Chapter 7: Establishing Consensus (III): Different Levels of Generality

I. Introduction

Establishing whether or not a consensus among the States parties can be made out, I have argued, is no easy matter. I pointed out, in Chapters 5 and 6, several ways in which the tensions between the morality-focussed perspective and the ethos-focussed perspective influence this assessment – in particular, by virtue of the shifting boundary between the rein effect and the spur effect (lack of consensus or trend in favour of the applicant), as well as the choice of sources (consensus based primarily on domestic or international law). The notion of commonality introduced in Chapter 1, it transpires, is hardly ideologically neutral.

A further, perhaps even more foundational way in which accounts of commonality and difference across the States parties to the ECHR may differ is by virtue of their orientation towards different questions: which issues within the legal systems of the States parties, precisely, are investigated with a view to establishing (lack of) European consensus? One of the ECtHR's standard formulations on the role of consensus in determining the margin of appreciation makes the possibility of different approaches particularly explicit: the Court speaks of lack of consensus "either as to the relative importance of the interest at stake or as to the best means of protecting it" as a relevant factor.[1046] It specifies, in other words, at least two different issues which might be considered through the lens of vertically comparative law: the relatively general issue of how important a certain interest is considered to be, on the one hand, and the more specific issue of which means are adopted to protect it, on the other. This formulation thus makes clear that one can conceive of different objects to which (lack of)

1046 ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, at para. 67; for further cases involving this formulation, as well as the connection to the margin of appreciation more generally, see Chapter 8, III.2.

consensus pertains.[1047] Differently put, it matters *how the issue is framed* since it will influence what exactly to compare.[1048]

It will usually be "possible to trace as many similarities as differences [between the States parties], depending on the precise criterion chosen for comparison"[1049] – therefore, the criterion chosen may have a crucial and often decisive impact on whether commonality among the States parties is discovered and whether the rein effect or the spur effect of consensus is operationalised. This remains a somewhat underappreciated issue in general,[1050] but I will focus, for present purposes, on only one aspect of it: the fact that the vertically comparative analysis which forms the basis of European consensus can be conducted *at different levels of generality*. I will mostly leave aside, therefore, discussions as to the appropriate way of framing the issue in non-discrimination cases involving Article 14 ECHR, or cases in which there is debate as to whether the comparative materials relied on by the ECtHR cover the topics it claims they do.[1051]

With regard to the level of generality at which consensus is approached, a common approach in the ECtHR's case-law – and often the unspoken premise underlying accounts of European consensus by academic commentators[1052] – is to identify the issue before the Court[1053] in binary terms (e.g., does sterilisation as a precondition of legal gender recognition violate the right to private life or not) and, with a certain sense of self-evidence, to

1047 Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 196.

1048 Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 496; Senden, *Interpretation of Fundamental Rights*, at 130; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 152.

1049 Gerards, "Giving Shape to the Notion of 'Shared Responsibility'" at 45.

1050 Although one of the merits of the recent edited volume on European consensus has been to put more of a spotlight on it: see the summary in Gearty, "Building Consensus on European Consensus" at 460-461.

1051 Both of these issues are well illustrated in ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Standlmayer; for the prior point, see also briefly Chapter 5, IV.

1052 See Chapter 1, III.

1053 This issue might itself be identified in different ways, e.g. from different angles or at different levels of generality. I will mostly bracket this question for present purposes, but see Chapter 5, IV. for a discussion of ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others* which clearly indicates how a non-discrimination perspective may change the way in which the issue before the Court is framed.

then tailor the level of generality of the comparative materials so that it coheres with this issue (e.g., do the States parties retain sterilisation as a precondition of legal gender recognition or not).[1054] One might think of it as a Goldilocks level of generality: neither too general nor too specific, but "just right" for the case at issue. Sometimes this element of "just right" shines through in the ECtHR's formulations. For example, in *De Tommaso v. Italy*, the Court provided a comparative overview which aims to ascertain whether or not the States parties' laws make provision for "measures comparable to those applied in Italy in the present case".[1055]

Yet while this is a common approach, probably even the dominant approach within the ECtHR's case-law, it by no means exhausts the possibilities and it is certainly not the only way in which the ECtHR conducts its vertically comparative analysis; indeed, the ECtHR itself seems well aware of the fact that it can tailor its comparative analysis towards different objects.[1056] I will begin this chapter, therefore, by demonstrating the Court's use, within its processes of justification,[1057] of European consensus at various different levels of generality (II.). This overview also shows how the different levels of generality may relate in different ways to various sources of consensus, particularly to consensus based on domestic law and consensus based on international law.

It quickly becomes apparent that the possibility of moving between different levels of generality contributes massively to the malleability of estab-

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1054 The example is from ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 122.

1055 ECtHR (GC), Appl. No. 43395/09 – *De Tommaso v. Italy*, Judgment of 23 February 2017, at para. 69; the Goldilocks element also comes through quite clearly in ECtHR (GC), Appl. No. 26374/18 – *Guðmundur Andri Ástráðsson*, at para. 151, where the Court examines the States parties' laws at different levels of generality but notes that the comparative survey of the specific requirement at issue (compare at para. 224) is "particularly relevant to the present case".

1056 See e.g. ECtHR (GC), Appl. No. 35289/11 – *Regner v. the Czech Republic*, Judgment of 19 September 2017, at para. 70, where the Court discusses various aspects of national security and classified access to information before turning "*more specifically* to the refusal or the withdrawal of security clearance granting courts access to confidential documents" (emphasis added).

1057 For the distinction between processes of discovery and justification, see generally Chapter 1, IV.5.; for an argument that, in some cases at least, "the actual margin of appreciation is determined at a more concrete level [of generality with regard to (lack of) consensus] than is explained in the Court's reasoning", see Henrard, "How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion" at 400.

lishing (lack of) consensus which preceding chapters have already touched upon. As in those chapters, I want to argue that the ECtHR's use of European consensus at different levels of generality need not necessarily be aleatory, but can rather be understood as an expression of the triangular tensions between different kinds of normativity. The second half of this chapter is dedicated to exploring this connection. I begin by showing how the move to a higher level of generality as the basis for the consensus enquiry may either create space for morality-focussed reasoning or, conversely, for emphasis on the national ethos of the respondent State (III.1.). I then consider the prior possibility in more detail by discussing ways in which consensus might be referred to at different levels of generality within the Rawlsian framework of reflective equilibrium (III.2.). The merit of such a framework, I suggest, is that it moves away from the unquestioning reliance on consensus at the Goldilocks level of generality; but the coherentist orientation of frameworks such as reflective equilibrium also threatens to underestimate and hence obscure the contradictory nature of the patterns of argument involved (IV.).

II. Levels of Generality in the Court's Use of European Consensus

I have already mentioned the assumption of a Goldilocks level of generality underlying many accounts of European consensus. But for all that the ECtHR often does tailor its use of consensus to the level of generality of whatever it takes to be the relevant issue in the case before it, there are also numerous instances of comparative surveys being conducted or analysed at different levels of generality,[1058] sometimes within the same judgment. For example, in *Bărbulescu v. Romania*, the ECtHR mentioned, first, European consensus as to the right to secrecy of correspondence "in general terms";[1059] second, lack of consensus as to how the specific issue of monitoring employees at their workplace should be regulated;[1060] but, third, a trend to require that the data subject be informed before any monitoring

1058 Van Drooghenbroeck, *La Proportionnalité dans le Droit de la Convention Européenne des Droits de l'Homme*, at 533; Gerards, *General Principles of the European Convention on Human Rights*, at 105 speaks of "uncertainty regarding the level of abstraction".

1059 ECtHR (GC), Appl. No. 61496/08 – *Bărbulescu v. Romania*, Judgment of 5 September 2017, at para. 52.

1060 Ibid., at para. 118.

activities are carried out.[1061] In *Opuz v. Turkey*, the Court noted that "there seems to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints", but it did draw on vertically comparative law to establish "certain factors that can be taken into account in deciding to pursue the prosecution".[1062]

In some cases, the ECtHR builds on aspects which are *more specific* than (what was arguably) the primary issue before it. To stay with the example of trans rights mentioned above: in earlier cases, the focus was not yet whether certain preconditions of legal gender recognition are permissible or not, but rather whether there is a right to such recognition *at all*. In the case of *Sheffield and Horsham v. the United Kingdom*, the ECtHR had argued that there was a lack of consensus "as to how to address the repercussions" of legal gender recognition, for example with regard to areas of law "such as marriage, filiation, privacy or data protection" or with regard to situations in which trans people might be obliged to reveal their previously assigned legal gender.[1063] The comparative analysis was thus conducted at a rather specific level relative to the question before the Court (i.e. the right to legal gender recognition as such, not its specific repercussions),[1064] but nonetheless served to establish a lack of consensus and led to the rein effect: no violation of the Convention was found.

This conclusion was famously reversed four years later in *Christine Goodwin v. the United Kingdom*, which exemplifies the different levels of generality available to the ECtHR in its comparative endeavours. It now left aside the lack of European consensus regarding "the resolution of the legal and

1061 Ibid., at para. 132.

1062 ECtHR, Appl. No. 33401/02 – *Opuz*, at para. 138; the ECtHR went on to argue (at para. 143) that the Turkish authorities had taken too one-sided an approach in light of the variety of factors identified; for use of consensus with regard to different factors within proportionality and balancing, see e.g. ECtHR (GC), Appl. Nos. 40660/08 and 60641/08 – *von Hannover v. Germany (No. 2)*, Judgment of 7 February 2012, at paras. 106 and 110; ECtHR (GC), Appl. No. 80982/12 – *Muhammad and Muhammad v. Romania*, Judgment of 15 October 2020, at paras. 148-150.

1063 ECtHR (GC), Appl. Nos. 22985/93 and 23390/94 – *Sheffield and Horsham*, at para. 57; in a similar vein, see e.g. ECtHR (GC), Appl. No. 42202/07 – *Sitaropoulos and Giakoumopoulos v. Greece*, Judgment of 15 March 2012, at paras. 74-75, discussing different "arrangements" for voting from abroad; similarly ECtHR, Appl. No. 19840/09 – *Shindler*, at para. 115.

1064 See critically Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 365-367.

practical problems posed" (the "repercussions" of *Sheffield and Horsham*, one surmises) and relied instead on international trends in favour of "increased social acceptance" of trans persons (very high level of generality) and of their "legal recognition" (mid-level generality, precisely the question at issue).[1065] While the judgment in *Christine Goodwin* is somewhat unusual in that it relied primarily on trends outside Europe,[1066] other cases also refer to *vertically* comparative materials which are *more general* than (what was arguably) the issue before the ECtHR. For example, a number of cases establish the great importance of the best interests of the child in custody cases by reference to European consensus, thus taking a principle of a relatively high level of generality as a "common point of departure" among the States parties which then also constitutes the starting point for the ECtHR's consideration of the more specific issue before it.[1067]

A number of cases involving consensus at a relatively high level of generality have gained notoriety in part because of just how general the lack of consensus identified by the ECtHR was. Thus, in the case of *Vo v. France*, the Court held that "there is no European consensus on the scientific and legal definition of the beginning of life",[1068] a point later echoed in *A, B and C v. Ireland*.[1069] Despite being anchored in the kind of vertically comparative legal reference to "[e]xisting legislation in the Member States"

1065 ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*, at para. 85.

1066 See Chapter 5, IV.

1067 ECtHR, Appl. No. 22028/04 – *Zaunegger v. Germany*, Judgment of 3 December 2009, at para. 60 which also, however, refers to the more specific aspect of "scrutiny by the national courts" in that regard, which was crucial in the case at issue; see similarly ECtHR, Appl. No. 35637/03 – *Sporer v. Austria*, Judgment of 3 February 2011, at para. 87; the Court has repeatedly noted the "broad consensus" that the best interests of the child are paramount: see e.g. ECtHR (GC), Appl. No. 41615/07 – *Neulinger and Shuruk*, at para. 135; ECtHR, Appl. No. 27496/15 – *Mohamed Hasan v. Norway*, Judgment of 26 April 2018, at paras. 123 and 149; ECtHR, Appl. No. 70879/11 – *Ilya Lyapin v. Russia*, Judgment of 30 June 2020, at para. 44; somewhat more specifically see also ECtHR (GC), Appl. No. 37283/13 – *Strand Lobben and Others v. Norway*, Judgment of 10 September 2019, at para. 207; children's rights have also been emphasised based on consensus in other contexts, see e.g. ECtHR (GC), Appl. No. 36391/02 – *Salduz v. Turkey*, Judgment of 27 November 2008, at para. 60 on "the fundamental importance of providing access to a lawyer where the person in custody is a minor" based on the "relevant international law materials".

1068 ECtHR (GC), Appl. No. 53924/00 – *Vo*, at para. 82; see further on this case Chapter 5, III.2. and Chapter 8, II.

1069 ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at para. 237; see further infra, notes 1110-1120.

which is typical of European consensus,[1070] this claim is made at such a high level of generality as to have been described as relating to the "philosophical premises" of the case.[1071]

In these cases as in some others which I will mention below, the turn to lack of consensus at a high level of generality served to operationalise the rein effect and thus favoured the respondent State. Conversely, however, in some judgments the reliance on consensus at a high level of generality established principles which, as in *Christine Goodwin*, mitigated in favour of the applicant – e.g., "consensus among Contracting States to promote economic and social rights"[1072] or "the equality of the sexes" as "a major goal in the member States of the Council of Europe"[1073] – and the ECtHR found a violation of the Convention.

The possibility of approaching vertically comparative reasoning at different levels of generality also lends additional complexity to the tensions which may exist between consensus established primarily by reference to domestic law and consensus established primarily by reference to *international law*, as discussed in the previous chapter. Depending on the kind of materials which are available or which the ECtHR chooses to rely on, several different constellations may occur. On the one hand, international law is sometimes linked to consensus at the level of principles rather than rules, i.e. supplying only "general concepts which underpin legal standards" but no "specific implementing measures".[1074] This seems intuitively plausible in many cases, since norms of international law (like the Convention itself) will often leave States a margin of appreciation in deciding the

1070 See ECtHR (GC), Appl. No. 53924/00 – *Vo*, at para. 40, citing from an opinion of the European Group on Ethics in Science and New Technologies at the European Commission.

1071 Føllesdal, "A Better Signpost, Not a Better Walking Stick: How to Evaluate the European Consensus Doctrine" at 196.

1072 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 84.

1073 ECtHR (Plenary), Appl. Nos. 9214/80, 9473/81 and 9474/81 – *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, at para. 78; see also e.g. ECtHR (GC), Appl. No. 30078/06 – *Konstantin Markin*, at para. 127.

1074 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 13 (for the citation distinguishing rules from principles) and 59 (for the connection between international law and principles, on the one hand, and domestic law and rules, on the other); see also Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 132.

specifics of implementation.[1075] Thus, the ECtHR has sometimes referred to consensus established by reference to international law at a very high level of generality, for example to establish that compliance with Article 4 ECHR (freedom from slavery and forced labour) involves positive as well as negative obligations for the States parties,[1076] or that the protection of health constitutes a legitimate aim in the context of doping controls.[1077]

On the other hand, particularly within human rights law, the question may be whether a certain manner of implementation still falls within that margin or not,[1078] and the requirements of international law may become rather specific – one need only think, for example, of some conventions of the International Labour Organization (ILO) or of the various specialised United Nations treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of Persons with Disabilities. In that vein, the ECtHR relied, inter alia, on ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise and on ILO Convention No. 151 concerning Protection of the right to Organise and Procedures for Determining Conditions of Employment in the Public Service in the case of *Demir and Baykara v. Turkey*.[1079] In cases such as this, consensus based on international law has the ring of a *lex specialis* to it: the ECtHR itself has on occasion referred to the "consensus emerging from *specialised* international instruments".[1080] More specialised need not necessarily mean more specific, but there is certainly an area of overlap: as Eva Brems has put it, "if a State has underwritten certain detailed obligations in one text, the interpretation of a more

1075 I am referring here to a substantive, not a structural margin; see Chapter 8, III.1.

1076 ECtHR, Appl. No. 73316/01 – *Siliadin*, at paras. 85-89; see also on Art. 4 ECHR and norms of international law ECtHR (GC), Appl. No. 60561/14 – *S.M.*, at paras. 279 et seqq.

1077 ECtHR, Appl. Nos. 48151/11 and 77769/13 – *National Federation of Sportspersons' Associations and Unions (FNASS) and Others*, at para. 165.

1078 The development of the case-law on trans rights exemplifies this: having initially acknowledged only a right to legal gender recognition as such, with the "appropriate means of achieving recognition" falling within the States parties' substantive margin (ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*, at para. 93), subsequent case-law has scrutinised various preconditions for legal gender recognition and thus narrowed the substantive margin left to the States parties; see further Theilen, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe" at 378.

1079 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at paras. 37, 44, 100, 122, 148 and 165.

1080 ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 102 (emphasis added).

general text can be oriented in that sense".[1081] This kind of reliance on consensus established by reference to fairly specific norms of international law has played a role in a number of cases before the ECtHR.[1082]

These examples should suffice to illustrate the malleability of the ECtHR's consensus enquiry with regard to the level(s) of generality at which it is conducted. Some of these examples also indicate very clearly that the conclusions drawn from European consensus may differ quite drastically depending on the level of generality which is deemed relevant:[1083] depending on how it frames the issue, the ECtHR may discover anything from a "spectrum of national positions" indicating a lack of consensus, to common ground with the respondent State left sequestered "at one end of the comparative spectrum", and tend towards the rein effect or the spur effect accordingly.[1084] Yet, as several commentators have noted, the ECtHR rarely specifies why it chooses any given level of generality to base its analysis on.[1085] In what follows, I would like to suggest that this

1081 Brems, *Human Rights: Universality and Diversity*, at 421; echoed by Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 46; see also Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 274; finally, see also ECtHR (Plenary), Appl. No. 14038/88 – *Soering*, at para. 88, dismissing an *e contrario* argument to the effect that specifically explicated obligations in other treaties should not be interpreted into the ECHR; but see also ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers*, at para. 106, in which the ECtHR distanced itself from the "more specific and exacting norm regarding industrial action" contained in the European Social Charter.

1082 Senden, *Interpretation of Fundamental Rights*, at 258.

1083 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 366; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 496; Senden, *Interpretation of Fundamental Rights*, at 129-130; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 15; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 151.

1084 Both citations are from ECtHR, Appl. No. 31045/10 – *National Union of Rail, Maritime and Transport Workers*, at para. 91; see also the oscillations e.g. in ECtHR (GC), Appl. No. 74025/01 – *Hirst*, at para. 81.

1085 Janneke Gerards, "Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights," in *Constructing European Constitutional Law*, ed. M. Claes and M. De Visser (Oxford: Hart), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344626>, at 9; Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 366; see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 16-17.

choice relates at least in part to the triangular tensions between the kind of ethical normativity associated with consensus itself (i.e. a pan-European ethos), on the one hand, and individual national ethe as well as moral normativity, on the other.

III. The Implications of Shifting Levels of Generality

1. Different Constellations within Triangular Tensions

One way to approach the implications of shifting levels of generality for these triangular tensions is to discuss how different levels of generality at which European consensus is discussed relate to the ECtHR's conclusions as to the issue before it, and how this in turn bears on other forms of reasoning independent of European consensus. Cases in which consensus is established in such a way that it relates directly to the ECtHR's conclusions are relatively straight-forward, at least when viewed from the ethos-focussed perspective: ethical normativity developed at the level of a pan-European ethos provides an immediate response to the question at hand.[1086] Thus Mónika Ambrus has argued that "the level of abstraction [for the comparison] should defer to the level at which the concrete rights or interests have been formulated",[1087] and Kristin Henrard has similarly held that "the appropriate level to measure consensus is the one that connects most directly to the central matter of a case".[1088]

For example, if the question at issue is deemed to be whether a complete lack of legal gender recognition for trans persons violates human rights, then the comparative analysis would investigate neither the importance accorded to gender identity within law (too general) nor the different preconditions and procedures attached to gender recognition (too specific), but whether or not a possibility of legal gender recognition exists at all within the States parties' legal systems.[1089] This is what I referred to above

1086 By saying this, I do *not* mean to imply that this way of using consensus could predetermine outcomes: at a minimum, the tensions discussed in the preceding chapters would continue to necessitate a variety of choices as to its application.

1087 Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 367.

1088 Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 151.

1089 See supra, notes 1063-1065.

as the Goldilocks level of generality: neither too general nor too specific, but "just right" for the case at issue, and hence understood as being of most direct relevance for it. This sense of immediate relevance no doubt accounts in part for the sense of self-evidence with which the level of generality of the consensus analysis is often tailored towards whatever the issue before the Court is construed as being.

By contrast, when consensus is approached at a relatively high level of generality, then there is a certain disconnect between the claims that can be made on that basis and the more specific conclusions which the ECtHR must ultimately reach. As Rachovitsa has put it in the context of systemic integration, "[t]he higher the degree of abstraction, the lower the impact on the interpretation of the treaty in dispute".[1090] In the spectrum between "the uselessly general and the controversially specific", as Ely memorably put it,[1091] the move from consensus at a general level to more specific conclusions "entails a value judgment" which cannot be justified by reference to the comparative materials themselves.[1092] On the basis of the ethos-focussed perspective, consensus at a high level of generality cannot, therefore, "claim the same degree of persuasive value" as consensus relating directly to the specific issue before the ECtHR.[1093] Though commentators on consensus rarely write from within the tradition of legal realism, it is to the typically realist "distrust of abstraction" that this attitude is indebted.[1094]

1090 Adamantia Rachovitsa, "Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights," (2015) 28 *Leiden Journal of International Law* 863 at 878.

1091 Ely, *Democracy and Distrust. A Theory of Judicial Review*, at 64 (on ostensible societal consensus in the national context).

1092 ECJ, C-411/05 – *Félix Palacios de la Villa v Cortefiel Servicios SA*, Opinion of AG Mazák, 15 February 2007, ECLI:EU:C:2007:106, at para. 91; for a positioning of this citation in relation to consensus-based reasoning, see Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" at 408-409.

1093 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 17; this point is also implied in Glas, "The European Court of Human Rights' Use of Non-Binding and Standard-Setting Council of Europe Documents" at 117.

1094 Kennedy, *A Critique of Adjudication (fin de siècle)*, at 106. The most famous version is probably Holmes's phrasing that "general propositions do not decide concrete cases" (Supreme Court of the United States, *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)); more generally, this approach can

Conversely, proponents of the morality-focussed perspective are likely to welcome assessments of European consensus at a higher level of generality *precisely because* it leaves space for a value judgement in the course of moving from consensus at a general level to more specific conclusions, and therefore leaves a space undetermined by ethical normativity. Daniel Regan has been the most explicit on this point: while he opposes the use of European consensus in its currently predominant form as "incompatible with the Convention's aim of providing protection of certain fundamental rights" by stifling its "normative development",[1095] he suggests that the ECtHR could be "inspired by the general principles of laws of the Contracting States".[1096] Such an approach would be reminiscent of the way in which the European Court of Justice deploys vertically comparative reasoning in its case-law on general principles, with vertically comparative analysis usually restricted to broad principles at a high level of generality, thus leaving ample space for substantive reasoning of the kind preferred by the morality-focussed perspective.[1097] European consensus, in this scenario, provides only a "starting point" for further reasoning based on moral rather than ethical normativity.[1098]

Other commentators have welcomed the use of consensus at high levels of generality less explicitly; but given the space it opens up for the morality-focussed perspective, it nonetheless seems compatible – or, at the very least, *more* compatible – with their approach than consensus geared specifically at the case at hand. For example, George Letsas juxtaposes the use of European consensus (which he opposes) with a "search for 'common values' in international human rights materials".[1099] There are several ele-

be traced back to the Kantian insight that "rules do not spell out the conditions of their own application": see Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," (2006) 8 *Theoretical Inquiries in Law* 9.

1095 Regan, "A Worthy Endeavour?" at 52.

1096 Ibid., 75.

1097 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 402-403; see also Gerard Conway, "Levels of Generality in the Legal Reasoning of the European Court of Justice," (2008) 14 *European Law Journal* 787.

1098 Regan, "A Worthy Endeavour?" at 76; see also supra, note 1067.

1099 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 523; see also Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 115 and 122; the phrasing "common values" is taken from ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 85.

ments at play here, many of which (such as the numerical issues and sources of consensus involved) have been treated over the course of the preceding chapters. But there is also, arguably, an implicit acknowledgement of the permissibility of referring to European consensus *provided that this is done at a high level of generality*. While Letsas's focus is elsewhere, and he styles the reference to "common values" as "common *values*",[1100] one could also emphasise it differently: *common* values.

Within this debate, then, those who favour a strong place for the notion of a pan-European ethos within regional human rights adjudication tend to advocate the use of European consensus in such a way that the level of generality at which the vertically comparative analysis is conducted coheres with whatever is taken to be the main question before the ECtHR: in this way, European consensus gains the most immediate relevance for the outcome of the case. Conversely, proponents of the morality-focussed perspective favour the use of consensus at higher levels of generality since this creates a disconnect between the consensus analysis and the question at issue, creating more space for other kinds of normativity. Both sides of the debate thus commonly assume that consensus, particularly consensus in favour of the applicant, will be "easy to discover at a high level of abstraction" but quickly dissipate with regard to more specific issues:[1101] hence why Letsas, for example, can talk of *common* values at a high level of generality.

In many cases, this assumption of greater agreement at higher levels of abstraction may hold, but it is by no means universally valid. Certain propositions may be consensual only so long as one does scrutinise their underlying, more general rationale too deeply. This scenario is often said to apply, at least to some extent, to the human rights project as a whole: "Yes, we agree on the rights, but on condition that no one asks us

1100 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 523.

1101 Gerards, "Giving Shape to the Notion of 'Shared Responsibility'" at 45; see also Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 16; Tzevelekos and Dzehtsiarou, "International Custom Making" at 323; I have also previously emphasised this scenario in 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 408; in the context of the European Union, see de Búrca, "The Language of Rights and European Integration" at 46; and see generally Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 156.

why".[1102] In a similar vein, one might say that European consensus at a relatively specific level might be based on more general concepts on which there is *less* agreement.

One area within which lack of consensus among the States parties at a high level of generality has often been emphasised by the ECtHR is that of freedom of religion, especially religious attire. For example, the case of *Leyla Şahin v. Turkey* concerned a Turkish ban on religious clothing within universities, which the ECtHR deemed compatible with the right to freedom of religion. The majority opinion argued that a wide margin of appreciation must be accorded where "the relationship between State and religions are at stake", and notably "when it comes to regulating the wearing of religious symbols in educational institutions, especially" – as the comparative legal materials adduced in that case were deemed to illustrate – "in view of the diversity of the approaches taken by national authorities on the issue".[1103] The majority thus focussed on the lack of consensus on religious attire in educational institutions in general, and even connected this issue to the extremely general proposition that it is "not possible to discern throughout Europe a uniform conception of *the significance of religion in society*".[1104] By way of contrast, Judge Tulkens in her dissenting opinion applied a vertically comparative analysis more specifically to the States parties' laws on religious attire *in universities*, and found a consensus in favour

1102 As related by Jacques Maritain in UNESCO, "Human Rights. Comments and Interpretations", UN Doc. UNESCO/PHS/3 (rev.), 25 July 1948, available at <https://unesdoc.unesco.org/ark:/48223/pf0000155042>, at p. I; my reading here is that notions even more general than the already-general formulations of human rights at issue are controversial (e.g. human dignity, the meaning of life, etc.); one might, conversely, also frame this as the general concept of human rights being relatively consensual, with more specific conceptions of human rights being more controversial; since I think my argument in this section holds true in substance regardless of what is regarded as relatively abstract and what as relatively specific, I leave aside any attempt at a clear delineation of whether and how one could or should decide between these different perspectives.

1103 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109; see also e.g. ECtHR, Appl. No. 27058/05 – *Dogru v. France*, Judgment of 4 December 2008, at para. 63.

1104 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109; though the ECtHR does not invoke the phrasing in this case, this could be connected back to lack of consensus on "the relative importance of the interest at stake": see supra, note 1046; critically on this approach as involving "too high a level of abstraction" Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 152.

of the applicant: "in none of the member States has the ban on wearing religious symbols extended to university education, which is intended for young adults".[1105]

Since the move to a more general level for the vertically comparative analysis in this case led to a finding of *lack* of consensus, thus invoking the rein effect by way of a broad margin of appreciation, the effect was to provide more space to the national ethos of the respondent State:[1106] because of the broad margin of appreciation, "the role of the national decision-making body must be given special importance".[1107] Far from using consensus at a high level of generality to find an area of common ground and create space for morality-focussed considerations in its further reasoning, then, the ECtHR here uses lack of consensus at a high level of generality to give more weight to national ethe, specifically the national ethos of the respondent State.

It is notable that the case of *Leyla Şahin* concerned religious freedom in a country which raises strong exceptionalist claims as to its traditional understanding of the principle of secularism,[1108] and it is likely that this context motivated the direction which the ECtHR's judgment took. My point here is that the strong emphasis on national ethe which results comes at the expense of a pan-European ethos in one sense (i.e. relatively specific rules on religious attire) but, crucially, it is also in line with it in a different sense (i.e. lack of consensus on the appropriate relationship between State and church, or on the significance of religion in society). Indeed, if we take the ECtHR's reasoning at its word, then it is lack of consensus at a high level of generality, not the national ethos and a possible claim to exceptionalism, which constitutes the starting point of its justification: in a formulation which strongly foregrounds the ethos-focussed perspective's emphasis on reasonable disagreement about moral matters, the Court notes that when "opinion in a democratic society may reasonably differ widely", *then* the role of the national decision-making body attains particular im-

1105 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, dissenting opinion of Judge Tulkens, at para. 3; see also ECtHR, Appl. No. 64846/11 – *Ebrahimian v. France*, Judgment of 26 November 2015, at para. 65, where the ECtHR came close to admitting a consensus against the respondent State at relatively specific levels of generality but posited a narrow margin of appreciation by reference to *Leyla Şahin* and the "national context of State-Church relations".

1106 On such allegiances in general see Chapter 4, III.3.; on this constellation in relation to the margin of appreciation, see especially Chapter 8, III.1. and III.2.

1107 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109.

1108 See Chapter 4, II.2. in fine.

portance – and the lack of consensus as to the relationship between the State and religions is used to illustrate that opinion may indeed reasonably differ.[1109]

An example already cited in the previous section, the infamous case of *A, B and C* in which the applicants challenged Ireland's (then) highly restrictive abortion regime, may demonstrate the way in which this dynamic unfolds. The first point which this case demonstrates is how lack of consensus at a general level can be operationalised despite consensus at the more specific level. In *A, B and C*, the Court was compelled to accept that "there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law" – yet it held that this did not decisively narrow the margin of appreciation.[1110] "Of central importance" for this conclusion was the fact that, as established in the prior judgment in *Vo*,[1111] the Court can establish "no European consensus on the scientific and legal definition of the beginning of life".[1112] Because of this lack of consensus *as to a general issue, the importance of unborn life*, the margin remained broad – and, as in *Leyla Şahin*, no violation of the Convention was found.

The second point of note in this case is the way in which lack of consensus worked alongside but also *preceded*, within the ECtHR's reasoning, what was presented as Ireland's national ethos. Because the ECtHR, in *A, B and C*, gave strong weight to (what it took to be) the Irish national ethos in the form of the "profound moral views of the Irish people",[1113] it is sometimes said that the respondent State's national ethos "trumped" the spur effect of European consensus,[1114] that the ECtHR allowed said national ethos "as a counter-argument to European consensus",[1115] or that "the

1109 ECtHR (GC), Appl. No. 44774/98 – *Leyla Şahin*, at para. 109.
1110 ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at paras. 235-236.
1111 See supra, note 1068.
1112 ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at para. 237.
1113 Ibid., at para. 241; see also paras. 222-227 in the context of a "legitimate aim".
1114 See in that vein de Londras and Dzehtsiarou, "Grand Chamber of the European Court of Human Rights: A, B & C v Ireland, Decision of 17 December 2010" at 256 ("the limited availability of abortion in Ireland was said to be based on the 'profound moral views' of the Irish people, which constituted a trumping internal consensus").
1115 Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 24.

Court went against [European consensus]".[1116] Framing the issue in this way,[1117] I think, underestimates the malleability of consensus itself: the immediate counter-argument to the consensus in favour of the applicant was *itself based on European consensus*, namely the lack of consensus at higher levels of generality.[1118] It was in light of the broad margin which followed from this and which the ECtHR continued to emphasise[1119] that the "profound moral views of the Irish people" appeared, later on in the judgment, as part of the Court's (very limited) substantive assessment.[1120]

I will consider the connection between European consensus and the margin of appreciation in more detail in the next chapter.[1121] For present purposes, the conclusion I wish to draw is that shifting between different levels of generality within the consensus analysis can not only be of crucial import for the establishment of either consensus or lack thereof, but also, relatedly, has implications for the role consensus plays within the triangular tensions which I have been discussing throughout. In particular, emphasis on consensus at high levels of generality may allow it to function as a "starting point"[1122] – but also *no more* than a starting point – for the ECtHR's reasoning, creating a disconnect between the general consensus analysis and the more specific conclusions which the ECtHR must reach and thus opening up space for morality-focussed reasoning. Conversely – and in that regard the concerns aired by commentators on *A, B and C* ultimately ring true – the emphasis on lack of consensus at high levels of generality points towards giving significant argumentative weight to the na-

1116 Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 7 in footnote 25; see also Peat, *Comparative Reasoning in International Courts and Tribunals*, at 145-146.

1117 A tendency which originates, I suspect, in ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, at para. 6; see also the government's argument summarised in para. 186 of the majority opinion.

1118 See also Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 156, noting how "a strong consensus […], in other respect" is balanced out "by lack of consensus, in another respect".

1119 ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at paras. 238 and 240.

1120 Ibid., at para. 241; see also Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 60-61, where he acknowledges that the Court "avoided juxtaposing European consensus and internal consensus" yet still upholds the idea that the latter trumped the former.

1121 Chapter 8, III.; see in particular III.3. for the point at issue here.

1122 Supra, note 1098.

tional ethos of the respondent State.[1123] In the following subsection, I would like to build on the possibility of shifting between different levels of generality to explore the way in which different kinds of normativity are set in relation to one another.

2. Shifting Levels of Generality as a Search for Reflective Equilibrium

The preceding subsection has shed some light on why the ECtHR invokes (lack of) European consensus at different levels of generality in different cases: doing so allows it to shift its point of emphasis within the triangular tensions between different kinds of normativity according to the case at issue and the solution it seeks to justify. If we accept this connection, then it also provides a partial explanation for the ECtHR's reluctance to specify *why* it approaches consensus at a certain level of generality:[1124] such a specification lies implicit in the kind of reasoning it otherwise employs (i.e. giving more weight to morality-focussed reasoning or to the national ethos of the respondent State), but accordingly also depends on the internal logic of that form of normativity and can always be undermined from different perspectives. In this subsection, I would like to further develop this insight by exploring some ways in which the shift between different levels of generality has been deliberately operationalised within commentary on the ECtHR's use of consensus in particular and liberal political philosophy more broadly. I do so by considering a proposal by Kanstantsin Dzehtsiarou for the use of consensus in cases involving minority rights and further developing this proposal within the Rawlsian framework of reflective equilibrium. My point will be to show that, whatever the heuristic merits of such frameworks, they cannot resolve the triangular tensions at issue – although, as I discuss in this chapter's final section, they may obscure them.

Let me begin, then, by describing Dzehtsiarou's proposal for the use of consensus in cases concerning minority rights – one of the few proposals which explicitly relies on the use of consensus at *different* levels of generality. As briefly indicated above, Dzehtsiarou distinguishes between consensus at the level of principles ("general concepts which underpin legal stan-

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1123 See de Londras, "When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of *A, B & C* v. *Ireland* and Referendum-Emergent Constitutional Provisions" at 321-323.

1124 See supra, note 1085.

dards") and consensus at the level of rules ("specific implementing measures which are undertaken to give effect to a legal principle in a particular system").[1125] His underlying assumption is that, all else being equal, the ECtHR's consensus analysis should be conducted at the level of rules[1126] – this part of his argument, I would suggest, broadly follows the Goldilocks approach common in academic commentary on consensus. Yet in cases concerning minority rights, Dzehtsiarou suggests, "the Court can be satisfied with the existence of consensus at the level of principles, without requiring the existence of consensus at the level of rules".[1127] This chimes with the possibility of creating space for morality-focussed considerations as mentioned above: shifting to a higher level of generality within ethical normativity creates a disconnect between consensus and the issue before the Court. In light of the morality-focussed perspective's focus on protecting minority rights, it comes as no surprise that Dzehtsiarou suggests this approach in cases dealing with minority rights, while retaining a more ethos-focussed perspective for other cases.

One might further develop this way of shifting between different levels of generality as one aspect of trying to achieve *reflective equilibrium* within the ECtHR's reasoning. The notion of reflective equilibrium was popularised by John Rawls in the realm of political morality and has since also been applied to legal reasoning.[1128] Simply put, it constitutes a method of interpretation and justification by means of which "one tries to find a scheme of principles that match people's considered judgments and general convictions" by going to and fro between them, retaining some and altering others along the way.[1129] Reflective equilibrium thus takes a *coherentist* and *anti-foundationalist* approach. The prior indicates that justification

1125 Supra, note 1074.

1126 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 132; see also supra, note 1093.

1127 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 124. This point is complicated, however, by Dzehtsiarou's preoccupation with the ECtHR's sociological legitimacy: see further Chapter 10, III.1.

1128 See e.g. Dworkin, "Justice and Rights" at 197; MacCormick, *Legal Reasoning and Legal Theory*, at 245-246; D.W. Haslett, "What Is Wrong with Reflective Equilibria?," (1987) 37 *The Philosophical Quarterly* 305 at 309.

1129 John Rawls, "The Independence of Moral Theory," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press, 1999) at 288; the "to and fro" movement is particularly clear e.g. at Rawls, *A Theory of Justice*, at 18. By referring broadly to interpretation and justification, I mean to draw attention to the fact that reflective equilibrium can be considered releis seen as "a matter of the mutual support of many considerations, of everything fitting together into one coherent view".[1130] The latter, relatedly, means that a conception of justice "cannot be deduced from self-evident premises or conditions on principles", and accordingly any normative principles are proposed not as "necessary truths or derivable from such truths" but rather, more contingently, as provisional, revisable conclusions.[1131] As a consequence, reflective equilibrium in a strict sense is "a point at infinity that we can never reach", though we can strive towards it[1132] – but any point that we take to constitute reflective equilibrium in practice must be regarded as unstable and "liable to be upset by further examination".[1133]

A key point in this process of constant re-examination (of making "adjustment decisions", as Haslett calls them[1134]) is the potential relevance of normative principles and considered judgements *at all levels of generality*.[1135] Rawls notes that "considered judgments at all levels of generality" are considered relevant, "from those about particular situations and institutions up through broad standards and first principles to formal and abstract conditions on moral conceptions",[1136] and including "intermediate levels of generality".[1137] Each "considered conviction whatever its level" is

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vant within both processes of discovery and processes of justification as discussed in Chapter 1, IV.5. The aspect of justification is perhaps more prominent in Rawls (e.g. Ibid., 15, 18-19 and 507); for the connection to processes of discovery, see e.g. T.M. Scanlon, "Rawls on Justification," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003) at 149; Kai Nielsen, "Grounding Rights and a Method of Reflective Equilibrium," (1982) 25 *Inquiry* 277 at 291.

1130 Rawls, *A Theory of Justice*, at 19.

1131 Ibid.; the typically constructivist disconnect of moral theory from metaphysics and claims of "moral truth" – in Rawls's case, by depending on reflective equilibrium – is also the main point of Rawls, "The Independence of Moral Theory" at 286-291; see also, very clearly, Nielsen, "Grounding Rights and a Method of Reflective Equilibrium" at 292.

1132 Rawls, *Political Liberalism*, at 385; see also Rawls, "The Independence of Moral Theory" at 289.

1133 Rawls, *A Theory of Justice*, at 18.

1134 Haslett, "What Is Wrong with Reflective Equilibria?" at 306.

1135 Besides the citations that follow, see also Rawls, *Political Liberalism*, at 381; Rawls, *The Law of Peoples*, at 58; for an overview of Rawls's development in this regard, see Scanlon, "Rawls on Justification" at 141.

1136 Rawls, "The Independence of Moral Theory" at 289.

1137 Rawls, *Political Liberalism*, at 45.

seen as "having a certain initial credibility", but "there are no judgments on any level of generality that are in principle immune to revision".[1138]

This explicit reliance on shifting levels of generality provides one reason why reflective equilibrium might be set in relation to the ECtHR's case-law involving European consensus, as described above. In Rawls's later works (following his so-called "political turn"), he takes the "public culture" of a democratic society as "the shared fund of implicitly recognized basic ideas and principles".[1139] This public culture is said to comprise "the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge".[1140] In the transnational context of the ECtHR, one might thus interpret vertically comparative references as a way of grappling with the notion of a *European public culture* as part of a search for reflective equilibrium.[1141]

Understanding European consensus as part of a search for reflective equilibrium in this way might bolster Dzehtsiarou's take on cases involving minority rights. The move to a higher level of generality to avoid reliance on presumably prejudiced laws at the more specific level mirrors Rawls's response to claims that reflective equilibrium might be too "conservative",[1142] in which he emphasised that "one does not count people's more particular considered judgments, say those about particular actions

1138 Rawls, "The Independence of Moral Theory" at 289.
1139 Rawls, *Political Liberalism*, at 8.
1140 Ibid., 13-14.
1141 I first drew this connection in 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 416; but see infra, IV.; see also Gerards, *General Principles of the European Convention on Human Rights*, at 44 for an account of the ECtHR as searching for reflective equilibrium, although geared not at consensus but rather at the move between general principles and individual cases within the ECtHR's case-law itself.
1142 The phrasing is from Rawls himself at Rawls, "The Independence of Moral Theory" at 288; for a variety of criticisms of reflective equilibrium, see e.g. Haslett, "What Is Wrong with Reflective Equilibria?" at 311; R.M. Hare, "Rawls' Theory of Justice," in *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'*, ed. Norman Daniels (Stanford: Stanford University Press, 1989) at 82-83; Simon Blackburn, "Can Philosophy Exist?," in *Méta-Philosophie: Reconstructing Philosophy?*, ed. Jocelyne Couture and Kai Nielsen (Calgary: University of Calgary Press, 1993) at 91; Peter Singer, "Sidgwick and Reflective Equilibrium," (1974) 58 *The Monist* 490 at 516; Daniel Little, "Reflective Equilibrium and Justification," (1984) 22 *The Southern Journal of Philosophy* 373 at 379.

and institutions, as exhausting the relevant information".[1143] Rather, more general judgments – or, in the case of consensus, more general aspects of European public culture – can be understood to point towards an adjustment decision which leads to the reconsideration of more specific (lack of) consensus.

An earlier essay of Rawls's even mirrors the morality-focussed elements in Dzehtsiarou's motivation for avoiding reliance on consensus at a more specific level: he deemed it "desirable, although not essential" that "some convincing reason can be found" to account for those instances in which adjustment decisions are made in the quest for coherence, and names convictions dropped because they are realised to have been "fostered by what is admittedly a narrow bias of some kind" as an example.[1144] As commentators on Rawls have suggested, "one can carefully analyse which biases are likely to occur under specific circumstances and design methodological devices or include specific elements in the process to counter these biases most effectively".[1145] Setting different accounts of (lack of) consensus at different levels of generality in relation to one another within the framework of reflective equilibrium might be understood as one such "methodological device" – an attempt at evening out the biases involved in both morality-focussed and ethos-focussed perspectives.

An example from the ECtHR's case-law may illustrate this approach. Dzehtsiarou cites the case-law on ethnic minorities,[1146] which is a particularly useful case-study since it demonstrates, in its development over time and by virtue of differences between majority opinions and dissents, the differing perspectives involved. We might begin with the case of *Chapman v. the United Kingdom*, which concerned the refusal of planning permission to station caravans on the applicant's land and ensuing enforcement measures. The applicant based her argument, in part, on the Council of Europe Framework Convention for the Protection of National Minorities.[1147] The ECtHR admitted that the Framework Convention could be seen as "an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an

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1143 Rawls, "The Independence of Moral Theory" at 288-289.
1144 Rawls, "Outline of a Decision Procedure for Ethics" at 11-12.
1145 Wibren van der Burg and Theo van Willigenburg, "Introduction," in *Reflective Equilibrium: Essays in Honour of Robert Heeger*, ed. Wibren van der Burg and Theo van Willigenburg (Dordrecht: Springer, 1998) at 12.
1146 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 16 and 124-125.
1147 ECtHR (GC), Appl. 27238/95 – *Chapman*, at para. 83.

obligation to protect their security, identity and lifestyle".[1148] *However*, it refused to draw any conclusions from this fact, deeming the consensus thus identified *too general* – the Framework Convention was considered not "sufficiently concrete for [the Court] to derive any guidance" from it, as it merely "sets out general principles and goals but the signatory States were unable to agree on means of implementation";[1149] the respondent State was accorded a wide margin of appreciation and no violation was found. This form of argument mirrors the ethos-focussed perspective's criticism of the use of consensus at high levels of generality, given the disconnect between the comparative materials themselves and the more specific conclusions which might be drawn from them.[1150]

In later cases, however, the ECtHR changed its approach, though without openly admitting as much. In particular, in the famous case of *D.H. and Others v. the Czech Republic*, the ECtHR once again had to consider consensus in relation to the protection of ethnic minorities at relatively high levels of generality, this time in a case concerning the education of Roma children. Implicitly building on the judgment in *Chapman*, the respondent State argued that "neither the Convention nor any other international instrument contained a general definition of the State's positive obligations concerning the education of Roma pupils", nor was there any European consensus within domestic law as to whether special schools are acceptable, i.e. no consensus at the more specific level.[1151]

The ECtHR, by contrast, explicitly relied on *Chapman* to substantiate an "emerging international consensus" in favour of the protection of national minorities, conveniently failing to mention that it had previously deemed this consensus too general to provide any normative guidance.[1152] Instead, it now relied on the consensus as identified in *Chapman* as well as a number of other international instruments and recommendations to establish that "the Roma have become a specific type of disadvantaged and vulnerable minority" deserving of "special protection", particularly in the field of

1148 Ibid., at para. 93.

1149 Ibid., at para. 94; see critically Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 152.

1150 Supra, notes 1090-1093.

1151 ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 155.

1152 Ibid., at para. 181; see also ECtHR (GC), Appl. No. 15766/03 – *Oršuš and Others v. Croatia*, Judgment of 16 March 2010, at para. 148.

education.[1153] Consensus at more specific levels did not play a major role;[1154] indeed, when the ECtHR noted that "other European States have had similar difficulties" in providing schooling for Roma children, it is more related to an acknowledgment of the (albeit insufficient) efforts of the Czech Republic than as an indication that the rein effect of European consensus might be at issue.[1155]

The shift is significant:[1156] *D.H.* presents a picture-book example of the deliberate use of consensus at high levels of generality to create space for morality-focussed considerations. Reconstructing the judgment within the framework of reflective equilibrium, one might say that the ECtHR considered the lack of consensus as to whether special schools are acceptable (as proposed by the government), but refused to give normative force to

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1153 ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 182; for the many international materials cited, see further paras. 54-107; see also ECtHR (GC), Appl. No. 15766/03 – *Oršuš and Others*, at para. 147; on "taking the human rights corpus as [the ECtHR's] reference point for determining group vulnerability", see also Peroni and Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law" at 1084. While Peroni and Timmer advocate for such an approach, primarily on the basis of legitimacy concerns (on which, see Chapter 9) they also rightly note the danger of reifying the vulnerability of certain groups (and, for that matter, the groups themselves) if the socially and historically constructed power structures leading to vulnerability are not rendered visible: ibid., 1073-1074; see also, critically on *D.H.* on similar grounds relating to homogenisation of minority groups, Roberta Medda-Windischer, "Dismantling Segregating Education and the European Court of Human Rights. *D.H. and Others vs. Czech Republic*: Towards an Inclusive Education?," (2007/8) 7 *European Yearbook of Minority Issues* 19 at 38-39; and generally Lourdes Peroni, "Religion and Culture in the Discourse of the European Court of Human Rights: The Risks of Stereotyping and Naturalising," (2014) 10 *International Journal of Law in Context* 195; for suggestions on how vertically comparative law could be used to denaturalise rather than naturalise, see Chapter 11, IV.4.

1154 It was used e.g. to introduce the notion of indirect discrimination, i.e. still at a relatively high level of generality: ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, at para. 184; with regard to more specific issues, the focus was less on European consensus than on reports pertaining to the Czech Republic itself: ibid., at para. 200, and see Chapter 6, IV. (especially IV.6.) for the different sources at issue.

1155 Ibid., at para. 205.

1156 See also Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 294.

this understanding of consensus at a specific level "no matter what",[1157] and indeed refused to see it as the only approach to constructing consensus or lack thereof. Instead, the ECtHR looked to other elements within European public culture (other sources of European consensus and consensus at different levels of generality), concluded that "biases are likely to occur" if lack of consensus at a more specific level was followed,[1158] made adjustment decisions within its reasoning accordingly and reached a result based on general consensus, though contrary to lack of consensus at a more specific level.

As a counter-example, consider the case of *A.P., Garçon and Nicot v. France*, in which the ECtHR was called upon to consider whether it constitutes a violation of Article 8 ECHR to make legal gender recognition conditional on proof that the person at issue suffers from a gender identity disorder.[1159] Trans persons and non-governmental organisations working on trans rights have, for some time now, been arguing against this precondition:[1160] not only does it position the medical profession as gatekeepers of legal gender recognition,[1161] it also contributes to the stigmatisation of trans identities by reinforcing the notion that trans people are objects of medicine rather than subjects of rights.[1162] The ECtHR stated that it "is mindful" of the prominence of these arguments in pro-trans advocacy, and aware "that addressing gender identities from the perspective of a psychological disorder adds to the stigmatisation of transgender persons".[1163]

1157 As Zwart, "More Human Rights Than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How It Can Be Done" at 93 suggests the ECtHR should; see Chapter 4, IV.

1158 Supra, note 1145.

1159 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 136.

1160 For an overview, see <http://stp2012.info/>; in the context of human rights law, see generally Jens T. Theilen, "Depathologisation of Transgenderism and International Human Rights Law," (2014) 14 *Human Rights Law Review* 327.

1161 See, in the context of access to health care, David Valentine, *Imagining Transgender. An Ethnography of a Category* (Durham and London: Duke University Press, 2007), at 58; Chris Dietz, "Governing Legal Embodiment: On the Limits of Self-Declaration," (2018) 26 *Feminist Legal Studies* 185 at 190.

1162 Gonzalez-Salzberg, "An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France" at 535.

1163 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 138; a caveat must be made to the effect that this kind of argument should not be taken to rubber-stamp stigmatisation of mental illnesses more generally: see Transgender Europe, "Anti-Activity Report" (2018), available at

However, it immediately juxtaposed this argument with the European consensus among the domestic laws of the States parties with regard to the specific issue of a psychiatric diagnosis as a precondition of legal gender recognition, noting that this precondition is featured "in the vast majority" of the States parties (only four of them having omitted it) and that there is, therefore, "currently near-unanimity" in favour of the position of the respondent State.[1164] Despite "an important aspect of the identity of transgender persons" being at stake, the ECtHR took this as the basis for leaving the States parties "wide discretion", and concluded without significant further argument that there was no violation of the Convention.[1165] Its brevity was arguably due, at least in part, to the relatively unusual situation of a consensus in favour of the respondent State, rather than a lack of consensus among the States parties;[1166] but regardless of the numerical issues involved, my point here is the way in which consensus is introduced with regard to a specific source (domestic law) at a specific level of generality (psychiatric diagnosis as a precondition for legal gender recognition), without the least attempt to question or re-examine it in the way which reflective equilibrium would require.

There are other cases in which the ECtHR arguably proceeds in this manner.[1167] What makes the judgment in *A.P., Garçon and Nicot v. France* seem particularly callous is that the ECtHR *acknowledged* the stigmatisation involved in the pathologisation of trans identities,[1168] yet still made no attempt to question its reliance on (a specific form of) European consensus which perpetuated such pathologisation.[1169] Had it looked to different aspects of European public culture – resolutions of the CoE's Parliamentary Assembly, for example – it would have found reason for re-examination in the form of statements against trans pathologisation at various

<https://tgeu.org/wp-content/uploads/2018/06/TGEU_Anti-ActvityReport_16-18.pdf>, at p. 13.

1164 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 139.

1165 Ibid., at paras. 140 and 144.

1166 See generally Chapter 5, III.1.

1167 Most famously in ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 106.

1168 Supra, note 1163.

1169 See critically Theilen, "Beyond the Gender Binary: Rethinking the Right to Legal Gender Recognition" at 256-257.

levels of generality.[1170] In accordance with the idea of not accepting any one element of European public culture at face value but rather making constant adjustment decisions, these documents in turn would not, in and of themselves, be decisive within the quest for reflective equilibrium. Simply adopting one particular understanding of consensus and assigning it strong normative force without further question or any attempt to destabilise it by considering the biases it might carry, however, runs counter to the idea of reflective equilibrium.

These brief examples could be further expanded on by providing more detailed accounts of the different elements of European public culture at issue and how they might be set in relation to one another. For present purposes, however, I would instead like to note that while the framework of reflective equilibrium provides a means by which to set morality-focussed and ethos-focussed considerations in relation to one another, it *by no means resolves the triangular tensions at issue*. The above-cited case-law on ethnic minorities exemplifies this: while *Chapman* was open to criticism from the morality-focussed perspective, the comparative materials relied on in *D.H.* were deemed “relatively vague [and] largely theoretical” by a dissenting opinion,[1171] thus pointing back to the ECtHR’s earlier stance in *Chapman* and to the ethos-focussed criticism of relying on consensus (only) at high levels of generality.

After all, that Roma constitute a disenfranchised minority facing prejudice is hardly a revolutionary insight (controversial as it may nonetheless

1170 See in particular Parliamentary Assembly of the Council of Europe, Resolution 2048 (2015) of 22 April 2015, “Discrimination against transgender people in Europe”, at paras. 1 and 6.2.2 which notes that trans persons face “widespread discrimination”, deems pathologisation of trans persons “disrespectful of their human dignity and an additional obstacle to social inclusion”, and calls on States to “abolish […] a mental health diagnosis as a necessary legal requirement to recognise a person’s gender identity”; the ECtHR mentions this document as part of its list of international materials at ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 77, but does not bring it up within its reasoning on the matter. For further comparative materials pointing in similar directions, see Gonzalez-Salzberg, “An Improved Protection for the (Mentally Ill) Trans Parent: A Queer Reading of AP, Garçon and Nicot v France” at 534; it should be noted, though, that the representative character of at least some of these documents can in turn be questioned, depending on one’s approach to a pan-European ethos: see generally Chapter 6, IV.3.

1171 ECtHR (GC), Appl. No. 57325/00 – *D.H. and Others*, dissenting opinion of Judge Jungwiert, at para. 5.

be in some quarters).[1172] But, as discussed in previous chapters, acknowledging the disenfranchisement of a minority group does not imply agreement on whether, when and how to empower that group by means of transnational human rights, so the ECtHR's conclusion can always be challenged on the basis of lack of consensus at a more specific level,[1173] to say nothing of the national ethos of the respondent State. The framework of reflective equilibrium, while it would encourage to-and-fro movement between different levels of generality and thus add additional complexity – perhaps avoiding too strong a focus on (lack of) consensus at the Goldilocks level of generality, perhaps also avoiding too quick a reliance on general principles by problematising the binary distinctions between e.g. rules and principles or between minority cases and others[1174] – could never point towards any one solution. There can, as critics of Rawls have long since emphasised, be many different reflective equilibria.[1175]

IV. Interim Reflections: Beyond the Goldilocks Level of Generality

In sum, the ECtHR makes use of European consensus at different levels of generality. While it often relies on comparative materials at a Goldilocks level of generality in relation to what it takes to be the main issue of the case, it also regularly refers to comparative materials which are more specific or, in particular, more general. This kind of shift has implications for the way in which the ECtHR situates itself within the triangular tensions between moral normativity, ethical normativity by reference to a pan-European ethos, and ethical normativity by reference to national ethe; approaching the notion of a pan-European ethos in different ways – e.g. by switching to (lack of) consensus at higher levels of generality – may have significant consequences for the instrumental allegiances formed with other kinds of normativity. One way of structuring the ECtHR's reasoning

1172 See e.g. James A. Goldston, "The Struggle for Roma Rights: Arguments that Have Worked," (2010) 32 *Human Rights Quarterly* 311 (Roma as "the quintessential pan-European ethnic minority").

1173 See e.g. Chapter 3, II and Chapter 4, III.2.

1174 See supra, particularly notes 1074 and 1127.

1175 Haslett, "What Is Wrong with Reflective Equilibria?" at 307 and 310; Nielsen, "Grounding Rights and a Method of Reflective Equilibrium" at 294; on the "relativist implications" of this point, see Little, "Reflective Equilibrium and Justification" at 384; for a defence of Rawls, see Scanlon, "Rawls on Justification" at 151-153.

against this backdrop might be to conceptualise it as searching for reflective equilibrium, with the to-and-fro movement between different levels of generality understood as an attempt to set different kinds of normativity in relation to one another and even out biases as far as possible, even though the underlying tensions could never be fully resolved.

I have previously argued that seeing European consensus as the basis of a European public culture which forms part of the search for reflective equilibrium provides a helpful way of conceptualising it.[1176] I continue to see certain advantages to this framework: in particular, while the notion of a European public culture of course mirrors that of a pan-European ethos which I have been referring to throughout, it differs insofar as its introduction *as part of the process of reaching towards reflective equilibrium* means that it would be geared, from the very beginning and in its various elements at different levels of generality, as "liable to be upset by further examination".[1177] The anti-foundationalist character of reflective equilibrium and the acknowledgment of different ways of using European consensus point away from an understanding of consensus which regards it as an "objective element" external to the Court:[1178] different understandings of consensus – and for that matter other forms of normativity – are all part of, but all *only* part of, the search for reflective equilibrium and may be used to unsettle one another. Accordingly, the "outcome of the case is […] not tied to [European consensus] *on the impugned measure*"[1179] because that (lack of) consensus is understood to be only one of several levels of generality which might be relevant within the ECtHR's reasoning.

Contrary to the intuitive sense that consensus should be used at a Goldilocks level of generality which is "just right" for the issue at hand, then, I would suggest that different levels of generality should be taken into account. Restricting vertically comparative legal reasoning to just one issue creates the impression that a pan-European ethos can be clearly and uncontroversially defined and obscures the choice that was made in defining what "the issue" is. Such an approach to consensus thus carries the same danger as advocating for a fixed number of States parties to consti-

1176 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".
1177 Supra, note 1133.
1178 See Chapter 1, IV.5. and Chapter 3, II.
1179 Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 306 (emphasis added).

tute "consensus" or "lack of consensus", or of setting up a fixed hierarchy between consensus based on national laws and consensus based on (various elements within) international law:[1180] it tends to naturalise a certain understanding of European consensus without sufficient regard to countervailing elements within European public culture, let alone other forms of normativity.

Approaching European consensus as an aspect of the search for reflective equilibrium points away from its use only at a Goldilocks level of generality. But reflective equilibrium is not only anti-foundationalist but also, as mentioned above, coherentist. It is for this reason that I am now less inclined to advocate for it as a way of approaching the ECtHR's reasoning, since I have come to share the critical mistrust of coherentist theories in favour of those which foreground contradiction and paradox. On the basis of more critically minded approaches, the coherentist approach associated (for example) with reflective equilibrium is seen as too reconciliatory in the face of conflicting logics such as those of the morality-focussed and the ethos-focussed perspective,[1181] and the resulting denial of paradox, as Chantal Mouffe argues, makes it more difficult to grasp the hegemonic aspects of any particular arrangement[1182] – or, as Martti Koskenniemi puts it in the legal context, "the competition of opposite interests that are the flesh and blood of the legal everyday".[1183]

There *is* an interesting discussion to be had, I think, about the relationship between these two approaches (coherentist and paradoxicalist) in turn, which perhaps need not only be one of opposition but could also have symbiotic elements.[1184] After all, the very idea of establishing coherence can be taken to imply an underlying contradiction, so one might conceive of reflective equilibrium, for example, as a structuring device for establishing contingent coherence in the form of a judicial decision,[1185]

1180 See Chapter 5, V. and Chapter 6, VI.

1181 Mouffe, *The Democratic Paradox*, at 29; Koskenniemi, *From Apology to Utopia*, at 65.

1182 Mouffe, *The Democratic Paradox*, at 45.

1183 Koskenniemi, "An Essay in Counterdisciplinarity" at 19.

1184 Jeffrey Edward Green, "On the Co-originality of Liberalism and Democracy: Rationalist vs. Paradoxicalist Perspectives," (2015) 11 *Law, Culture and the Humanities* 198 at 215 rather charmingly speaks of rationalist and paradoxicalist understandings of co-originality which are themselves co-original.

1185 The element of contingency of judgments, i.e. their place within a broader discursive process, comes through e.g. in Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control"; see also Chapter 11, III. and IV.3.

without *necessarily* denying the underlying contradictions. If one looks for it, then, one may find some measure of overlap between coherentist and paradoxicalist approaches,[1186] and the framework sketched above may still be of interest in the context of judicial processes of justification (and, for that matter, of interpretation). However, the emphasis of coherentist and paradoxicalist approaches is clearly different; and to my mind that is far from irrelevant. Because reflective equilibrium emphasises coherence over paradox, it ends up downplaying not only the differences between different kinds of normativity but also the opposition between different substantive positions underlying conflicts before the ECtHR, which remains an important aspect mitigating against its use at least without further incorporation of paradoxicalist elements.

Consider, for example, the notion of "bias" referred to above as part of the justification for making adjustment decisions within the search for reflective equilibrium. On some level, I take this to be a helpful notion, especially in contrast to universalising approaches such as the morality-focussed perspective, which "attempts to understand itself as if it were free of all bias" although it clearly represents particular interests[1187] – but also in contrast to use of European consensus which does not acknowledge the idealisations of the ethos-focussed perspective. The move between different levels of generality within reflective equilibrium can be thought of as a way of self-reflectively trying to grapple with the problem of bias, regardless of whether morality-focussed or ethos-focussed considerations are at issue.[1188] But this also makes particularly clear how reflective equilibrium is implicated in a coherentist approach: the notion of bias serves not only to explain different perspectives but also to *position some as preferable to others*

1186 For example, Mouffe's point that no "final resolution or equilibrium" between the "conflicting logics" of (what I have been calling) the morality-focussed and ethos-focussed perspective is "ever possible" (Mouffe, *The Democratic Paradox*, at 45) is echoed in Rawls's admission that reflective equilibrium is a "point at infinity that we can never reach" (supra, note 1132) – *but* I would argue that the focus on hegemonic articulations which results from Mouffe's different priorities nonetheless gives her approach a very different flavour.

1187 Cynthia Weber, *Queer International Relations. Sovereignty, Sexuality and the Will to Knowledge* (Oxford: Oxford University Press, 2016), at 137 (on ostensibly "universal figures").

1188 With regard to gender stereotypes, this is reflected e.g. in Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights" at 717 (arguing for an anti-stereotyping approach both with regard to the national level and the ECtHR's "own reasoning"); see Chapter 2, II.1. and Chapter 3, II., and generally on different idealisations Chapter 4, III.1.

so as to make a coherent result possible. The attempt to even out biases thus aims to mitigate the differences between what would otherwise be seen as "logics which are incompatible in the last instance",[1189] thereby denying or at least distracting from that incompatibility.

Several points follow from this. Practically speaking, there is the danger of slipping into a position of comfortable self-affirmation in which bias is always attributed to whichever form of normativity is opposed[1190] – proponents of the morality-focussed perspective are quick to point out that democratic procedures underlying European consensus are flawed, proponents of the ethos-focussed perspective are just as quick to point out how condescending it is to place one's own opinion above that of others as expressed by those very democratic procedures, and so on. A related point is the overall bias of reflective equilibrium itself: the focus on achieving an overall coherent position based on adjustment decisions within European public culture tends to be oriented (only) towards relatively marginal change, although more radical positions are not theoretically excluded. Even if applied self-reflectively, reflective equilibrium may thus "cause our imaginative space to become stagnant"[1191] by simply reproducing dominant aspects within European public culture.

This is perhaps particularly true insofar as reflective equilibrium is associated primarily with the use of consensus at higher levels of generality in cases concerning minority rights, as discussed above. By way of contrast, consider again cases such as *A, B and C* or *Leyla Şahin*: while I disagree emphatically with the outcome of these cases, the move to a *lack* of consensus at higher levels of generality is interesting because it shows how easily consensus can be destabilised by pointing to divergence and disagreement within European public culture. I will sketch a similar approach in the final chapter of this study by exploring the ways in which vertically compar-

1189 Mouffe, *The Democratic Paradox*, at 5.

1190 See generally on the limits of self-reflectivity Tzouvala, *Capitalism as Civilisation. A History of International Law*, at 38-39 and 216; Jean d'Aspremont, "Martti Koskenniemi, the Mainstream, and Self-Reflectivity," (2016) 29 *Leiden Journal of International Law* 625; for (what I read as) a more positive rendition of self-reflexivity, however, see Jean d'Aspremont, "Three international lawyers in a hall of mirrors," (2019) 32 *Leiden Journal of International Law* 367; see also Chapter 11, IV.1. for discussion of the implications of centring a reflective subject in this way.

1191 Adamantia Rachovitsa, "The Principle of Systemic Integration in Human Rights Law," (2017) 66 *International and Comparative Law Quarterly* 557 at 573 (on systemic integration).

ative legal reasoning might be used to emphasise *contradictions* within European public culture rather than consensus. For now, I propose to consider European consensus in its broader doctrinal context within the ECtHR's reasoning: turning from the establishment to the deployment of consensus might teach us more about the way in which the ECtHR situates itself within the underlying triangular tensions.