the case was a moot point; the ruling thus concerned the period before 1 January 2010.

31 ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 98.

32 Ibid., at para. 105.

The Court concluded that Austria did not have to introduce registered partnerships for same-gender couples any earlier than it did, and found no violation of the Convention.

If there is such a thing as a "typical" use of European consensus, then *Schalk and Kopf* can, in many ways, be considered to exemplify it. It contains a relatively detailed comparative overview of the domestic laws of the States parties to the ECHR as well as other legal commitments, in this case EU law. It integrates these into its reasoning at several points, both in determining the scope of the ECHR's provisions and when assessing compliance with them. It refers to both existence and "non-existence" of European consensus and draws differing conclusions. It connects consensus to other doctrines commonly used by the Court, particularly the margin of appreciation and the notion of the ECHR as a living instrument. And it becomes quite clear that consensus can constitute a highly relevant consideration within the ECtHR's reasoning.

Schalk and Kopf thus provides a feel for the way in which European consensus forms part of the ECtHR's reasoning. However, it must also be emphasised that the use of consensus remains, in many ways, difficult to pin down and there are thus limits to the way in can be grasped by describing any one case (or group of cases). Indeed, part of my argument in later chapters will be that the way in which consensus is operationalised depends on certain normative tensions and its use will therefore differ according to epistemological shifts and the kind of normativity foregrounded in any given judgment. Nonetheless, before adding such nuance I think it helpful to first provide a more detailed analysis of the kind of reasoning described by reference to "European consensus". The next section therefore builds on the examples just given to distil some key characteristics of consensus.

III. Key Characteristics of European Consensus

I would submit that, whatever the flexibility involved within the ECtHR's reasoning,[33] certain conditions must be fulfilled in order to speak meaningfully of "European consensus". They relate to the definition which I offered above: pro memoria, I understand consensus to mean a form of *comparative legal* reasoning which refers *vertically* to the positions taken by the

33 Rightly emphasised by Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 3.

States parties to the ECHR, viewed through the prism of *collectivity*. I now propose to briefly discuss the three key characteristics of consensus which this implies.

First, European consensus makes use of *comparative legal* reasoning[34] – in fact, the ECtHR itself regularly introduces the materials used to establish consensus under the heading of "comparative law".[35] The implication is that consensus refers to "legal norms existing outside the Convention itself":[36] they do not directly form part of those legal norms which the ECtHR is tasked to interpret – i.e., the Convention – but they *are* considered legal or at least quasi-legal norms within other legal systems, whether domestic or international.

European consensus is sometimes understood in a broader sense, encompassing not only reference to legal norms but also other types of consensus. In that vein, Laurence Helfer influentially distinguished between "three distinct factors" used "as evidence of consensus" within the ECtHR's case-law: "legal consensus, as demonstrated by European domestic statutes, international treaties, and regional legislation; expert consensus; and European public consensus".[37] The first is the kind of consensus already discussed in the examples above. The second kind refers to the opinions of those deemed "experts" in any given area, for example to

34 An aspect which is reflected even in many article titles: see e.g. Mónika Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law," (2009) 2 *Erasmus Law Review* 353; Christos L. Rozakis, "The European Judge as Comparatist," (2005) 80 *Tulane Law Review* 257; Christopher McCrudden, "Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared," (2012-2013) 15 *Cambridge Yearbook of European Legal Studies* 383-415; Sabine Gless and Jeannine Martin, "The Comparative Method in European Courts: A Comparison Between the CJEU and ECtHR?," (2013) 1 *Bergen Journal of Criminal Law and Criminal Justice* 36.

35 Supra, text to note 25.

36 Ida Elisabeth Koch and Jens Vedsted-Hansen, "International Human Rights and National Legislatures - Conflict or Balance?," (2006) 75 *Nordic Journal of International Law* 3 at 12.

37 Laurence R. Helfer, "Consensus, Coherence and the European Convention on Human Rights," (1993) 26 *Cornell International Law Journal* 133 at 139 (footnotes omitted); see also Birgit Peters, "The Rule of Law Dimensions of Dialogues Between National Courts and Strasbourg," in *The Rule of Law at the National and International Levels. Contestations and Deference*, ed. Machiko Kanetake and André Nollkaemper (Oxford and Portland: Hart, 2016) at 221.

"[m]edical and scientific considerations".[38] The third kind of consensus refers to the bulk of public opinion across Europe, though rarely substantiated by empirical evidence such as polls. The ECtHR's reference to evolving "attitudes" in *Marckx*[39] is sometimes read as an example of this.[40]

The ECtHR's case-law also demonstrates the multitude of possible connections between these three approaches to consensus. Medical and scientific considerations, for example, can influence public opinion or themselves be influenced by prevailing social standards, and they can also be recorded in the context of international organisations such as the World Health Organization, thereby gaining "wide international recognition"[41] not only in terms of medical expertise, but also in legal or quasi-legal terms. Public opinion and legal consensus can influence one another[42] and are often cited side by side, as in the above example of *Schalk and Kopf* when the ECtHR posits "a rapid evolution of social attitudes towards same-sex couples" and relates it to their legal recognition.[43]

For all this, however, legal norms remain by far the most commonly cited factor to establish consensus within the ECtHR's case-law,[44] with the two other factors or other types of consensus only occasionally playing a significant role. It is this specifically legal form of consensus which many commentators – and increasingly, it seems, the ECtHR itself – rely on to interpret the ECHR and justify the ECtHR's decisions. It is consensus in the sense of comparative legal reasoning, too, which is commonly located "out there",[45] as a factor which might guide the ECtHR's judges rather than being constructed by them, and hence considered to hold such

38 ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin v. the United Kingdom*, Judgment of 11 July 2002, at para. 81.

39 ECtHR (Plenary), Appl. No. 6833/74 – *Marckx*, at para. 41.

40 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), at 77-78.

41 ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*, at para. 81; see also ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot v. France*, Judgment of 6 April 2017, at para. 139.

42 See generally Susan Marks, "International Judicial Activism and the Commodity-Form Theory of International Law," (2007) 18 *European Journal of International Law* 199 at 207.

43 Supra, note 29.

44 Shai Dothan, "Judicial Deference Allows European Consensus to Emerge," (2017) *Chicago Journal of International Law* 393 at 399.

45 The notion that law is "out there" in the sense of being independent of lawyers' use of it is a common target of criticism by critical legal scholars; in the present context, I borrow it, in particular, from Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law," (1985) 26 *Harvard International Law Jour-*

promise as a relevant consideration in the interpretation of the ECHR. It is this type of consensus, accordingly, which will constitute my focus in what follows.[46]

The classification of consensus as a form of comparative legal reasoning is crucial, but also potentially misleading since it is somewhat idiosyncratic. One key point in that regard is the particular combination of the court making use of comparative reasoning and the comparative materials referred to: European consensus, as used by the ECtHR, relates specifically to the laws of the States parties to the ECHR. This is what I term its *verticality*,[47] for it means that the comparative materials used to establish European consensus originate in precisely those States which "fall within the jurisdiction of the court in question", in this case the ECtHR.[48] A similar form of verticality can be observed, for example, when the European Court of Justice (ECJ) refers to the constitutional traditions of the EU Member States to establish general principles of EU law.[49]

This verticality clearly distinguishes European consensus from the horizontal comparative references sometimes made between, for example, the constitutional courts of different States – these operate "among legal systems that belong to the same level".[50] If there is to be any parallel in the reasoning of national courts, it is that of federal courts that make compara-

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nal 411 at 423, whose reflections on comparative law in general seem quite apt in the context of European consensus; the topos of consensus as "out there" will re-emerge infra, IV.5.; see also, in the national context, John Hart Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980), at 63.

46 For a brief discussion of its limits and relationship to expert consensus, see Chapter 6, particularly sections IV.5.-6.

47 On vertical comparative law in general, see e.g. Aleksandar Momirov and Andria Naudé Fourie, "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law," (2009) 2 *Erasmus Law Review* 291 at 295; in the context of European consensus, a more common distinction than that between vertical and horizontal references seems to be between "internal" and "external" comparative materials, which is related but not identical to my point here: see further Chapter 6, IV.4.

48 Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Cambridge: Intersentia, 2011), at 115.

49 See generally 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" at 393-394.

50 Philipp Dann, Maxim Bönnemann, and Tanja Herklotz, "Of Apples and Mangoes. Comparing the European Union and India," (2016) *Indian Yearbook of Comparative Law* 3 at 6.

tive reference to a "national consensus" among various state laws;[51] tellingly, the ECtHR's use of consensus has often been compared to the US Supreme Court's search for a national consensus.[52] On the international plane, the verticality of consensus resonates with the recently re-burgeoning field of "comparative international law" which emphasises, inter alia, the direct relevance of the comparative method for the ascertainment and interpretation of international law.[53] European consensus may be considered a prime example of comparative international law in that sense.[54]

This is not to say that the ECtHR does not make use of comparative legal reasoning more generally – it certainly does,[55] although less frequently than it relies on European consensus. Sometimes it refers horizontally to other regional systems of human rights protection, for example to the American Convention or to the case-law of the Inter-American Court of

51 E.g. Supreme Court of the United States, *Roper v. Simmons*, 543 U.S. 551 (2005).

52 Mary Ann Glendon, *Rights Talk. The Impoverishment of Political Discourse* (New York: The Free Press, 1991), at 152-153; Jeffrey A. Brauch, "The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights," (2009) 52 *Howard Law Journal* 277; John L. Murray, "Consensus: Concordance, or Hegemony of the Majority?" (Dialogue between judges, European Court of Human Rights, 2008), at 28-34; Senden, *Interpretation of Fundamental Rights*, at 119-122; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 172-175; Jaka Kukavica, "National Consensus and the Eigth Amendment: Is There Something to Be Learned from the United States Supreme Court?," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019).

53 Anthea Roberts et al., "Comparative International Law: Framing the Field," (2015) 109 *American Journal of International Law* 467 at 470; see also Momirov and Naudé Fourie, "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law" at 296; for an early example, see Michael Bothe, "Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte," (1976) 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 280.

54 See Roberts et al., "Comparative International Law: Framing the Field" at 470; Samantha Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators," in *International Law and… Select Proceedings of the European Society of International Law, Vol. 5*, ed. August Reinisch, Mary E. Footer, and Christina Binder (Oxford: Hart, 2016) at 62.

55 For a spotlight on this kind of reasoning, see Carla M. Zoethout, "The Dilemma of Constitutional Comparativism," (2011) 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 787.

Human Rights.[56] Sometimes it also refers – diagonally, as it were[57] – to the domestic laws of States not party to the ECHR.[58] I will bracket these kinds of comparative references in what follows, not because I take them to be any less important but because, as used by the ECtHR, they operate within a different logic than that applied to vertically comparative reasoning – the use of European consensus, in other words, involves different kinds of normative tensions and is supported or opposed for different reasons than other comparative references, in part due to its verticality.[59]

A further and related idiosyncratic feature of European consensus is that the vertically comparative materials on which it is based are assessed by the ECtHR *through the prism of collectivity*.[60] This is to say that the Court not only deals with similarities and differences among the laws of the States parties – this would be par for course in most if not all comparative endeavours[61] – but also *groups* the comparative materials accordingly and sets them in relation to one another according to the relative size of those groups. The very term "European consensus" implicitly reflects not only the aspect of verticality ("European") but also of commonality or collectivity ("consensus").[62] Similarly, both aspects shine through in the reference

56 E.g. ECtHR (GC), Appl. No. 69698/01 – *Stoll v. Switzerland*, Judgment of 10 December 2007, at para. 111.

57 Contrast Anne-Marie Slaughter, "A Typology of Transnational Communication," (1994) 29 *University of Richmond Law Review* 99 at 111, who formally includes States outside a transnational court's jurisdiction under the umbrella of "vertical communication" – but admits that such cases may in fact have more in common with horizontal communication (ibid.).

58 E.g. ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*, at paras. 84-85; ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others v. Italy*, Judgment of 21 July 2015, at paras. 65 and 178; ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik v. Russia*, Judgment of 24 January 2017, at para. 19 as well as the dissenting opinion of Judge Pinto de Albuquerque in that case, at para. 32.

59 See in particular Chapter 2, II.2. and Chapter 3, IV.1.-2.

60 Emphasised e.g. by Senden, *Interpretation of Fundamental Rights*, at 67 in fine; Kanstantsin Dzehtsiarou, "What Is Law for the European Court of Human Rights?," (2017) 49 *Georgetown Journal of International Law* 89 at 101.

61 See David Kennedy, "New Approaches to Comparative Law: Comparativism and International Governance," (1997) *Utah Law Review* 545 at 546; Carozza, "Uses and Misuses of Comparative Law" at 1233.

62 As many commentators have noted, the term "consensus" is otherwise understood to imply unanimity; in the context of European consensus, however, it usually refers only to State majorities: see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 11-13; Luzius Wildhaber, Ar-

to "the existence or non-existence of *common ground* between the laws of the Contracting States" as it is found, inter alia, in *Schalk and Kopf*.[63]

Several points follow from this combination of verticality and collectivity. For one thing, there are clearly pragmatic limits to the level of detail at which the Court's comparative endeavours can be conducted.[64] These pragmatic constraints (e.g. time constraints and language barriers) are well-known from any kind of engagement with comparative law and often exacerbate a lack of proper contextualisation of "foreign" law, particularly in light of the preconceptions through which it is usually approached. The ECtHR finds itself in a relatively privileged position compared, for example, to national courts – like other transnational courts, it might be considered a "legal melting pot" or "laboratory" for comparative law[65] precisely because of its vertical placement "above" the States parties and hence its international composition. However, this cannot come even close to mitigating the pragmatic constraints of any comparative endeavour which aims to set the laws of not just two or three, but of *forty-seven* States (as well as any applicable norms of international law) in relation to one another across a broad range of subject-matters in various judgments.

European consensus differs from most attempts at comparative law in that, in a sense, it *embraces* this lack of contextualisation. One way of putting this succinctly (though it only captures part of the issue) is that the ECtHR is not usually concerned with the reasons for any given legal norm, but merely with the substantive position which it implies with regard to

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naldur Hjartarson, and Stephen Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights," (2013) 33 *Human Rights Law Journal* 248 at 257; critically Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 45; see further on the implications of this Chapter 3, IV.3.-4. and, on numerical issues involved in establishing consensus, see Chapter 5; see also Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 173, noting the "positive tenor" of the term "consensus" which (misleadingly!) suggests "a lack of dissent or disagreement, an absence of strife".

63 Supra, note 31 (emphasis added).

64 For an overview of some challenges, see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 101-114.

65 Fernanda G. Nicola, "National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union," (2016) 64 *American Journal of Comparative Law* 865 at 868 (on the ECJ).

the matter at hand.[66] It is these substantive positions which are then added up, as it were, and to which the prism of collectivity is thus applied. While there are a few counter-examples and ample room for flexibility, in particular, with regard to level of generality at which the comparative analysis is conducted,[67] this kind of outcome-oriented approach to collectivity leads to the kind of "counting" which is commonly associated with European consensus:[68] States are grouped according to whether the position read into their legal system accords with the view of the applicant before the ECtHR – or not.

The implications of this grouping differ according to whether commonality is deemed to be present and, if so, depending on which position it favours. European consensus is a form of reasoning which is notoriously Janus-faced in the sense that it can be used to argue in two directions[69] – what has been called the "rein effect" and the "spur effect", respectively.[70] The prior refers to cases in which the ECtHR either identifies a majority position *against* the applicant or a lack of a clear majority one way or the other. In these cases, (lack of) consensus constitutes an argument against a violation of the Convention – it reins in the Court, as it were. Conversely, when the ECtHR identifies a clear majority in *favour* of the applicant, then it "spurs" the Court towards a more expansive approach, and consensus is used as an argument for a violation of the Convention. *Schalk and Kopf*

66 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 121; see also Kanstantsin Dzehtsiarou and Vasily Lukashevich, "Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court," (2012) 30 *Netherlands Quarterly of Human Rights* 272 at 290-291.

67 See further Chapter 7, II.

68 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 175.

69 See e.g. Gerards, "Judicial Deliberations in the European Court of Human Rights" at 430; Yutaka Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry," in *Constituting Europe. The European Court of Human Rights in a National, European and Global Context*, ed. Andreas Føllesdal, Birgit Peters, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013) at 89; Paul Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?," (1998) 19 *Human Rights Law Journal* 1 at 5; Eva Brems, *Human Rights: Universality and Diversity* (The Hague et al.: Martinus Nijhoff, 2001), at 412; Samantha Besson and Anne-Laurence Graf-Brugère, "Le droit de vote des expatriés, le consensus européen et la marge d'appréciation des États," (2014) 25 *Revue Trimestrielle des Droits de l'Homme* 937 at 942-943; in more detail Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 24-30.

70 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251.

offers an example of the rein effect (although it also contains elements of the spur effect, e.g. in the use of consensus to establish a broad understanding of "family life"), while *Marckx* or *Demir and Baykara* can be seen as examples of the spur effect.

As a consequence of this bifurcation, it comes as no surprise that the use of consensus is criticised on different grounds in either case.[71] The more controversial scenario in practice seems to be the rein effect: many critics of European consensus are concerned about its use in relation to the specific subject-matter of human rights,[72] for they see a contradiction or at least a tension between vertically comparative legal reasoning and the idea of human rights. Since human rights are (seen as) conceptually focussed on the individual, it is those cases in which consensus is used to argue against the individual applicant – i.e., cases involving that rein effect – that take centre-stage when this line of criticism is followed. Conversely, the spur effect of European consensus relates to those cases in which consensus is used as an argument against the respondent State – here, the main line of criticism therefore relates to the fact the positions taken by a majority of States are transposed onto those States who find themselves in a minority.

European consensus finds itself caught between these diametrically opposed kinds of criticism; but precisely because of its Janus-faced nature, the applicability of either line of criticism in any given case will depend on whether the ECtHR identifies common ground among the States parties or not. As I will argue in what follows, this leads to the possibility of instrumental allegiances between consensus and other approaches to reasoning. But it also demonstrates that consensus is situated at the interstices of different approaches to interpretation, and thus caught up in persistent tensions owing to different kinds of criticism. The next section will introduce these tensions in more detail, situating them in relation to human rights theory and (critical) international legal theory more generally.

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71 Carozza, "Uses and Misuses of Comparative Law" at 1228-1229; Vassilis Tzevelekos and Kanstantsin Dzehtsiarou, "International Custom Making and the ECtHR's European Consensus Method of Interpretation," (2016) *European Yearbook on Human Rights* 313 at 326; Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 14.

72 E.g. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 9; Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," (2011) 29 *Netherlands Quarterly of Human Rights* 324 at 354.

IV. European Consensus and Critical International Legal Theory

1. Different Perspectives on Consensus: Structuralist Methodology

One facet of the academic discourse surrounding European consensus which struck me when I first began research on this topic is the way in which the debate can be very clearly structured by ideal-type, diametrically opposed starting assumptions. This is particularly so in cases involving the rein effect: the standard criticism of consensus takes it to task for endorsing unjustifiable restrictions, particularly on minority rights; for paradoxically giving normative force to the very States parties whose laws the ECtHR is supposed to be supervising; and for replacing moral truth with mere factual consensus.[73] In defence of consensus, this approach is derided as claiming a ludicrous "status of philosopher kings with ultimate moral authority" for the ECtHR;[74] disagreement about moral matters such as human rights is emphasised; and hence the vertically comparative reference to democratically underlaid legal norms is regarded as essential rather than paradoxical: "There are democratic and epistemic benefits to enlisting domestic institutions in forming the content of Convention rights".[75] Distrust of States clashes with trust of States, and an epistemology predicated on substantive argument about moral truth clashes with an emphasis on disagreement and political solutions to moral problems.

With regard to the spur effect, the epistemological differences are slightly less marked, but a common perspective is no more forthcoming. One might regard consensus as a "hegemony of the majority" of States parties, and hence as contemptuous of the mores, heritage, culture and democratic processes within those States who find themselves in a minority.[76] One might, conversely, argue that giving too much weight to the decisions of individual States would negate the point of a regional system of human rights protection, hence shifting the focus back to a Europe-wide compari-

73 E.g. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 74.

74 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012), at 115.

75 Clare Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights," (2018) 56 *Columbia Journal of Transnational Law* 467 at 480.

76 Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 45-47.

son.[77] Nationalist and internationalist precommitments pull commentators towards either of these perspectives, which remain difficult to bring into conversation with one another.

Finally, many proponents of European consensus argue that the combination of the rein effect and the spur effect allows for the development of regional human rights standards while increasing the ECtHR's "legitimacy", in the sense of support for its judgments by the States parties and hence better chances at implementation.[78] This kind of argument operates on a different plane from the other controversies just mentioned, since it incorporates a strategic element into the ECtHR's reasoning which is geared at generating support for the Court in the long term. While this kind of argument has become extremely influential, some starkly oppose it, maintaining that it is "based on an overstated fear" that the ECtHR might lose its legitimacy, and that "[p]iecemeal evolution" of its case-law in accordance with European consensus cannot be reconciled with a principled account of human rights.[79] Again, there is a sense that the issue can be approached from diametrically opposed starting assumptions – either a matter of principle or strategy. A combination of the two is difficult to achieve without sweeping significant normative tensions under the rug.[80]

To put a spotlight on these differing perspectives and their various precommitments, epistemologies, idealisations, and implications I borrow from a structuralist methodology in the sense suggested by Martti Koskenniemi – a form of analysis which aims to bring to the surface the "deep structure" of "more familiar phenomena" of social life so as to understand them better.[81] Accordingly, the analysis which follows operates, for the most part at least, on the *meta-level* compared to the various perspectives just mentioned. My hope is that by making the theoretical implications of the various perspectives involved in debates on consensus more explicit, it

77 Gerald L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights," (2008) 19 *European Journal of International Law* 101 at 115.

78 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, chapter 6.

79 Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 124.

80 Although many proponents of European consensus, to my mind, do just that; for a criticism of this tendency, see Chapter 10.

81 Martti Koskenniemi, "What is Critical Research in International Law? Celebrating Structuralism," (2016) 29 *Leiden Journal of International Law* 727 at 727-728; on structuralism and critique, see further Chapter 11, IV.1.

will become possible to get a better grasp of the role which European consensus plays within the ECtHR's case-law, and for that matter of the ECtHR's reasoning more generally. I thus build on the assumption explicated by Panos Kapotas and Vassilis Tzevelekos, according to which debates about European consensus are "closely linked to the wider discourse on the philosophical foundations of human rights and to the limits of judicial review", and ultimately to foundational questions underlying all "liberal democratic polities".[82]

Accordingly, much of what follows is "devoted to disentanglement"[83] – to disentangling different approaches to European consensus within the ECtHR's case-law from one another and setting them in relation to different approaches to human rights more generally by connecting doctrine and theory. The ECtHR itself famously "eschews abstract theorising"[84] and has offered only rare and partial indications of why it uses European consensus.[85] Partly due to this, I will draw to a significant extent on academic literature to establish the main tenets of different perspectives on European consensus, and only then turn back to the ECtHR's case-law to assess how they might be said to impact upon the use of consensus in more detail.[86]

It is worth noting, however, that my references to literature on human rights theory are not only faute de mieux, but also a deliberate move to underline its practical importance. Theoretical accounts may sometimes seem (overly) abstract, but they have the potential to influence how we think about and assign meaning to human rights, and hence to bring ideas into circulation which in turn influence how the ECtHR's judges conceive of their own role. In that sense, human rights theory is by no means discon-

82 Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 14.

83 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), at 4.

84 Alastair Mowbray, "The Creativity of the European Court of Human Rights," (2005) 5 *Human Rights Law Review* 57 at 61; see also Angelika Nussberger, *The European Court of Human Rights* (Oxford: Oxford University Press, 2020), at 73.

85 See Senden, *Interpretation of Fundamental Rights*, at 265-266; Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 9; see more generally Fredman, "Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law" at 633.

86 Chapters 2 to 4 build primarily on literature whereas chapters 5 to 8 focus on case-law. Chapters 9 and 10 return to academic commentary to discuss the issue of legitimacy.

nected from human rights practice: "analyses affect outcomes".[87] To render that connection more explicit is precisely what a structuralist analysis aims for by "bring[ing] to the surface that underlying world of beliefs that controls our institutional practices".[88] Human rights theory can be considered one of the manifold fora in which the "world of beliefs" underlying the ECtHR's practices is developed and through which it might be grasped.

2. Human Rights between Apology and Utopia

Before turning to theory dealing explicitly with human rights, however, I would like to briefly discuss Koskenniemi's own structuralist account of international legal argument in his path-breaking monograph, *From Apology to Utopia*, so as to then demonstrate its relevance in the area of human rights. While the bulk of the argument in the following chapters will be critically oriented only in a relatively weak sense,[89] it has been strongly influenced by critical international legal theory of the kind put forward by Koskenniemi, and accordingly I think it is a helpful place to begin so as to both explicate the intellectual debt and highlight areas of divergence.

Koskenniemi identifies two patterns of justifying positions taken within international legal argument. The first is "descending": it is based on the fact that, in order to uphold its normativity, international law must be capable of overriding individual State will. The latter is "ascending": it assumes that international law is based on States' will so as to ensure its concreteness, in contrast to some kind of natural morality.[90] Either kind of argument can be used to challenge the other – descending argument "cannot demonstrate the content of its aprioristic norms in a reliable manner" and hence seems (overly) utopian when challenged on the basis of State will,

87 Susan Marks, *The Riddle of All Constitutions. International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000), at 5.

88 Koskenniemi, "What is Critical Research in International Law? Celebrating Structuralism" at 733.

89 As is *From Apology to Utopia* itself, since it provides a structuralist critique of international law without a strong political (e.g. femininst, anti-capitalist, etc.) critique of the structural biases which go along with it; see Michele Tedeschini, "The Politics of International Lawyers: Whose Legacy Is at Stake? Reflections on Martti Koskenniemi's Series on 'The Politics of International Law'" (Critical Legal Thinking, 2019), available at <http://criticallegalthinking.com/2019/07/15/politics-of-international-lawyers-whose-legacy-is-at-stake-martti-koskenniemi/>. I will elaborate on this point in Chapter 11, II.

90 Koskenniemi, *From Apology to Utopia*, at 17 and 59.

whereas ascending argument privileges State will in a way which makes it open to doubt whether law is "effectively constraining", hence appearing (overly) apologetic.[91] As a result, international legal argument oscillates between these two patterns of justification in a way that renders it radically indeterminate, i.e. merely a formal structure for making arguments but "singularly useless" insofar as the choice between differing substantive outcomes is concerned.[92]

From Apology to Utopia deals with "the classical law of peace, concerned with the relations of sovereign States vis-à-vis each other" and thus largely brackets the field of international human rights law.[93] As Frédéric Mégret has shown at length, however, its claims are no less applicable to international human rights law than they are to international law at large.[94] Similar argumentative structures, although concerned more with capturing the notion of human rights in general than with specific legal interpretations, are also reflected in the popular juxtaposition of so-called "moral" and "political" theories of human rights and reactions to it. The prior kind of theory, represented in particular by James Griffin, takes up the popular idea of rights "that we have simply in virtue of being human" and hence make scant reference to State will.[95] The latter kind of theory, originating in the work of John Rawls and developed in particular by Charles Beitz, "takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights".[96]

Each of these two accounts carries diametrically opposed weaknesses. The prior constitutes "top-down theorizing" which refers "to human rights

91 Ibid., 60.
92 Ibid., 67-69.
93 Ibid., 14.
94 Frédéric Mégret, "The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law," (2013) 27 *Temple International and Comparative Law Journal* 455; from Koskenniemi's own writings on human rights, see in particular Martti Koskenniemi, "The Effect of Rights on Political Culture," in *The Politics of International Law* (Oxford: Hart, 2011) at 134.
95 James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), at 2.
96 Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), at 102, building on John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

practice at most as a test case […] or as something to criticize"[97] and hence remains open to the charge of utopianism, for it lacks concreteness. The latter avoids this problem as it is clearly "practice-responsive",[98] but conversely has difficulties in establishing a sufficient degree of normativity and slides all too easily into apology.[99] It comes as no surprise that those who attempt to navigate a middle path between moral and political accounts focus on the legal dimension of human rights: the law "qua normative practice" evokes the familiar oscillation between ascending and descending argument.[100]

As I read it, Koskenniemi's dichotomy of ascending and descending argument is deliberately based, at least in the first instance, entirely on formal considerations, i.e. the reliance on or opposition to State will.[101] It is because of this formality, a kind of internal logic, that it becomes possible to claim that these two sets of argument "are both exhaustive and mutually exclusive".[102] This approach is entirely apt insofar as the general structure of international legal argument is concerned, since it relates directly to the twin demands of normativity and concreteness which aim to distinguish international law from its "neighbouring intellectual territories", particularly morality and politics.[103] The emergence of specifically legal accounts of human rights in explicit contrast to moral and political accounts only confirms this pattern.

For present purposes, however, I am interested not only in the dichotomy of ascending and descending argument, but also in *further differentia-*

97 Samantha Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights," in *The Role of Ethics in International Law*, ed. Donald Earl Childress (Cambridge: Cambridge University Press, 2012) at 216.

98 Alain Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions* (Abington: Routledge, 2017), at 7.

99 But see the discussion in Beitz, *The Idea of Human Rights*, at 104-106.

100 Besson, "Human Rights: Ethical, Political… or Legal? First Steps in a Legal Theory of Human Rights" at 217; see also Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), at 11.

101 Although the broader connections to liberal social theory are very much a part of his argument, as the brief overview of his structuralist approach above indicates. See also explicitly e.g. Koskenniemi, *From Apology to Utopia*, at 66 and 600; for emphasis of this point, see e.g. Outi Korhonen, "New International Law: Silence, Defence or Deliverance?," (1996) 7 *European Journal of International Law* 1 at 24; see also infra, note 187, and, on the connections which critical international legal theory typically draws between law and broader social phenomena, see further Chapter 11, IV.1.

102 Koskenniemi, *From Apology to Utopia*, at 59.

103 Ibid., 16.

tion between the rationales for supporting one or the other (or both),[104] so as to more specifically investigate (some of) the various *uses* of European consensus in that context.[105] My aim, in other words, is not to challenge the more general structure described by Koskenniemi but to elaborate on how it is used in the context of regional human rights law, particularly with regard to European consensus. I retain from his account the focus on *mutually exclusive* patterns of justification – I will sometimes express this by speaking of *different kinds of normativity*. This aspect explains the sense of diametrically opposed starting assumptions which I mentioned above. Because I investigate different rationales for supporting (or opposing) the use of European consensus, however, my framework will be less formal than Koskenniemi's, and hence I make no claim that the different perspectives I discuss are exhaustive. I will focus on two main sets of considerations, which I introduce in the following two subsections: principled and strategic considerations.

3. Morality-focussed and Ethos-focussed Perspectives

The different perspectives which I gather under the umbrella of "principled" considerations have been most extensively explored in constitutional law and political theory at the national level. The main dichotomy at issue

104 A variety of different rationales is discussed, for example, by Andreas Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 200-208; on the "diverse roles" of consensus see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 1.

105 My use of "use" is deliberate, and largely inspired by Sara Ahmed; as she notes, it "often points beyond something even when it's about something" (Sara Ahmed, "Uses of Use. Diversity, Utility and the University" (2018), available at <https://www.youtube.com/watch?v=avKJ2w1mhng>, at 0:09:20), thus allowing for easy differentiation between rationales underlying consensus. I also hope that the use of "use" will foreground the element of construction involved (again echoing Ahmed, we might say that it expresses not only a relation, but an activity): consensus *is used by legal actors in certain ways*, rather than constituting some pre-discursive essence. For a use of use similarly foregrounding this latter aspect (with regard to law more generally), see Martti Koskenniemi, "Epilogue. To Enable and Enchant - on the Power of Law," in *The Law of International Lawyers. Reading Martti Koskenniemi*, ed. Wouter Werner, Marieke de Hoon, and Alexis Galán (Cambridge: Cambridge University Press, 2017) at 410.

is sometimes presented, somewhat simplistically, as one of "democracy" versus "human rights".[106] I say "somewhat simplistically" because both concepts are, of course, subject to widely varying interpretations and each can be supercharged with the other. It is commonplace to note, for example, that democracy worthy of the name needs human rights of some sort – elections, by themselves, are "underdeterminative of democracy".[107] Conversely, human rights require democratic appropriation and specification if they are not to remain formal and paternalistic guarantees.[108] Any position taken within constitutional argument can thus claim to represent "true" democracy and human rights:[109] it is important to keep in mind that these notions are, in Edward Said's memorable phrase, "by no means simple and agreed-upon concepts that one either does or does not find, like Easter eggs in the living-room".[110]

I do think that democracy and human rights can and should work in tandem but, for present purposes, I am more interested in the tensions which can arise between them insofar as they are understood as "two logics which are incompatible in the last instance",[111] specifically as logics which entail not only differing understandings of substantive concepts such as

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106 For example, John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005), at 5 builds on Constant and juxtaposes the liberties of the ancients ("political liberties") with those of the moderns ("basic rights of the person"), though he acknowledges that this is a "stylized contrast".

107 Thomas Carothers, "Empirical Perspectives on the Emerging Norm of Democracy in International Law," (1992) *Proceedings of the American Society of International Law* 261 at 264.

108 A point made very emphatically by Ingeborg Maus, *Menschenrechte, Demokratie und Frieden. Perspektiven globaler Organisation* (Frankfurt a.M.: Suhrkamp, 2015).

109 Conor Gearty, "Building Consensus on European Consensus," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis Tzevelekos (Cambridge: Cambridge University Press, 2019) at 449; Martti Koskenniemi, "'Intolerant Democracies': A Reaction," (1996) 37 *Harvard International Law Journal* 231 at 231; for example, Ian Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?," (2018) 67 *International and Comparative Law Quarterly* 477 at 479 claims that "strict supranational review of national decision-making" is "a *sine qua non* of democratic self-government" (emphasis in original).

110 Edward W. Said, *Orientalism* (London: Penguin Books, 2003), at xiv.

111 Chantal Mouffe, *The Democratic Paradox* (London and New York: Verso, 2005), at 5; see also Dimitrios Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights," in *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, ed. Panos Kapotas and Vassilis

equality but also radically different epistemologies. I draw inspiration, in particular, from the juxtaposition of different "traditions" or "grammars" in the writings of Jürgen Habermas and Chantal Mouffe. While these two writers draw very different conclusions from that juxtaposition,[112] both capture the same basic tension in a particularly evocative manner, and in such a way that connections can usefully be drawn to the debates surrounding European consensus. I will call the two different perspectives at issue the *morality-focussed perspective* and the *ethos-focussed perspective* respectively,[113] partly to underline the differing epistemologies and partly to avoid more loaded terms such as "liberalism" and "republicanism" which is Habermas's way of framing the issue.[114] (Insofar as I do occasionally talk of liberalism, it tends to refer to the "larger worldview"[115] which I take both the morality-focussed perspective and the ethos-focussed perspective, as well as most of the legal human rights project as a whole, to form part of.)

The morality-focussed perspective emphasises the importance of prepolitical rights to ensure moral self-determination. Because they are conceived of as prepolitical to avoid a "tyranny of the majority", the "moral-cognitive moment" is dominant in determining those rights;[116] for lack of reference to the will of any particular political community, they are

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Tzevelekos (Cambridge: Cambridge University Press, 2019) at 287 who speaks of "[t]wo conflicting schools of thought".

112 Habermas aiming for reconciliation and Mouffe emphasising paradox; I will touch further upon this in a moment, and again in Chapter 7, IV. and Chapter 11.

113 I will sometimes use these terms in the singular form and sometimes in the plural, without assigning much weight to the distinction. The singular form captures the stylized form of each perspective, though without meaning to detract from different approaches within them which the plural renders more visible; see also infra, V.

114 See generally Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: Polity Press, 1996), at 99; Jürgen Habermas, "Versöhnung durch öffentlichen Vernunftgebrauch," in *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (Frankfurt a.M.: Suhrkamp, 1999) at 89; see also Jürgen Habermas, "Volkssouveränität als Verfahren," in *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt a.M.: Suhrkamp, 2014) at 610; confusingly, Habermas uses the same distinction in a different (though arguably related) sense in Habermas, *Between Facts and Norms*, at 296 (see his footnote 10, at 549).

115 Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, Mass.: Harvard University Press, 1997), at 5.

116 Habermas, *Between Facts and Norms*, at 100.

"moral-universalistic".[117] The ethos-focussed perspective, by contrast, holds that "the ethical-political will of a self-actualizing collectivity is forbidden to recognize anything that does not correspond to its own authentic life project": thus the "ethical-volitional" moment predominates,[118] and rights are assumed to gain normativity in "ethical-particularistic" contexts.[119] In contrast to the universalising beam of the morality-focussed perspective, ethically oriented approaches thus rely on a form of normativity which is *relative* to certain groups.[120]

The transnational context of the ECtHR further complicates the picture. Whereas ethical normativity is most commonly derived from particularities, traditions or democratic procedures within individual States, the ECHR covers not one but forty-seven States. Ethical normativity can thus be grounded in different macrosubjects – either individual States or the *community of States parties as a whole*. I take this latter approach to be the essence of one line of argument commonly adduced to justify reference to European consensus: for lack of democratic procedures at the transnational level itself, vertically comparative references viewed through the prism of collectivity constitute the next-best stand-in for grounding ethical normativity.

In light of this, we can reformulate some of the controversies surrounding the rein effect and the spur effect of European consensus which I described above.[121] Criticism that the rein effect of consensus detracts from moral truth and the proper protection of minority rights is based on the morality-focussed perspective, the argument being that the ECHR should instead be read as prepolitical in the sense of being clearly removed from domestic politics and the laws which they give rise to.[122] The diametrically opposed defence of European consensus as carrying democratic and epistemic benefits and quite rightly relating the ECtHR's decisions to the laws of the States parties to the ECHR is based on the ethos-based perspective.

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117 Mouffe, *The Democratic Paradox*, at 129.
118 Habermas, *Between Facts and Norms*, at 100.
119 Mouffe, *The Democratic Paradox*, at 129.
120 To avoid confusion, I should note that "moral" and "ethical" are sometimes used as synonyms; thus, Griffin's personhood account of human rights (supra, note 95) is sometimes called "ethical" rather than "moral" (in contrast to "political" accounts). My usage of the terms here is, by contrast, based on the contrast between (universalising, cognitive) moral and (relative, volitional) ethical normativity.
121 Supra, IV.1.
122 See Chapter 2.

Yet so is the criticism of the spur effect of consensus: here, the complaint is that consensus overrides the ethos of the respondent State. Proponents of European consensus argue based on a different kind of ethical normativity, grounded not within an individual State but derived from European consensus for all the States parties taken together: I call this a *pan-European ethos*.[123]

We can relate the distinctions made so far back to Koskenniemi's framework by noting that the opposition between the ethical-volitional and the moral-cognitive perspectives is mirrored in ascending and descending patterns of justification in that it reflects the fundamental distinction between the "categories of will and knowledge" as the basis for argument.[124] On the more substantively loaded accounts which form the basis of my enquiry, however, the morality-focussed and ethos-focussed perspectives not only represent different patterns of justification but also incorporate different, more substantively oriented rationales for arguing based on or in opposition to State will. The prior sets out to vindicate prepolitical human rights and moral self-determination, whereas the latter emphasises the importance of civic self-organisation and equal political participation.[125] Specifying these rationales creates space to distinguish (or "disentangle") them from alternative rationales for supporting (or opposing) the use of European consensus, such as those discussed in the following subsection.

A further difference in how I will frame the tensions surrounding European consensus compared to the Koskenniemian account pertains to the different kinds of ethical normativity just described. Within the dichotomy of apology and utopia, European consensus could be said to occupy a paradigmatically ambiguous role, for it contains elements of both ascending and descending argument.[126] The intuitive connection, at least to me, is to ascending argument – consensus is based, after all, on the positions taken by the States parties to the ECHR. The controversies surrounding the rein effect exemplify this role, for the use of consensus is opposed precisely because it seems overly apologetic.[127] However, in cases involving the spur effect, European consensus also serves to override the will of indi-

123 See Chapter 3.
124 Koskenniemi, *From Apology to Utopia*, at 422.
125 See also Gearty, "Building Consensus on European Consensus" at 467, whom I read as half-way in between the formal and the substantive by juxtaposing "normativity" and "democratic will".
126 Carozza, "Uses and Misuses of Comparative Law" at 1232.
127 This aspect was my primary focus in connecting the Koskenniemian structure to European consensus in Theilen, "Levels of Generality in the Comparative Rea-

vidual States, and it can thus serve as the "revenge of utopia against the unfortunate laggards" among the States parties.[128]

The distinction between State will in general and individual State will – or, differently put, the distinction between different macrosubjects within which ethical normativity is grounded – thus assumes a crucial place in evaluating the use of European consensus. To foreground this distinction, I will re-adjust the dichotomy of ascending and descending patterns of argument to a *triangular* model in which consensus as an expression of a pan-European ethos is not presented as middle-ground between two poles, but rather forms its own pole which stands in tension with both moral normativity as well as ethical normativity based on individual national ethe. Describing consensus as a form of ethical normativity showcases certain affinities and differences within (what is then conceptualized as) the triangular tensions at issue: while its Janus-faced nature opens up opportunities for different instrumental allegiances with other kinds of normativity depending on the case at hand,[129] consensus builds on an ethos-focussed rather than a morality-focussed epistemology.

A further reason to accentuate the notion of a pan-European ethos is that it foregrounds the specifically regional character of the ECHR, an aspect which has barely been touched upon in human rights theory.[130] The intuitive connection to the States parties drawn by vertically comparative legal reasoning prompts the idea that consensus might be a way of filling this lacuna by "articulating regionally specific conceptions of shared human rights concepts, or interpreting locally identified human rights norms".[131] There is a fuzzy feeling of a European identity, with the States parties as "members of [a] club"[132] and the ECtHR using consensus to identify "fundamental values that bind European Countries together and

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soning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" at 415-416.

128 Mégret, "The Apology of Utopia" at 488.

129 See further Chapter 4, III.3.

130 Critically Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 19-22; for a rare account of European consensus which centres the issue of how it relates to "sense of regional identity" and the exclusionary effects of such a construction, see the brilliant article by Claerwen O'Hara, "Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'," (2020) *Law and Critique*.

131 Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 106 (on the Inter-American Court).

132 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 124.

give concrete expression to what it is to be European".[133] As with any supposedly common identity, I would suggest that it is important to ask who constructs it and what its exclusionary effects are. What of those within the States parties whose positions are not reflected in the laws making up consensus? What of those whose democratically formed positions are not represented by those States forming an alleged consensus? What of those outside Europe who are impacted in various ways by the interpretations of the ECtHR but never considered as part of European consensus in the first place?[134] But however one answers these questions, the element of a common regional identity emerges within the ECtHR's reasoning, for better or worse, in part through the use of European consensus – and the notion of ethical normativity at the pan-European level aims to capture this.

The way in which consensus has developed as an expression of a pan-European ethos which mediates between apology and utopia as its own prong within triangular tensions is one of the senses in which European consensus can be deemed to constitute a compromise between different perspectives on the interpretation of the Convention. Such a compromise need not, in and of itself, be a problem, but it may carry certain downsides. With regard to the national level, Mouffe holds that the interaction between the morality-focussed and ethos-focussed perspectives "installs a very important dynamic" in which each constantly challenges and subverts the hegemonic idealisations of the other; she therefore deems their paradoxical articulation to have "very positive consequences".[135] If European consensus is given too much weight within the triangular tensions which occur at the transnational level, then this potential for mutual contestation is lost and the idealisations involved in the use of consensus cannot be sufficiently challenged. I will therefore argue that it is important, at a minimum, to counteract the "compromise" of European consensus with other forms of reasoning.

133 Michael O'Boyle, "The Future of the European Court of Human Rights," (2011) 12 *German Law Journal* 1862 at 1866.

134 See Eyal Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy," (2018) 9 *Journal of International Dispute Settlement* 240 at 245-247.

135 Mouffe, *The Democratic Paradox*, at 44-45; see in more detail Chapter 11, IV.2.

4. Strategic Considerations and Consensus as Legitimacy-Enhancement

In theory, the suggestion that use of European consensus should be accompanied and indeed challenged by other kinds of reasoning is somewhat uncontroversial: academic commentary is replete with references to consensus as a *rebuttable* presumption,[136] or to doctrinal figures such as "core rights" which establish a kind of "consensus-free" zone.[137] The ECtHR's case-law similarly contains manifold indications that considerations other than European consensus play a role, for example by virtue of other factors influencing the width of the margin of appreciation which it accords to the respondent State.[138] Yet besides the notion of a pan-European ethos which may constitute one rationale for giving normative force to European consensus, there may be other reasons for doing so, and these reasons arguably have a tendency to smooth over potential counter-arguments to European consensus and therefore consolidate its position as a particularly strong argument.

Broadly speaking, one might say that the kind of rationales I have in mind belong to the realm of what, in Rawlsian terms, one might call *non-ideal theory*. As Rawls put it in *The Law of Peoples*, at issue here are "questions arising from the highly nonideal conditions of our world with its great injustices and widespread social evils".[139] With whatever principles of justice are deemed ideal in mind, non-ideal theory thus seeks to identify transitional "policies and courses of action that are morally permissible and politically possible as well as likely to be effective".[140] Simply put, it grapples with the non-ideal conditions which pertain in practice and tries to formulate pragmatic, but not incoherent responses to them.

Non-ideal considerations are not traditionally acknowledged by courts (though this is not to say that judges do not consider them in practice).[141] Insofar as they are explicated, they usually pertain to what in non-ideal theory would be called the danger of "rug-pulling", i.e. taking into consideration those "cases where people base life plans or important activities on the

136 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 27 and 119.
137 See Chapter 4, III.2.
138 See Chapter 8, III.2.-3.
139 Rawls, *The Law of Peoples*, at 89.
140 Ibid.
141 On the distinction between processes of discovery and justification, see infra, IV.5.

reasonable expectation that the rules will remain unchanged".[142] Legal doctrine knows this issue through the doctrine of legitimate expectations, or through the related principle of legal certainty.[143] European consensus is sometimes used to argue against legitimate expectations of a finding of no violation despite precedent to that effect, as when the ECtHR held in *Bayatyan v. Armenia* that a "shift in the interpretation of Article 9" to encompass a right to conscientious objection was "foreseeable".[144] The key difference to the usual debates about both non-ideal theory and legitimate expectations is that we are not dealing, here, with individuals' "life plans" but rather with the foreseeability of a change in interpretation *for the States parties*.[145]

This does raise a number of interesting and little discussed questions on the role of precedent within the ECtHR's case-law, the extent to which changes must be "foreseeable" for the States parties in order to be justified, and the conservative implications of such an approach. I will mostly leave this branch of non-ideal theory aside, however, so as to focus primarily on a different kind of non-ideal consideration which seems to increasingly hold sway with regard to constitutional adjudication in general,[146] but also enjoys incredible popularity with regard to European consensus in particular. For this line of reasoning, the issue is not so much whether the result of any given decision is morally permissible (as in ideal theory, and also when legitimate expectations are at issue), but whether it is likely to be effective or whether it will, rather, face opposition which might detract both from its implementation and from support for the ECtHR in general.

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142 A. John Simmons, "Ideal and Nonideal Theory," (2010) 38 *Philosophy & Public Affairs* 5 at 20.

143 See generally Andreas von Arnauld, *Rechtssicherheit: Perspektivische Annäherungen an eine "idée directrice" des Rechts* (Tübingen: Mohr Siebeck, 2006); in the context of the ECHR, see Patricia Popelier, "Legitimate Expectations and the Law Maker in the Case Law of the European Court of Human Rights," (2006) *European Human Rights Law Review* 10.

144 ECtHR (GC), Appl. No. 23459/03 – *Bayatyan v. Armenia*, Judgment of 7 July 2011, at para. 108; Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights," (2011) 12 *German Law Journal* 1730 at 1744 calls this a mitigation of the "surprise effect" of evolutive interpretation.

145 Contrast the case-law of the ECJ on legitimate expectations as summarised in Tim Maciejewski and Jens T. Theilen, "Temporal Aspects of the Interaction between National Law and European Union Law: Reintroducing the Protection of Legitimate Expectations," (2017) *European Law Review* 706 at 713-714.

146 See Roni Mann, "Non-ideal Theory of Constitutional Adjudication," (2018) 7 *Global Constitutionalism* 14.

The ECtHR, after all, is not detached from broader political structures and power constellations within Europe.[147] If this has ever been in doubt, it became amply clear over the course of the last few years, for example in the context of high-level conferences on reform of the ECtHR such as those in Brighton (2012) and Copenhagen (2018).[148] These conferences have led, in particular, to increasing emphasis on notions such as the margin of appreciation or subsidiarity.[149] On their own terms, these concepts could be read as part of the principled oscillations described above, e.g. as giving stronger weight to national ethe;[150] but the kind of political discourse surrounding the reform of the ECtHR suggests that they also constitute a way of exerting pressure on the Court to conform to the positions of some States parties for less-than-principled reasons.[151]

With this context in mind, it is often said that the use of European consensus will contribute to the ECtHR's "legitimacy" in the sense of gaining or retaining the support of the States parties:[152] besides its democratic credentials, a further rationale adduced in its support is therefore its (purported) *legitimacy-enhancement*. Ultimately, this approach to consensus sees it as a *strategic* move to deal with the non-ideal conditions and power constellations within which the ECtHR finds itself.[153]

Within the Koskenniemian framework discussed above, strategic elements are just as likely to motivate moves between descending and ascending patterns of justification as more principled considerations are; if anything, particularly for the kind of "pragmatic middle-ground" which European consensus exemplifies, "strategic action" is assumed to be the relevant

147 Mikael Rask Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?," (2018) 9 *Journal of International Dispute Settlement* 199 at 221.

148 For a more long-term overview, see Ed Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?," (2016) 36 *Human Rights Law Journal* 261.

149 Most notably in terms of positive law, Protocol No. 15 to the ECHR will add a reference to the margin of appreciation to the ECHR's Preamble.

150 See, in the context of the reform process, Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" at 484; and, more generally, Chapter 8, IV.

151 Critically e.g. James A. Goldston and Shirley Pouget, "The Copenhagen Declaration: How Not to "Reform" the European Court of Human Rights," (2018) *European Human Rights Law Review* 208.

152 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 143.

153 See Chapter 9, II.5.

(though often undisclosed) rationale.[154] Strategy is introduced, in accordance with the radical indeterminacy of law, as a point of contrast to the ostensible "constraining force of the decision process"[155] – to emphasise, in other words, that decisions are not "produced by law".[156] Indeed, once the indeterminacy of law is accepted as a starting point, positing any kind of "principled" counterpoint to strategy seems suspect since it cannot be legally justified without renewed oscillation between descending and ascending argument: "In the search for justifiability, again, every argument is vulnerable to the logic of apology and utopia".[157]

The reason I nonetheless introduce a clear analytical distinction between principled and strategic considerations is to gain a position from which it *becomes possible to also criticise strategic moves*. I do not understand principled considerations as fixed in the sense of being mandated by any kind of legal constraint; but the indeterminacy of formal legal argument does not imply the equal desirability of all substantive results proposed.[158] Accordingly, my point is merely that, *whatever* the decision as to the "best" judgment in substance is based on in ideal terms (e.g., morality-focussed or ethos-focussed considerations), this can and should be distinguished from strategic considerations which might prompt an institution such as a court to make strategic concessions.[159] Departing from principle for reasons of strategy may be a desirable course of action in some cases – but it need not be, and this is a question worth discussing, however difficult it may be.

I adopt this framework, in other words, not due to any belief that it is somehow ontologically grounded or an analytical necessity, but because of the effects I hope it will have with regard to the debates surrounding European consensus.[160] Succinctly put, I want to introduce a sense that the rationale for making use of consensus matters – it matters, for example,

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154 Koskenniemi, *From Apology to Utopia*, at 598 (in footnote 98).

155 Ibid.

156 Ibid., 570; see also e.g. Kennedy, *A Critique of Adjudication (fin de siècle)*, at 2, where strategy is directly linked to ideological (i.e. non-"legal") considerations.

157 Koskenniemi, *From Apology to Utopia*, at 598.

158 Quite the opposite, in fact: to my mind, critical international legal theory, at least insofar as it is concerned with "legal" results at all, is geared at opening up possibilities so as to allow for "better" decisions in the sense that they do not inadvertently reproduce structural biases; see further Chapter 11, IV.1.

159 See Mann, "Non-ideal Theory of Constitutional Adjudication" at 40.

160 For the move from whether knowledge is true to what knowledge *does*, see Eve Kosofsky Sedgwick, "Paranoid Reading and Reparative Reading, or, You're So Paranoid, You Probably Think This Essay Is About You," in *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2002) at 124.

whether consensus is given normative force because it reflects the results of democratic procedures within the States parties, as discussed above, or because it is regarded as a strategy to influence the future behaviour of the States parties, attempting to retain their support and encourage implementation of the ECtHR's judgments. My sense is that academic commentary on European consensus is increasingly conflating the two – if not explicitly, then at least in the sense that the ECtHR's legitimacy is regarded as indispensable and the use of consensus is, in turn, considered a crucial way of retaining that legitimacy.[161] Because the ECtHR commonly refers to consensus without specifying its rationale for doing so, it furthers or at least does not counteract this tendency.

This is the second sense in which I worry that European consensus may constitute too much of a compromise – it is taken to embody non-ideal considerations, and strategic concessions in particular, in such a way that counterarguments to the idealisations of a pan-European ethos are derided as "los[ing] touch with reality".[162] Strategic concessions as such are not, I think, inherently problematic; but blurring the lines between ideal and non-ideal theory in such a way that they become well-nigh indistinguishable in the fulcrum of European consensus and leave little room for contestation may well be. The perspective of legitimacy provides only for a form of "pseudo-normativity".[163] To compromise by giving it too prominent a role in human rights adjudication runs the risk of effectively minimising the emancipatory potential of the ECHR and lending credence to critical assessments that "[g]overnments have taken power over the idea of 'human rights' without really surrendering to them".[164]

5. The Indeterminacy of Processes of Justification

To tie up this section, let me return once more to the definition of European consensus which I offered above: consensus as a form of comparative

161 See Chapter 10.

162 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 117-118; for further examples in this vein, see Chapter 10, III.3.

163 Martti Koskenniemi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity," (2011) 26 *International Relations* 3 at 18; see also Martti Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism," (2003) 7 *Associations* 349 at 372.

164 Philip Allott, *Eutopia. New Philosophy and New Law for a Troubled World* (Cheltenham: Edward Elgar, 2016), at 228.

legal reasoning which refers vertically to the positions taken by the States parties to the ECHR, viewed through the prism of collectivity. A crucial part of this definition which I have not so far commented on is the classification of consensus as a kind of "reasoning". I have also spoken of the "use" of consensus, of giving consensus "normative force", or, taking up the ECtHR's formulation in *Demir and Baykara*,[165] of consensus as a "relevant consideration". A common and similarly ambiguous starting assumption is that consensus constitutes a *method of interpretation*.[166] In this subsection, I would like to briefly reflect more explicitly on what these formulations refer to.

The traditional dichotomy in this regard is between processes of discovery and processes of justification.[167] The prior describes the deliberation among the ECtHR's judges leading up to the decision finally announced in the form of a judgment. With regard to European consensus, we know that, as a general matter, comparative studies which form the basis of consensus-type arguments are carried out upon request from the judge-rapporteur by the ECtHR's Research Division.[168] Accordingly, European consensus forms part of the ECtHR's reasoning in the sense that it is included in the judges' deliberations before a decision is reached. More specific information (especially with regard to individual decision-making processes) is

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165 Supra, note 15.

166 This, too, is reflected in *Demir and Baykara*, see ibid.; see also e.g. Vassilis Tzevelekos and Panos Kapotas, "Book review of Dzehtsiarou, 'European Consensus'," (2016) 53 *Common Market Law Review* 1145 at 1145; Fiona de Londras and Kanstantsin Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights," (2015) 15 *Human Rights Law Review* 523 at 541; Rozakis, "The European Judge as Comparatist" at 270; Maija Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights," (2012-2013) 23 *Finnish Yearbook of International Law* 73 at 79; contrast Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions*, at 133, describing consensus as "a method of *justification* rather than a method of *interpretation*" (emphases in original).

167 Richard A. Wasserstrom, *The Judicial Decision. Toward a Theory of Legal Justification* (Stanford: Stanford University Press, 1961), at 27; for a similar distinction see Niklas Luhmann, *Recht und Automation in der öffentlichen Verwaltung. Eine verwaltungswissenschaftliche Untersuchung* (Berlin: Duncker & Humblot, 1966), at 51.

168 See in more detail Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 86-88; Dzehtsiarou also introduces consensus as "a tool of interpretation" which "the ECtHR uses *in its decision-making*" (ibid., at 1, emphasis added) and states that it "supports the Court in *finding* the meaning of the Convention rights" (at 153, emphasis added).

generally unavailable, however, due to the confidentiality of deliberation.[169]

The process of justification, by contrast, refers to the reasons put forward in the public sphere to support the ECtHR's decisions, specifically the reasoning it offers as part of its judgments. Particularly in response to legal realist critiques which stressed the influence of non-legal factors ("politics", "ideology", "career interests", etc.) within the process of discovery, the process of justification has often been presented as the more relevant aspect of adjudication. For one thing, given the confidentiality usually associated with the process of discovery, the public justification offered for judicial decisions is often all we have to go on, as it were.[170] More foundationally, and partly as a consequence of this, discovery and justification are considered functionally distinct: "A judicial opinion is not an institutional record documenting a mental process, but rather an elaborated ratiocination of a decision through reasons considered valid and appropriate", inter alia to expose it "to evaluation and contestation on its own terms".[171]

As categorical as these distinctions may appear in theory, it is worth noting that there are also multiple points of contact. For example, one might argue that there is, legal realist critiques notwithstanding, an expectation that the justification for a decision will, by and large, be a good faith depiction of the grounds which actually motivated it within the process of discovery. Conversely, concerns about its justifiability will reflect back on the kind of deliberations which lead to the decision in the first place.[172] Insofar as the use of European consensus is concerned, the ECtHR itself has occasionally drawn explicit connections – as when it noted, in the justification for its decision in *Kafkaris v. Cyprus*, that "*[i]n reaching its decision the Court has had regard* to the standards prevailing amongst the member States

169 Rule 22 (1) Rules of the Court.

170 MacCormick therefore speaks of "at least ostensibly justifying reasons": Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 14-16.

171 Mann, "Non-ideal Theory of Constitutional Adjudication" at 25; see also Joxerramon Bengoetxea, Neil MacCormick, and Leonor Moral Soriano, "Integration and Integrity in the Legal Reasoning of the European Court of Justice," in *The European Court of Justice*, ed. Gráinne de Búrca and J.H.H. Weiler (Oxford: Oxford University Press, 2001) at 44.

172 See generally Andreas von Arnauld, "Zur Rhetorik der Verhältnismäßigkeit," in *Verhältnismäßigkeit*, ed. Matthias Jestaedt and Oliver Lepsius (Tübingen: Mohr Siebeck, 2015) at 282-283; Robert Alexy, *Theorie der juristischen Argumentation*, 7th ed. (Frankfurt a.M.: Suhrkamp, 2012), at 282.

of the Council of Europe":[173] in other words, it mentioned its process of discovery as part of its process of justification.

In the context of comparative reasoning more broadly, it is generally acknowledged that the comparative materials mentioned during the process of justification form only a small part of those considered during the process of discovery.[174] Legal realist critiques have therefore re-emerged under the heading of "cherry-picking" – roughly speaking, the charge that comparative references are broadly considered during the process of discovery but cited only opportunistically within the process of justification, i.e. insofar as they cohere with the result advocated for by the judges.[175] However, while the notion of "cherry-picking" is sometimes mentioned in discussions of European consensus,[176] the brunt of the debate has been elsewhere. After all, a further point which distinguishes consensus from comparative reasoning more generally is the *regularity* with which it is referred to within the ECtHR's judgements – to the point that high-profile judgments which deal with general issues but do not mention consensus stand out and are immediately seized upon for criticism.[177]

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173 ECtHR (GC), Appl. No. 21906/04 – *Kafkaris v. Cyprus*, Judgment of 12 February 2008, at para. 101 (emphasis added).

174 Stefan Martini, *Vergleichende Verfassungsrechtsprechung. Praxis, Viabilität und Begründung rechtsvergleichender Argumentation durch Verfassungsgerichte* (Berlin: Duncker & Humblot, 2018), at 81.

175 Richard A. Posner, "The Supreme Court 2004 Term. Foreword: A Political Court," (2005) 119 *Harvard Law Review* 32 at 88; Antonin Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts," (2004) 98 *Proceedings of the American Society of International Law* 305 at 308.

176 Janneke Gerards, "The European Court of Human Rights and the National Courts: Giving Shape to the Notion of 'Shared Responsibility'," in *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law. A Comparative Analysis*, ed. Janneke Gerards and Joseph Fleuren (Cambridge et al.: Intersentia, 2014) at 45; Senden, *Interpretation of Fundamental Rights*, at 127-128; Shai Dothan, "The Optimal Use of Comparative Law," (2014) 43 *Denver Journal of International Law and Policy* 21 at 39.

177 The chamber judgment in ECtHR (Second Section), Appl. No. 30814/06 – *Lautsi v. Italy*, Judgment of 3 November 2009 is exemplary of this: see e.g. the reaction by Zoé Luca, "Case of Lautsi v Italy. Religious Symbols in Public Schools and the (Lack of) Margin of Appreciation," (2010) 17 *Maastricht Journal of European and Comparative Law* 98; for criticism from within the ECtHR itself, see e.g. ECtHR (GC), Appl. No. 54012/10 – *Mihalache v. Romania*, Judgment of 8 July 2019, concurring opinion of Judge Pinto de Albuquerque, at para. 10; see generally on the kind of case in which consensus is used supra, I.

Therefore, while the "selective use" of consensus can occasionally be criticised,[178] it is not usually the main point of interest. The primary focus, instead, lies on *how* consensus is used. How is the prism of collectivity applied to vertically comparative law, i.e. when does lack of consensus turn into consensus?[179] Which comparative materials form the basis of this evaluation?[180] What are the criteria for comparison and which conclusions are drawn from this?[181] How is consensus set in relation to other forms of reasoning within the ECtHR's judgments?[182] All of these questions are discussed by reference to the ECtHR's judgments in which "reliance [on comparative materials] is made expressly",[183] i.e. in relation to the process of justification.[184] Even when different rationales for the use of European consensus are at issue, as in the oscillation between strategy and principle mentioned above, these rationales may not be explicit within the ECtHR's judgments but they constitute a meta-justification for the use of consensus, which *does* appear explicitly. Insofar as I do not specify otherwise, then, my primary focus in what follows will be on processes of justification rather than discovery.

This brings us back, finally, to the Koskenniemian framework, which likewise focusses on justification. Koskenniemi takes legal realist critiques and the resulting distinction between processes of discovery and processes of justification as his starting point and aims to demonstrate that *even* processes of justification provide *only* for a formal language or "grammar" but do not produce substantive outcomes.[185] Hence the claim that international law is radically indeterminate as a consequence of contradictory ascend-

178 See e.g. Paul Johnson, *Homosexuality and the European Court of Human Rights* (Abingdon: Routledge, 2013), at 82, citing ECtHR, Appl. No. 36515/97 – *Fretté v. France*, Judgment of 26 February 2002 (which makes use of consensus) and ECtHR (GC), Appl. No. 43546/02 – *E.B. v. France*, Judgment of 22 January 2008 (which "ignored" it).

179 See Chapter 5.

180 See Chapter 6.

181 See Chapter 7.

182 See Chapter 8.

183 Legg, *The Margin of Appreciation*, at 131.

184 See also R. St. J. Macdonald, "The Margin of Appreciation," in *The European System for the Protection of Human Rights*, ed. R. St. J. Macdonald, Franz Matscher, and Herbert Petzold (Dordrecht: Nijhoff, 1993) at 123.

185 Koskenniemi, *From Apology to Utopia*, at 25 and 570; see also Korhonen, "New International Law: Silence, Defence or Deliverance?" at 10; Thomas Skouteris, "Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship," (1997) 10 *Leiden Journal of International Law* 415 at 418-419.

ing and descending patterns of justification, rather than in some meaningful sense "objective": "International legal discourse is incoherent as it incorporates contradictory assumptions about what it is to argue objectively about norms".[186]

It may seem rather trivial to transfer this framework to the ECHR, albeit with the modifications discussed above, and thus to insist on indeterminacy in the context of human rights – while the radical implications of the indeterminacy thesis for central tenets of liberalism, and by extension for the concept of human rights, certainly remain underappreciated,[187] human rights *are* at least commonly perceived as particularly "vague" or "abstract" and in that more limited sense indeterminate.[188] Yet not only is there a world of differences between these perspectives on indeterminacy; my sense is also that in any case, perhaps paradoxically, European consensus emerges as an *attempt to reinstate a kind of objectivity* within the ECtHR's processes of justification even if or rather precisely *because* they are otherwise acknowledged to be relatively indeterminate.[189] It is claimed, for example, that any "departure from the solutions supported by [consensus] is profoundly problematic":[190] here, consensus seems to be conceived of as a factor external to the ECtHR's judges,[191] binding upon them and somehow predetermining the substantive result of any given case, not merely a formal means of articulation within the grammar of regional human rights law.

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186 Koskenniemi, *From Apology to Utopia*, at 63.

187 Ntina Tzouvala, "New Approaches to International Law: The History of a Project," (2016) 27 *European Journal of International Law* 215 at 229; see also Ntina Tzouvala, *Capitalism as Civilisation. A History of International Law* (Cambridge: Cambridge University Press, 2020), at 35.

188 See supra, I., particularly note 12; for the move from the "truism" of "linguistic openness" to a stronger sense of indeterminacy, see Koskenniemi, "The Effect of Rights on Political Culture" at 147; more generally on different approaches to indeterminacy Cameron A. Miles, "Indeterminacy," in *Concepts for International Law. Contributions to Disciplinary Thought*, ed. Jean d'Aspremont and Sahib Singh (Cheltenham: Edward Elgar, 2019); in the context of human rights, see also Frédéric Mégret, "Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes," in *New Approaches to International Law: The European and American Experiences*, ed. José María Beneyto and David Kennedy (The Hague: T.M.C. Asser Press, 2012), nothing that human rights as a body of law "does not even try to have the pseudo rigidity of rules".

189 On different senses of objectivity, see e.g. Chapter 3, II., Chapter 5, I. and V., and Chapter 10, III.2.

190 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 130.

191 See also Chapter 5, V.

By disentangling various perspectives on European consensus as well as different rationales for using it, I hope to counteract this tendency. Echoing Koskenniemi, my aim is thus to free legal actors from the preconception that they are constrained by the law – or by (a certain understanding of) European consensus – which not only gives them "a mistaken picture of the epistemic standing of their beliefs but also of the possibilities for transformative action",[192] as well as downplaying their own responsibility for the decisions they reach. Differently put, in the specific context of this study: my purpose is to underline that neither consensus (all its tempting compromises notwithstanding) nor other traditional forms of legal reasoning should exhaust the imaginative space which human rights are capable of opening up.[193]

V. *Outline of the Following Chapters*

The remaining chapters will take up and elaborate on the argument roughly traced above. I begin on the level of principle, juxtaposing the morality-focussed perspective and the ethos-focussed perspective. Chapter 2 introduces the prior: its criticism of European consensus as an infringement on prepolitical human rights, but also its less starkly dismissive attitude in cases involving the spur effect. Chapter 3 contrasts this approach with that of the ethos-focussed perspective, particularly its insistence that a moral-cognitive epistemology falls prey to widespread disagreement about rights and that ethical-volitional approaches are therefore more appropriate. I trace the move from individual national ethe to a pan-European ethos as exemplified by European consensus, and connect it to the internationalist commitments implied by institutionalising a regional system of human rights protection. Grounding normativity in a pan-European ethos, however, also raises difficult questions as to how a common European identity can be identified without significant homogenisation.

Frédéric Mégret has noted how apology and utopia are not only "ideal conceptual parameters of international jurisprudence", but also often represent "embodied audiences", with e.g. governments tending towards apology while civil society organisations tend towards utopia.[194] Much the same is true of the morality-focussed and ethos-focussed perspectives with

192 Koskenniemi, *From Apology to Utopia*, at 538.
193 See Chapter 11.
194 Mégret, "The Apology of Utopia" at 483.

regard to different groupings within society at large, but also with regard to academic literature: some authors come down very strongly in favour of one or the other and thus, in a sense, embody a relatively "pure" form of that perspective. For all the dangers of "mutual caricature",[195] I think it is useful to begin by taking up these ideal-type accounts, particularly because they exemplify the different starting assumptions which I described above. Nonetheless, I would also emphasise at the outset that most accounts carry elements of different perspectives. By grouping various authors together as proponents of "the" morality-focussed or ethos-focussed perspectives, I do not mean to flatten out important differences between them; the grouping merely serves illustrative purposes.

Chapter 4 provides more nuance in that regard, for it explores the triangular tensions which result between European consensus (based on the notion of a pan-European ethos) and both moral normativity as well as ethical normativity based on individual national ethe. I argue, first, that these tensions cannot be dissolved by means of reconceptualization as it is offered, for example, by the so-called "epistemic" account of consensus. Rather, the differing epistemologies and idealisations involved lead to the kind of oscillation between different perspectives which is by now familiar from the Koskenniemian framework, and which I will demonstrate by reference to the example of core rights. I also discuss the consequences of conceptualising the tensions at issue as triangular, specifically the sense of compromise which arises from the possibility of instrumental allegiances between normativity grounded in a pan-European ethos and other forms of normativity, depending on whether the rein effect or the spur effect is operationalised.

The following chapters set out to assess how these triangular tensions play out within the case-law of the ECtHR. I should note immediately that such an assessment is likely to exhibit a selection bias at least in some form[196] – given the large number of cases decided by the ECtHR and the recurring reference to European consensus, it has become well-nigh impossible to provide a truly exhaustive analysis (to say nothing of a complementary analysis of cases *not* involving consensus). In any event, my interest is primarily in the tensions inherent in the ECtHR's reasoning, not in quan-

195 Cécile Laborde and John Maynor, "The Republican Contribution to Contemporary Political Theory," in *Republicanism and Political Theory*, ed. Cécile Laborde and John Maynor (Malden, Mass.: Blackwell, 2008) at 2.

196 See Tzevelekos and Kapotas, "Book review of Dzehtsiarou, 'European Consensus'" at 1148.

titative analysis. Still, the way in which consensus is used and hence its place within these tensions may shift within different lines of case-law or according to subject-matter. There is room for further, more specific studies on this point; for present purposes, I broadly take cases spanning a wide range of contexts and Convention provisions into account.[197] Given the controversies most often raised in the context of consensus, however, I will take a special interest in minority rights, and cases involving the right to private life under Article 8 ECHR, in particular, will occupy a prominent role.[198]

A preliminary difficulty in approaching the case-law with an aim to investigating tensions within the ECtHR's reasoning is that the Court only rarely presents European consensus in such a way that it conflicts with the substantive result of the case. I therefore begin by exploring the flexibility inherent in the construction of consensus itself and the way in which this relates to morality-focussed and ethos-focussed considerations. Chapter 5 considers numerical issues: how many States parties are necessary to identify (lack of) consensus, and accordingly to operationalise the rein effect or spur effect? I argue that the conventional account of consensus involves an asymmetry in favour of the rein effect which reflects the concerns of the ethos-focussed perspective, but that other cases, particularly those involving "trends", incorporate more morality-focussed elements into the establishment of European consensus. Chapter 6 further complicates the picture by showing how not only domestic law, but also international law may be considered part of European consensus, and how this may lead to a shift in emphasis within the triangular tensions at issue. Chapter 7 picks up the crucial but little discussed question of how to frame the issue to which consensus is applied, particularly the level of generality at which consensus is referred to and how this relates to (whatever is construed as) the issue before the ECtHR. I suggest that shifts in the level of generality at which consensus is used, too, can be connected to the triangular tensions involved in the ECtHR's reasoning or, as a more general framework within liberal theory, to the notion of a reflective equilibrium – which has the ad-

197 See the overview in Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 17-20.

198 The particular importance of consensus in the context of the limitation clauses of Articles 8-11 has often been noted: see e.g. Aaron A. Ostrovsky, "What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals," (2005) 1 *Hanse Law Review* 47 at 50; Brauch, "The Dangerous Search for an Elusive Consensus" at 279.

vantage of disavowing reliance only on one specific interpretation of consensus at a certain level of generality, but remains limited by its coherentist approach.

Chapter 8 broadens the scope of analysis and considers consensus in relation to other doctrines within the ECtHR's case-law, specifically the notion of autonomous concepts and the controversial margin of appreciation. The latter, in particular, showcases the potential for oscillation between a pan-European ethos and either the morality-focussed perspective or individual national ethe. While any perspective can thus be undermined by switching to the alternate epistemologies of another, the juxtaposition of autonomous concepts, on the one hand, and the margin of appreciation, on the other, also demonstrates that an uneasy stability may emerge in practice – not because it is in any sense legally necessary but because certain doctrines gain prominence within the ECtHR's case-law. A strong emphasis on consensus emerges as one of the current hallmarks of said case-law.

As mentioned above, however, my sense is that it is not primarily – or at least not solely – the principled considerations of the ethos-focussed perspective which lead to the naturalisation of European consensus as identifying a clear substantive outcome for the ECtHR to endorse. Rather, the popularity of this line of argument is due in large part to the notion of consensus as legitimacy-enhancement. I tackle this approach in Chapter 9, setting out its background assumptions and core tenets before pondering whether the goal of retaining the support of the States parties can truly be achieved by incremental development of the ECtHR's case-law based on European consensus. I argue that supporting consensus due to its ostensible legitimacy-enhancement constitutes a form of abstract strategizing since it is disconnected from strategic considerations that are specific to any given case.

This has certain advantages and disadvantages, but the primary point which I will focus on is how abstract strategizing relates to the relationship between principle and strategy in conceptualising European consensus. In Chapter 10, I argue that there are persistent tensions between taking a principled stand and allowing strategic concessions, and that the conflation of the two in discussions on European consensus contributes to a normalisation of strategic concessions which severely limits the emancipatory potential of human rights. Accordingly, I close with a plea to move away from the notion of consensus as legitimacy-enhancement – not so as to prevent strategic concessions entirely, but so as to become more aware of their costs and to acknowledge the responsibility of the ECtHR's judges,

here as elsewhere, to *decide* where to take human rights rather than hiding behind certain understandings of what is deemed "realistic".

The red thread running through this study will be a focus on the contingent nature of European consensus – contrary to claims that it is an "objective" or "natural" method to use, "inherent" in regional human rights law, or "realistically" a necessary point of reference, my goal is to open up space for rethinking human rights in more transformative ways. This can be considered a rather standard approach to denaturalising current institutional practices, and part and parcel of many critically minded analyses in international law and elsewhere.[199] The question then follows, however, where a critique of European consensus should take us. There is a very real danger of co-optation here – that an argument against (the objectivity of) consensus might be taken to be an argument in favour of other forms of legal reasoning, and ultimately amount to little more than a plea for a slight shift within the ECtHR's processes of justification, otherwise content to leave things to business as usual.

To avoid this impression, I shift gears in the final chapter and move from an argument geared primarily at intervening in relatively specialised debates on European consensus to a broader consideration of the role of human rights courts such as the ECtHR within processes of social transformation. I provide a brief overview of the way in which the indeterminacy thesis outlined above can be connected to political critiques of human rights, of the consequences of such critiques for the way in which we approach legal and specifically judicial discourse, and specifically of possible uses of vertically comparative law beyond the narrow ambit of European consensus which distance themselves from the argumentative structures otherwise prevalent in regional human rights law. I suggest that vertically comparative law could be understood as what I call a "reflective disruption of equilibrium" – a way of foregrounding inconsistencies and paradoxes within European public culture so as to unsettle concepts otherwise left unquestioned. While by no means a panacea, my hope is that this mode of reasoning might create imaginative space for considering a more future-oriented and open jurisprudence of regional human rights.

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199 See Susan Marks, "False Contingency," (2009) 62 *Current Legal Problems* 1, also noting its limits; for further reflections on the limits of denaturalization *as such*, see Jens T. Theilen, Isabelle Hassfurther, and Wiebke Staff, "Towards Utopia - Rethinking International Law," (2017) 60 *German Yearbook of International Law* 315 at 328.