Chapter 10: Of Conflation and Normalisation: European Consensus between Strategy and Principle

I. Introduction

If different rationales undergird the use of consensus, then it becomes important to discuss how they relate to one another. In this chapter, I would like to approach this task by bringing together several different strands of argument commonly adduced in defence of European consensus. In particular, if the use of consensus is commonly justified on grounds of legitimacy enhancement which, as I argued in the preceding chapter, constitutes a form of strategic justification, then the question arises how this form of justification relates to its defence on democratic grounds as explored in earlier chapters.

This question has mostly been side-lined in debates on European consensus, and understandably so: it is a difficult question to grapple with because it is difficult to disentangle different rationales for the use of consensus. First, given the indeterminacy of human rights law, the counter-position to strategy can seem fleeting and intangible; accordingly, I will simply denote this position as "principle" so as to capture a position against which to evaluate the use of strategy while retaining the open-endedness of that position.[1514] Second, strategy itself depends on a multitude of both normative and empirical assessments and ultimately presents a bouquet of possible approaches no less diverse than assessments of principle. Strategic approaches to European consensus also prove elusive: I argued in the preceding chapter that conceptualising consensus as a stepping stone for the incremental development of the ECtHR's case-law constitutes a form of abstract strategizing – but that abstractness does not resolve questions as to how consensus should be applied in specific cases.[1515]

Finally, disentangling different rationales for the use of consensus must face the difficulty that these rationales are *not always made explicit*. This holds true, in particular, for the use of consensus by the ECtHR itself: the

1514 See further Chapter 1, IV.4.
1515 See infra, III.1.

Court "eschews abstract theorising"[1516] and seldom offers meta-justifications for the kind of reasoning it applies within its processes of justification;[1517] and on the rare occasion that it does so, it does not make explicit reference to *strategic* considerations. I therefore refer primarily to academic accounts of consensus, which do distinguish between principled and strategic rationales for its use although they rarely deal with the possible tensions between them. The picture I will paint aims to take into account the overall impression which results from this state of affairs: the conceptualisation of consensus as a fulcrum of both strategy and principle without sufficient attention to the implications of this conflation.[1518]

To introduce the interplay between strategy and principle, I begin by setting out what I call the "dilemma of strategic concessions" as part of non-ideal theory (II.). My aim in this section is twofold. First, to show that strategy is not in and of itself problematic, but rather a helpful perspective which focusses on the realisation of human rights in social life instead of autarkic judicial pronouncements. Second, that strategic concessions nonetheless come at a high cost since the deviation from principle implies that justice is subordinated to power. It is precisely because of this cost that the dilemma of strategic concessions needs to be faced head-on, rather than obscured by conflating strategy and principle, as it currently is in the context of European consensus – or so I will argue.

To tease out the implications of this conflation, I first discuss various perspectives on consensus in both ideal and non-ideal theory to underline that different rationales for the use of consensus need not always be in sync. It matters, in other words, *for which reasons* the use of consensus is supported or on which grounds it is justified (III.1.); I then show how the conflation of strategy and principle is celebrated because it is assumed to create an impression of objectivity – for example by setting consensus in relation to formal sources of international law – and discuss possible disadvantages to this approach such as the dilution of principled standards when indistinguishable from strategy (III.2.); and I argue, finally, that conflating strategy and principle within the fulcrum of European consensus contributes to a normalisation of strategy which makes the use of consen-

1516 Mowbray, "The Creativity of the European Court of Human Rights" at 61.

1517 See Chapter 1, IV.1.

1518 See also Or Bassok, "The European Consensus Doctrine and the ECtHR Quest for Public Confidence," 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 252.

sus more difficult to challenge, hence impeding contestation on principled terms (III.3.). I conclude with some reflections on the role of the ECtHR vis-à-vis the States parties to the ECHR, and on how certain images of its role might influence its desire to stay in strategic proximity to the States parties by means of European consensus (IV.).

II. Non-Ideal Theory: The Dilemma of Strategic Concessions

One way of approaching the dilemma of strategic concessions is through the lens of so-called "non-ideal theory" (although, as I mentioned in Chapter 1, strategy forms only one prong of non-ideal theory).[1519] Vast swaths of political morality and constitutional theory are concerned with ideal theory which, as Rawls put it, deals with "the principles of justice that would regulate a well-ordered society" in which everyone "is presumed to act justly and to do his part in upholding just institutions".[1520] These presumptions, as Rawls admits, are clearly "highly idealized".[1521] Non-ideal theory loosens them and, accordingly, concerns "how we are to deal with injustice" of the kind "that we are faced with in everyday life" rather than an idealised, "well-ordered" society.[1522]

The Rawlsian framework seems helpful to me in approaching the dilemma of strategic concessions in the context of consensus as legitimacy-enhancement, for his approach to non-ideal theory is inextricably connected to "questions of transition".[1523] With the goal of ideal theory in mind, non-ideal theory "asks how this long-term goal might be achieved, or worked toward, usually in gradual steps", thus seeking transitional "policies and courses of action that are morally permissible and politically possible as well as likely to be effective".[1524] This resonates with the aim which I ascribed to the strategic approach to consensus in the preceding chapter: if we assume it to maintain a benevolent aim that goes beyond the mere accumulation of institutional power, then its goal is to enhance the sociological legitimacy of the ECtHR *so that it may set higher human rights standards*

1519 See Chapter 1, IV.4.
1520 Rawls, *A Theory of Justice*, at 8.
1521 Rawls, *Political Liberalism*, at 35; see further Marcus Arvan, "First Steps Toward a Nonideal Theory of Justice," (2014) 7 *Ethics & Global Politics* 95 at 98-99.
1522 Rawls, *A Theory of Justice*, at 8.
1523 Rawls, *The Law of Peoples*, at 90; strongly emphasised by Simmons, "Ideal and Nonideal Theory" at 20-23.
1524 Rawls, *The Law of Peoples*, at 89.

in the long run.[1525] We could frame this as an instance of working towards ideal theory by means of non-ideal theory.

Roni Mann has recently elaborated on this way of approaching the issue by building on Rawls to develop a *non-ideal theory of constitutional adjudication*.[1526] In line with the general approach on non-ideal theory, she presents the problem at issue as a conflict between the demands of ideal theory and non-ideal circumstances:

> The dilemma of institutionally-hard cases arises […] where there is a significant tension or conflict between what the court would hold to be right *constitutionally* (in ideal circumstances) and what seems wise or prudent *institutionally*, given the actually existing non-ideal circumstances.[1527]

Part of Mann's argument is that we need to acknowledge that such cases *do present a dilemma*[1528] – in other words, neither pure principle nor pure strategy would provide a satisfactory answer across the board.

Framing this dilemma in reconciliatory terms, one might emphasise that strategy and principle require one another in order to function in a meaningful way. First, strategy needs principle. Indeed, on the Rawlsian approach, its transitional character means that non-ideal theory is inherently oriented towards ideal theory: "For until the ideal is identified […] nonideal theory lacks an objective, an aim, by reference to which its queries can be answered".[1529] Values cannot be meaningfully realised unless we have a stance on what those values are.[1530] Yet the very notion of realisation also points principle towards strategy. As I mentioned above, Rawls himself admits that ideal theory is "highly idealized"[1531] – and accordingly, a court that approaches its task of interpretation without any awareness of the non-ideal circumstances surrounding it whatsoever risks making grand pronouncements at the cost of their effectiveness in prac-

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1525 See Chapter 9, II.5.
1526 Mann, "Non-ideal Theory of Constitutional Adjudication", on Rawls at 38.
1527 Ibid., 16 (emphasis in original).
1528 See ibid., 21.
1529 Rawls, *The Law of Peoples*, at 90; see also Rawls, *A Theory of Justice*, at 8, 215-218 and 343; Rawls, *Political Liberalism*, at 285; Simmons, "Ideal and Nonideal Theory" at 34.
1530 This does not, I think, imply any particular grounding for those values, i.e. the distinction holds even if we accept the indeterminacy critique and do not see them as somehow already contained "in" law; see supra, I.
1531 Supra, note 1521.

tice.[1532] It seems more desirable, following Mann, to require courts to be concerned with both the "pronouncement of ideal constitutional values, and with the meaningful and sustainable *realisation* of these values in actual social and political life".[1533]

The need for some kind of strategy can be found, though often more latent than explicit, in many accounts of international adjudication. As at the national level,[1534] many commentators make primarily descriptive claims (i.e., courts *do* act strategically) rather than normative claims (i.e., courts *should* act strategically).[1535] Yet the prior tends to imply the latter by virtue of a certain sense of necessity, as when Shai Dothan claims that "[c]ourts that do not learn to act strategically will lose relevance or cease to function, leaving in operation only good strategists".[1536] From that perspective – similar to the talk of a "legitimacy crisis" of the ECtHR[1537] – any approach that leaves aside strategic considerations seems undesirable as it would, sooner or later, lead to States parties categorically refusing to comply with the ECtHR's judgments, withdrawing from the Convention system, or dismantling it entirely.[1538] In a colourful phrase of Frédéric

1532 Accordingly, the notions of (sociological) legitimacy and effectiveness are often linked in accounts of European consensus: see e.g. Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" at e.g. 290 and 316, read together; Dahlberg, "'The Lack of Such a Common Approach' - Comparative Argumentation by the European Court of Human Rights" at 82; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 118; Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 140-141; see generally Helfer and Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts" at 483.

1533 Mann, "Non-ideal Theory of Constitutional Adjudication" at 38 (emphasis in original).

1534 For an overview, see Lee Epstein and Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," (2000) 53 *Political Research Quarterly* 625.

1535 E.g. Dothan, "How International Courts Enhance Their Legitimacy" at 456 ("International courts try to enhance their legitimacy and behave strategically to pursue this goal"); see also Lupu, "International Judicial Legitimacy: Lessons from National Courts" at 448-449.

1536 Dothan, "Judicial Tactics in the European Court of Human Rights" at 124 (in footnote 22).

1537 See Chapter 9, II.2. and infra, III.3.

1538 Of course, the less one is invested in the ECtHR as a helpful institution, the less this would seem bothersome. For present purposes, I assume that the ECtHR is worth retaining, and focus more on how this might be achieved in light of opposition and, crucially, *at what cost*; for some thoughts on how to decenter the ECtHR, see Chapter 11.

Mégret's, it would resemble an "unyielding deontological line" with "the morbid, cultish feel of an absolutist's death wish".[1539]

Even if such extreme images are avoided, there is an awareness that practical relevance matters more than mere pronouncements. Françoise Tulkens has (extra-judicially) made this point most emphatically:

> To have any meaning in the lives of individuals and communities, [human rights] *must be embedded in practice*. A judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting-point of a process which should enable rights and freedoms to be made effective.[1540]

In other words, the ECtHR's judgments, like those of national constitutional courts, are proclaimed with the aim of *being realised*,[1541] thus potentially bringing strategy – including strategic concessions – into the equation to grapple with the question of how that goal can best be achieved.

Despite these convergences, it is clear that strategy and principle may also point in different directions in the non-ideal circumstances in which we often find ourselves, and in that sense be fundamentally irreconcilable – hence Mann's insistence on acknowledging the dilemma involved in institutionally-hard cases, and the admission that such cases are likely to involve a "'dirty hands' situation" when strategic concessions are at issue.[1542] It might well be argued that prioritising strategy in the context of human rights adjudication constitutes what Habermas has called a the subtle redefinition of a moral or ethical question as strategic.[1543] In other words: by focussing on the goal of upholding support for the ECtHR, the individual case – and the individual applicant – at issue are side-lined. One hesitates

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1539 Mégret, "The Apology of Utopia" at 478 (on lack of ascending argument in human rights law and the risk that it will not "be taken very seriously by states"); the notion of deontological suicide is also used by Mann, "Non-ideal Theory of Constitutional Adjudication" at 24 and 48.

1540 Françoise Tulkens, "Execution and Effects of the Judgments of the European Court of Human Rights. The Role of the Judiciary" (Dialogue between judges, European Court of Human Rights, 2006), at 9-10 (emphasis in original).

1541 On realisation of rights in the (Inter-American) regional context, see e.g. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" at 115; on the link between legitimacy and realisation, see critically Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism" at 369-370.

1542 Mann, "Non-ideal Theory of Constitutional Adjudication" at 37.

1543 Habermas, *Between Facts and Norms*, at 177; see also Dworkin, "Liberty and Moralism" at 305.

to wield the heavy cudgel of Kant,[1544] yet there is a sense in which the applicant is objectified as merely a means to further the ECtHR as an institution, rather than taking seriously the potential human rights violation that is being asserted. As Koskenniemi has put it discussing the "political moralist" disparaged by Kant, it will always be possible to "find a strategic consideration to justify putting other people into harm's way".[1545]

Accordingly, it is acknowledged even by those approaching the ECtHR (or other regional or international courts) from a strategic angle that strategy should not always carry the day. Fiona de Londras and Kanstantsin Dzehtsiarou, although strongly focussed on the need for strategic awareness, admit that it leads to the ECtHR becoming "susceptible to being captured by states' interests", and to the "possible negative implications" that follow from this.[1546] Helen Fenwick has made the dilemma in what Roni Mann would deem institutionally-hard cases particularly clear. Describing the ECtHR's exclusion of same-gender couples from the right to marry, she argues that "its reliance on one version of consensus analysis to take that stance is defensible" since "a degree of self-restraint based partly on such analysis allows the Court to maintain its legitimacy in positivist terms", i.e. to maintain its sociological legitimacy as part of a strategic approach.[1547] But while "defensible", such a strategy comes at a cost: "in taking this stance the Court is opposing a number of core Convention values", i.e. principled considerations such as non-discrimination.[1548] The core tension – in Fenwick's terms, the "struggle to maintain a balance"[1549] – between strategy and principle thus persists.

1544 E.g. Immanuel Kant, "Grundlegung zur Metaphysik der Sitten," in *Die Kritiken* (Frankfurt a.M.: Zweitausendeins, 2008) at 677.

1545 Koskenniemi, "Constitutionalism as Mindset" at 30; for a similar point with regard to the International Court of Justice, see Nollkaemper, "International Adjudication of Global Public Goods: The Intersection of Substance and Procedure" at 783.

1546 De Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 544 and 547.

1547 Fenwick, "Same-sex Unions at the Strasbourg Court in a Divided Europe: Driving Forward Reform or Protecting the Court's Authority via Consensus Analysis?" at 271.

1548 Ibid.

1549 Ibid.; see also Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 36, arguing that there "needs to be a compromise between the competing interests at stake" (i.e. setting principled standards and retaining sociological legitimacy); Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257-258, juxtaposing "normative

In sum, taking note of strategic concerns in one sense provides a helpful departure from a purely principled stance which would focus only on the judgment at issue without any awareness of how power operates in the environs of a court; but on the other hand, taking a strategic approach carries the very real danger of giving too much normative force to such power within the court's reasoning, and hence leaving too little room to question it. As Gilabert and Lawford-Smith have put it with regard to the incorporation of certain feasibility constraints into political theory:

> [I]ncluding them risks a cynical realism capitulating to injustices that could be superseded. But […] not including them leads to impotent idealism seeking desirable but extremely improbable outcomes, or to irresponsible risk taking that is likely to involve great costs in the face of dim prospects for major gains.[1550]

This is what I take to constitute the dilemma of strategic concessions. The subsequent section will explore how it plays out in the context of European consensus.

III. European Consensus as a Conflation of Strategy and Principle

1. Different Perspectives on Consensus within Non-Ideal Theory

The justification of consensus on strategic grounds which I explored in Chapter 9 adopts long-term support for human rights protection by the ECtHR as its goal, and regards the incremental development of the ECtHR's case-law based on European consensus as the appropriate path towards that goal. Use of European consensus is thus conceptualised as a "pragmatic"[1551] or "expedient tool"[1552] to ensure that the ECtHR does not incur the wrath of the States parties and thus retains sufficient sociological legitimacy to uphold human rights in the future. The emphasis on this

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problems" with the ECtHR's "institutional constraints" and seeking to "balance" them.

1550 Gilabert and Lawford-Smith, "Political Feasibility: A Conceptual Exploration" at 815.

1551 Macdonald, "The Margin of Appreciation" at 123; see also Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 253; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 471.

1552 Yourow, *The Margin of Appreciation Doctrine*, at 195.

strategic aspect explains, perhaps, why European consensus is sometimes seen less as a way of legally justifying a certain concrete norm and more as an "extra-legal" argument.[1553] The interesting twist to this kind of admission is that consensus is clearly *also* considered a legal argument.[1554] This bifurcation is possible because the gist of the matter lies not so much in the form of vertically comparative reasoning itself but in the rationale for its use:[1555] insofar as that rationale is strategic, it may be considered "extra-legal"; but because European consensus can also be defended on principled terms which are understood as "legal", it becomes the fulcrum in which strategy and principle meet. This section is dedicated to disentangling the various different perspectives on consensus which result from this amalgamation.

I would begin by emphasising that the different rationales for supporting or opposing the use of consensus *can be distinguished*. It may seem, at first, that there is significant overlap between support of or opposition to the use of consensus, no matter for which reason. Both ideal and non-ideal theory build on and construct certain images of the judicial role,[1556] and these may resonate with one another in different ways in practice. For example, the morality-focussed perspective tends to be critical of the States parties in an effort to protect the prepolitical rights of intra-State minorities; and this vision of the ECtHR as deliberately counter-majoritarian makes it seem problematic if the States parties' positions are taken into ac-

1553 Burstein, "The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights" at 439; Petkova, "The Notion of Consensus as a Route to Democratic Adjudication" at 675; see also de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 524.

1554 Explicitly Dzehtsiarou, "What Is Law for the European Court of Human Rights?"; see also Nussberger, *The European Court of Human Rights*, at 84 ("European consensus as a legal term").

1555 See Chapter 1, IV.2.

1556 For ideal theory, this is most immediately evident; for the ECtHR, see with particular clarity Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?" at 275-276; Kleinlein, "Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control" at 881; for non-ideal theory, see Mann, "Non-ideal Theory of Constitutional Adjudication" at 43; see also the discussion of different judicial "characters" in Ezgi Yildiz, "A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights," (2020) 31 *European Journal of International Law* 73; see further infra, IV.

count, whether for idealised democratic or non-ideal strategic reasons.[1557] Most often, proponents of the morality-focussed perspective therefore simply criticise the use of European consensus in and of itself, without any further specification along principled or strategic lines.[1558]

Conversely, many academic commentators support European consensus both for principled and for strategic reasons. Andrew Legg has summed up this approach most succinctly: on his conceptualisation of European consensus, it "furnishes [principled] substantive guidance about the content of moral norms, but also [strategically] addresses the legitimacy problems raised by interpretations of the Treaties that result in new moral guidelines for signatory states".[1559] Others have more or less explicitly taken a similarly conjunctive approach,[1560] often without further clarifying the relationship between the two different strands of argument. The underlying assumption seems to be that the fact of moral disagreement not only points towards ethical normativity as a matter of principle, but also makes it difficult for a (regional) court to retain its sociological legitimacy if it were to adopt the morality-focussed approach.[1561]

1557 See Kagiaros, "When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights" at 288; Bassok, "The European Consensus Doctrine and the ECtHR Quest for Public Confidence" at 254; more generally Mann, "Non-ideal Theory of Constitutional Adjudication" at 23.

1558 Letsas and Benvenisti are among the few to make this dual opposition to consensus explicit: see Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, arguing against the use of consensus on principled (at 121) and strategic (at 124-125) grounds; Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards", arguing against the use of consensus on principled (at 847, via the margin of appreciation) and strategic (at 851-853) grounds, although he also acknowledges strategic use of the margin of appreciation (see note 1562).

1559 Legg, *The Margin of Appreciation*, at 115.

1560 E.g. Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251; Lock, "The Influence of EU Law on Strasbourg Doctrines" at 817-818; Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 35-36; McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 30-31 also combines "instrumental" and "normative" arguments, although it seems to me that, on his reading, the latter retain a strong strategic element.

1561 This seems to be Dzehtsiarou's main point: while he does not explicitly relate the respective chapters on principle and strategy in his monograph on European consensus to one another, the strategic criticism of the morality-focussed perspective shines through in both chapters; see in particular Dzehtsiarou,

Yet this kind of overlap between principle and strategy is by no means logically necessary. For example, it is possible to oppose the use of consensus on principled grounds such as those associated with the morality-focussed perspective, yet still support it on strategic grounds as necessary for an effective realisation of minority rights.[1562] Holning Lau has elaborated on this position at length in his rewriting of the ECtHR's judgment of *Schalk and Kopf v. Austria*.[1563] In terms of ideal theory, his argument paradigmatically reflects the concerns of the morality-focussed perspective. He argues that the national laws which form the basis of consensus may "often reflect flawed democratic deliberations" impaired by "entrenched stereotypes", and that the States parties are therefore "not particularly well positioned to determine whether sexual-orientation-based differentiation is justified".[1564] In principle, then, Lau is opposed to consensus. Yet he supports its use as a matter of non-ideal theory: for "pragmatic reasons", specifically to prevent "enforcement problems", he suggests that the ECtHR should require the States parties to only "implement legal standards that a critical mass of Contracting States has already adopted".[1565] The dilemma of strategic concessions is rendered explicit, on Lau's account, because he only "begrudgingly" accepts deference to the States parties in response to non-ideal conditions.[1566]

One might think that it makes little difference whether the use of consensus is supported for strategic or principled reasons: some commentators, like Lau, do only the prior; others, like Samantha Besson, do only the latter;[1567] and many others besides do both or do not distinguish clearly

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European Consensus and the Legitimacy of the European Court of Human Rights, at 117-118 and 154; see also Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251; Legg, *The Margin of Appreciation*, at 115.

1562 As acknowledged by Benvenisti, "The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy" at 252-253.

1563 On that case, see generally Chapter 1, II.

1564 Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 248-249.

1565 Ibid., 253-254.

1566 Ibid., 257; see also Fenwick and Fenwick, "Finding 'East'/'West' Divisions in Council of Europe States on Treatment of Sexual Minorities: The Response of the Strasbourg Court and the Role of Consensus Analysis" at 273, "unpalatably" concluding that consensus should not be abandoned.

1567 Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 63; see also Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 160-161, acknowledg-

between support of consensus for principled or strategic reasons.[1568] One reason why it does not seem necessary to distinguish between principled or strategic elements in justifications of European consensus might be that the strategic approach, as described in Chapter 9, constitutes what I there called a form of abstract strategizing:[1569] its focus on the incremental development of the ECtHR's case-law by reference to developing standards within the community of the States parties points away from the specifics of individual cases, thus making it seem more compatible with a principled approach based on a pan-European ethos.

But proclaiming support of consensus in the abstract leaves open an entire host of questions as to its application in practice because, as I have been arguing throughout, consensus is not an "objective" method. In any given case, the ECtHR must face these questions in applying the framework of consensus to vertically comparative materials: how many States parties are needed to establish (lack of) consensus? Which sources should be regarded as decisive? What level of generality should the comparative analysis be conducted at, and which conclusions should be drawn from it? Are counter-arguments to consensus permissible and how can they be established? In answering these questions, tensions between different perspectives immediately re-emerge – not only between different perspectives within ideal theory but also between principled and strategic considerations. With regard to the *way in which consensus is used*, then, it is highly relevant whether its use is considered justified (primarily) on principled or strategic grounds.[1570]

This becomes particularly clear when considering in which cases consensus might *not* have normative weight or might be outweighed by other arguments, for example because elements of the morality-focussed perspective are introduced to counteract the idealisations involved in the reference to a pan-European ethos. The most widely discussed case to which I have made reference throughout concerns the adequate protection of minority rights: within ideal theory, some kind of caveat is commonly introduced even by proponents of European consensus to prevent a "tyranny of the

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ing epistemological advantages to consensus but sceptical of its use since she regards it as driven primarily by misguided legitimacy concerns; see generally, on sensitivity to institutional context within (only) ideal theory, Mann, "Non-ideal Theory of Constitutional Adjudication" at 23.

1568 Supra, notes 1559-1561.

1569 Chapter 9, IV.

1570 The possibility of a stark divergence is illustrated by Bassok, "The European Consensus Doctrine and the ECtHR Quest for Public Confidence" at 250.

majority", be it the notion of "core rights" or the rebuttal of a presumption established by consensus.[1571] Simultaneously, however, the overwhelming, structural force of prejudice and the interest dominant groups have in retaining their privilege make cases concerning minority rights liable to generate considerable controversy,[1572] and a primarily strategic defence of European consensus would thus mitigate *against* any form of counter-argument that defends minority rights at the expense of endangering the ECtHR's sociological legitimacy.[1573]

Similarly, rights which are vital for democracy to function are often singled out as necessitating particular protection within ideal theory, even by those favouring the ethos-focussed perspective[1574] – since the ethos-focussed perspective relies on trust of democratic procedures, it becomes crucial to ensure that such procedures can run their course smoothly. Yet the case-law of the ECtHR provides manifold examples that "judicial intervention into the way the democratic processes of democratic states are designed can trigger some of the most significant domestic political backlash against a supranational court like the ECtHR" since national polities "experience perhaps the most powerful sense of moral ownership over the terms of their own systems of democratic self-governance".[1575] Again, there is a tension between principle and strategy,[1576] and the way in which European consensus is operationalised in cases concerning the democratic process – for example, the way it is established, the argumentative weight ac-

1571 See Chapter 2, II.1. for the morality-focussed criticism, Chapter 4, III.2. for the notion of core rights, Chapter 7, III. for use of different levels of generality in this context, and Chapter 8, III.2. for consensus as a rebuttable presumption.

1572 Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 159.

1573 See generally Chapter 9, II.4. for the kind of approach to consensus usually associated with consensus as legitimacy-enhancement.

1574 Von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 330; see also Cram, "Protocol 15 and Articles 10 and 11 ECHR - The Partial Triumph of Political Incumbency Post-Brighton?" (explicitly speaking of "principled" arguments at 484).

1575 Pildes, "Supranational Courts and The Law of Democracy: The European Court of Human Rights" at 157.

1576 See Shai Dothan, "Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies," (2018) 9 *Journal of International Dispute Settlement* 145 at 150.

corded to it or the kind of counter-argument that is allowed – depends on what is considered the primary justification for its use.[1577]

In other words, for all the connections that can be drawn between strategy and principle,[1578] combining them to justify the use of European consensus without further discussion of their interrelation seems somewhat misleading because it covers up persistent tensions between ideal and non-ideal theory. Neither the structural similarity between principled and strategic arguments in favour of European consensus nor its relative formality serve to resolve these tensions, and hence standards of some kind for approaching institutionally-hard cases would be necessary if an abstract justification of European consensus is to translate over into a justification of its use in practice.[1579] If consensus is conceptualised as necessary to maintain support for the ECtHR (strategic element) and yet easily discarded in controversial cases such as those concerning minority rights (principled element), then there is a sense of having the cake and eating it.[1580]

2. Consensus and an Impression of Objectivity

If academic commentary provides little guidance on how the use of European consensus relates to the dilemma of strategic concessions, then the ECtHR's case-law is even less clear. Like most other courts, the ECtHR rarely admits to the reliance on strategic considerations in its judg-

1577 In both cases, of course, there is ample room for disagreement; the examples serve merely to illustrate the potential tensions between strategy and principle: see supra, I.

1578 For example, by virtue of connections between normative and sociological legitimacy: see Chapter 9, II.1.

1579 See generally on the tendency to eschew such standards Mann, "Non-ideal Theory of Constitutional Adjudication" at 32-37.

1580 See e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 117-119 and 123-124, moving from the importance of consensus as legitimacy-enhancement to its rebuttal in cases concerning minority rights; see also Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 130, claiming that "[t]he departure from the solutions supported by internal legal sources [i.e. some forms of consensus] is profoundly problematic" without a minority-related caveat; elsewhere, Dzehtsiarou has suggested with Fiona de Londras that the ECtHR follows strategic considerations unless a case is of "sufficient constitutionalist significance": de Londras and Dzehtsiarou, "Managing Judicial Innovation in the European Court of Human Rights" at 545, though without (at least on my reading of the passage) endorsing this empirical-analytical claim normatively.

ments.[1581] At most, it might use certain wordings – such as the reference to "sensitive" or "delicate" matters[1582] – which hint at what Clare Ryan calls "obscured justifications" including strategy.[1583] Despite this reluctance to admit to the relevance of strategic concerns, however, it seems likely that they were behind the Court's conclusions in quite a few cases, including some in which consensus was referred to: its convoluted treatment of consensus in *S.A.S. v. France*,[1584] its reliance on lack of consensus without any further argument in *Schalk and Kopf*,[1585] and its about-face in *Lautsi v. Italy* following criticism of the preceding chamber judgment[1586] come to mind as possible examples. Yet even if a strategic approach to consensus may, to some extent, constitute a relevant factor within the ECtHR's processes of discovery,[1587] then it is not usually made explicit within its processes of justification.[1588] This further reinforces the idea of European consensus as a fulcrum of strategy and principle by making different rationales for its use indistinguishable ("obscured", as Ryan puts it[1589]) in practice. In what follows, I would like to discuss the advantages and disadvantages of conflating strategy and principle in this way.

1581 Hence why I analysed its case-law, in Chapters 5 to 8, primarily through the lens of ideal theory.

1582 Both adjectives could be read as "likely to engender criticism"; but see also Chapter 5, III.2. for a reading relating them to moral complexity and the ethos-focussed perspective.

1583 Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 487 (and e.g. 488 on avoiding backlash); see also Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 161-162. Tellingly, former Judge and Vice President of the ECtHR Angelika Nussberger also speaks of a "more hidden" purpose of consensus in that it serves to predict the acceptability of the Court's judgments: Nussberger, *The European Court of Human Rights*, at 88.

1584 ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*, at para. 156; see Chapter 5, III.1.

1585 ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 105; see Chapter 1, II.

1586 ECtHR (GC), Appl. No. 30814/06 – *Lautsi and Others*, at paras. 68 and 70; see Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 162, citing this case as "an attempt [by the Court] to win back its political legitimacy", although Henrard is sceptical of this approach.

1587 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 184-186 for more detail, based on interviews with ECtHR judges.

1588 For the distinction between processes of discovery and justification, see Chapter 1, IV.5.

1589 Supra, note 1583.

The general sentiment in academic commentary (and, one may surmise from the relative lack of reference to strategic considerations in processes of justification, also the putative position of most judges) seems to be that strategy should not be made explicit. There are many good reasons to substantiate this position – for example, admitting to strategic concessions might exacerbate problems of reflectivity (i.e. the court might increasingly be criticised or threatened so as to achieve renewed concessions).[1590] Many commentators also assume that mentions of strategy rather than principle would impact negatively on a court's sociological legitimacy by tarnishing its image as an impartial arbiter of law,[1591] thus jeopardising at least in part the very aim of turning to strategy in the first place. This tendency is mirrored in the literature on European consensus as legitimacy-enhancement, where it is often taken as given that the strategic responsiveness of consensus to the States parties' positions "in a doctrinal, *not openly political* framework" is a *positive* aspect.[1592]

Given the underlying ideas of courts as forums of principle rather than strategy,[1593] the idea that courts should avoid becoming entangled (or admitting to being entangled) in "issues of political power"[1594] is widespread. Accordingly, the commonly drawn conclusion that strategic considerations should be hidden within processes of justification is hardly specific to European consensus. It nonetheless becomes particularly relevant in the present context, I think, mainly for two reasons. First, it is striking how widespread the justification of the use of consensus on primarily strategic grounds, i.e. as the basis for legitimacy-enhancement, has become.[1595] The

1590 See generally Mann, "Non-ideal Theory of Constitutional Adjudication" at 42.

1591 Lupu, "International Judicial Legitimacy: Lessons from National Courts" at 444; Odermatt, "Patterns of Avoidance: Political Questions Before International Courts" at 227; Helfer and Slaughter, "Toward a Theory of Effective Supranational Adjudication" at 313; and, more generally on themes of judicial independence, Laurence R. Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo," (2005) 93 *California Law Review* 899.

1592 Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, at 140 (emphasis added).

1593 See Mann, "Non-ideal Theory of Constitutional Adjudication" at 43, building on Ronald Dworkin, "The Forum of Principle," (1981) 56 *New York University Law Review* 469.

1594 Dworkin, "The Forum of Principle" at 517.

1595 See Chapter 9, I.; the vocabulary of "legitimacy" with its potentially normative implications (see ibid.) further reinforces the conflation of strategy and principle.

unspoken disconnect between its (allegedly principled) use in the judgments of the ECtHR and the (primarily strategic) underlying rationale thus becomes particular noticeable. Second, it is noteworthy that consensus is not only conceptualised as conveniently "doctrinal, not openly political" but that the associated connotation of legal "objectivity" is *itself taken as a positive aspect in terms of legitimacy-enhancement*. In that vein, it has been argued that the ECtHR "enhances its legitimacy if it is seen to be constrained by objectively verified legal arguments" and European consensus "creates an impression that it is", in fact, "constrained" by such a legal argument.[1596] Differently put, it the words of Daniel Peat, "consensus may shield the Court from criticisms of subjectivity".[1597]

I have been arguing against the conceptualisation of consensus as an "objective" argument throughout, but the point here is subtly different: the point is not (necessarily) that consensus *is* objective, but that it gives off an *impression* of objectivity. This is complicated terrain, for much nuance depends on how one understands the basic terms of debate such as "objective",[1598] "political", "strategic", and so on.[1599] Objectivity might be challenged in different ways, and these would usually be geared also at challenging the widespread impression of objectivity among legal actors – where else, if not in their perceptions, would objectivity reside? Critical international legal theory, for example, often aims to disrupt the "illusion" of objectivity in precisely this way,[1600] and it has occasionally been discussed whether this is a helpful move in particular contexts but not in oth-

1596 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 164; see also Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 90.

1597 Peat, *Comparative Reasoning in International Courts and Tribunals*, at 170.

1598 See e.g. the slightly different senses used in Chapter 1, IV.5., Chapter 3, II., and Chapter 5, I. and V.

1599 See Chapter 1, IV.4.

1600 Koskenniemi, *From Apology to Utopia*, at 536.

ers,[1601] or with regard to the perception of objectivity *by certain actors but not others*.[1602]

The debate about admitting to strategic considerations is also geared towards the perception of certain actors, primarily the States parties,[1603] but it is aimed at a slightly different, though not unrelated issue. Roughly speaking, I would suggest that strategic considerations constitute *one of many* considerations lurking behind an ostensible objectivity (alongside e.g. principled moral-political considerations). The key point for present purposes, however, is that because legal objectivity is commonly understood to exclude strategic considerations, admitting to strategic concessions is regarded as an "extra-legal" argument[1604] – hence the celebration of consensus as a form of reasoning which is said to seem legal while incorporating strategic concerns, indeed even urged to seem legal *because of* strategic concerns.

One way in which consensus is often connected to legal objectivity is by situating it in relation to customary international law (or, less commonly, general principles of international law).[1605] This connection was popularised, in particular, by Judge Ineta Ziemele – although she initially seemed to equate only a subset of cases involving European consensus with regional custom and argued that reliance exclusively on the latter might have provided greater clarity for the ECtHR's case-law.[1606] In a subsequent concurring opinion, her position seems to have changed to a more general equation of the two concepts: discussing European consensus, she holds that "the Court, when it examines domestic laws and practices […] is in

1601 E.g. famously Matthew Craven et al., "We Are Teachers of International Law," (2004) 17 *Leiden Journal of International Law* 363 at 374; see Robert Knox, "Strategy and Tactics," (2010) 21 *Finnish Yearbook of International Law* 193 for a critical response; see also Kennedy, *A Critique of Adjudication (fin de siècle)*, at 246 on the possibility of different effects of critique in different "social milieus".

1602 E.g. Severin Meier, "The Influence of Utopian Projects on the Interpretation of International Law and the Healthy Myth of Objectivity," (2017) 60 *German Yearbook of International Law* 519 at 536.

1603 See Chapter 9, II.3.

1604 Supra, note 1553.

1605 For the latter, see briefly Chapter 3, IV.1.

1606 Ineta Ziemele, "Customary International Law in the Case Law of the European Court of Human Rights - The Method," (2013) 12 *The Law and Practice of International Courts and Tribunals* 243 at 250-251.

fact looking for […] regional custom".[1607] Other judges[1608] and academic commentators[1609] have voiced similar sentiments, although often without further elaboration. Most recently, Vassilis Tzevelekos and Kanstantsin Dzehtsiarou have analysed the connection in detail and concluded that while there are "sonorous parallels", the Court does not currently conceptualise European consensus as custom and would face significant challenges were it to do so – although such an approach would be possible in theory.[1610]

The gist of this debate does not, I think, lie in confirming or disputing the doctrinal classification of consensus as custom, but rather in the connotations of legal objectivity crafted onto European consensus by virtue of its proximity to the sources of international law.[1611] As Dzehtsiarou has put it, regardless of the precise classification "the Court's approach to consensus can be located within the structure of the sources of international

1607 ECtHR (GC), Appl. No. 59552/08 – *Rohlena v. the Czech Republic*, Judgment of 27 January 2015, concurring opinion of Judge Ziemele, para. 2; see also more recently Ineta Ziemele, "European Consensus and International Law," in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc (Oxford: Oxford University Press, 2018).

1608 ECtHR (GC), Appl. No. 18030/11 – *Magyar Helsinki Bizottság v. Hungary*, Judgment of 8 November 2016, concurring opinion of Judge Sicilianos, joined by Judge Raimondi, para. 16.

1609 Besson, "Human Rights Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators" at 58; Draghici, "The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?" at 15-16; Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights" at 275; more cautiously e.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 163; Legg, *The Margin of Appreciation*, at 116 and 119; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 256; Tzevelekos, "The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?" at 654 and 662.

1610 Tzevelekos and Dzehtsiarou, "International Custom Making" at 336.

1611 Of course, this assumes in turn that international custom as one of these sources is (perceived as) objective: contrast Koskenniemi, *From Apology to Utopia*, chapter 6.

law"[1612] – and this makes the use of consensus seem appropriate.[1613] A similar motivation can be assumed for those commentators who relate the ECtHR's use of consensus to "subsequent practice" in the sense of Article 31 (3) lit. b VCLT, thus investing it with the authority of international law's "toolkit on treaty interpretation".[1614] All these frameworks serve to situate consensus as a form of reasoning which shows that the ECtHR is not "making political decisions"[1615] including (but not restricted to) the obfuscation of a strategic rationale for using consensus.

Practically speaking, one might question whether the use of European consensus truly does promote an impression of objectivity, even when connected to sources of international law in this way.[1616] Doubts might be raised, first and foremost, with regard to those States already liable to criti-

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1612 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 163.

1613 See Větrovský, "Determining the Content of the European Consenus Concept: The Hidden Role of Language" at 134; Lixinski, "The Inter-American Court of Human Rights' Tentative Search for Latin American Consensus" at 349-350.

1614 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 125; see also on consensus and Article 31 (3) lit. b VCLT in different ways Lugato, "The 'Margin of Appreciation' and Freedom of Religion: Between Treaty Interpretation and Subsidiarity" at 62; Legg, *The Margin of Appreciation*, at 106; Georg Nolte, "Jurisprudence under Special Regimes Relating to Subsequent Agreements and Subsequent Practice," in *Treaties and Subsequent Practice*, ed. Georg Nolte (Oxford: Oxford University Press, 2013) at 256; Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 81; Karl Zemanek, "Court Generated State Practice?," (2015) 20 *Austrian Review of International and European Law* 3 as well as the commentaries on that article in the same volume; more critically Peat, *Comparative Reasoning in International Courts and Tribunals*, at 47-48 and 165-166; on Article 31 (3) lit. c VCLT, see Chapter 6, II.

1615 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 164.

1616 With regard to the international legal sources, one might also note that the connections are primarily drawn in separate opinions or academic commentary, seldom in the ECtHR's majority opinions; especially Article 31 (3) lit. b VCLT is rarely referred to at all (with its absence all the more striking compared to frequent reliance on lit. c), and usually only in the context of formal or procedural issues: see e.g. ECtHR (Plenary), Appl. No. 15576/89 – *Cruz Varas and Others v. Sweden*, Judgment of 20 March 1991, at para. 100; ECtHR (GC), Appl. No. 15318/89 – *Loizidou v. Turkey (Preliminary Objections)*, Judgment of 23 March 1995, at para. 73; ECtHR (GC), Appl. No. 52207/99 – *Banković and Others v. Belgium and Others*, Decision of 12 December 2001, at paras. 56 and 62; ECtHR (GC), Appl. No. 29750/09 – *Hassan*, at para. 101.

cise the ECtHR.[1617] In the context of Russia "'erecting walls' of sovereignty"[1618] or the United Kingdom emphasising its position as an "independent nation",[1619] a form of reasoning *based on other States' positions* may not only further fuel antagonism towards the ECtHR,[1620] it also seems likely to be immediately politicised rather than being viewed as "objective".

One might argue that the situation is at least different with regard to those States in which there is already a higher level of diffuse support for the ECtHR. There may be some truth to this – the impression of consensus as "objective evidence"[1621] of how human rights should be approached is widespread in academic commentary, so it might be similar among State officials[1622] – but it is also worth remembering that even those who support the use of European consensus have long criticised its inconsistent and incoherent use within the ECtHR's case-law.[1623] This hardly creates an impression of objectivity, so that any defence of consensus on these grounds involves an extremely stark idealisation.[1624] And here we come back to the broader critique of objectivity, i.e. the claim of legal indeterminacy even insofar as principled arguments are at issue. If my argument in previous chapters is correct – if consensus is implicated in the triangular tensions underlying a regional system of human rights protection – then it

1617 See also Chapter 9, III. for more background on these cases.

1618 Sergei Yu. Marochkin, "A Russian Approach to International Law in the Domestic Legal Order: Basics, Development and Perspectives," (2016) XXVI *Italian Yearbook of International Law* 15 at 40.

1619 Leonard Hoffmann, "The Universality of Human Rights," (2009) 125 *Law Quarterly Review* 416 at 430.

1620 Amos, "Can European Consensus Encourage Acceptance of the European Convention on Human Rights in the United Kingdom?" at 267; Senden, *Interpretation of Fundamental Rights*, at 130; for a similar point in the context of EU law, see de Búrca, "The Language of Rights and European Integration" at 46.

1621 Mahoney, "Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin" at 74; for further references, see Chapter 3, II.

1622 Empirical research would be needed to back up this assumption, analogous to the more general research on legitimacy by Çalı, Koch, and Bruch, "The Legitimacy of the European Court of Human Rights: The View from the Ground".

1623 See e.g. the references in Chapter 5, II.

1624 See e.g. the caveat by Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" at 1736: "*If* European consensus is deployed consistently", then it prevents arbitrariness (emphasis added); or Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 172: consensus as an "objectively verified argument", but only "in theory".

seems highly unlikely that it could be used to strengthen an impression of objectivity, for its application always depends on how the ECtHR situates itself within those tensions. If the impression of objectivity were to be heightened, this would involve giving consensus an extremely formulistic and pivotal role in the ECtHR's reasoning[1625] – which would imply significant trade-offs with issues of principle and thus bring us back to the dilemma of strategic concessions.

More specifically with regard to the *obfuscation* of that dilemma within processes of justification, it is also worth raising the question whether an impression of objectivity despite a primarily strategic rationale for the use of consensus is truly desirable. Roni Mann's non-ideal theory of adjudication is once more helpful here as a counter-point, for she argues that, in light of the dilemma of strategic concessions, a consciously non-ideal theory "implies a distinctness of the ideal from the non-ideal, and a requirement to work with this distinctness", hence suggesting a two-phase deliberation and *also* a "two-tiered justification".[1626] Accordingly, Mann posits that decisions justified on strategic grounds should be identifiable as such: where non-ideal considerations form part of their justification, this "should be reflected in the language of the decision and in the effect it would have for the future, when circumstances change".[1627]

This is clearly a controversial proposal, but I would like to foreground one particular argument adduced by Mann to shake up the received wisdom that hiding strategic considerations is the preferable approach. If strategy is not made explicit as separate from principle, Mann argues, there

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1625 See Chapter 9, II.4. in fine.

1626 Mann, "Non-ideal Theory of Constitutional Adjudication" at 40; Gilabert and Lawford-Smith, "Political Feasibility: A Conceptual Exploration" similarly suggest a conceptual distinction between desirability and feasibility (at 818), leading to "all-things-considered" judgments when both are taken into account (at 822).

1627 Mann, "Non-ideal Theory of Constitutional Adjudication" at 52 (emphasis in original); a rare instance of such an approach in the context of European consensus (or, for that matter, the ECtHR more generally) can be found in Holning Lau's rewriting of *Schalk and Kopf* (see already supra, text to notes 1563-1566), which declares a right to same-gender marriage (thus seeking to retain the judgment's "expressive power") even as it abstains from finding a violation of the ECHR based on the rein effect of consensus (due to the ECtHR's "institutional constraints"): Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257; see also the two-tiered approach in Wintemute's take on *Schalk and Kopf*: Wintemute, "Consensus Is the Right Approach for the European Court of Human Rights".

is a danger of *dilution*: "as non-ideal decisions are idealised, they create diluted or eroded ideal precedent",[1628] thereby "distorting the elaboration of constitutional doctrine (first-order) and the evolving understanding of the role of the court in the constitutional system (second-order)".[1629] What was in fact a reaction to contingent non-ideal circumstances will subsequently be read, if not identifiable as such, as a point of principle. As David Hollinger has put it with regard to strategic minimalism, it may fulfil a certain purpose, but "it carries the same risk carried by its famous sibling, strategic essentialism: the risk that it shall deceive its own advocates".[1630]

This kind of consequence is arguably in evidence with regard to the conflation of strategy and principle as the relevant rationale(s) for the use of European consensus, with different implications depending on whether the rein effect or the spur effect is at issue and mirroring the criticisms made of European consensus within ideal theory as discussed in previous chapters.[1631] With regard to the rein effect, my sense is that the amalgamation of ideal and non-ideal theory may contribute to the idealisation of theories that emphasise judicial deference and restraint. This is what Roni Mann calls the erosion of second-order ideal theory: yielding to pressure by the States parties without making the strategic element involved identifiable "supports ideal constitutional theories that seek generally to curb the role of courts and the scope of judicial review, leading to gradual erosion which is unintended and perhaps imperceptible".[1632] If such a develop-

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1628 Mann, "Non-ideal Theory of Constitutional Adjudication" at 22 (emphases omitted).

1629 Ibid., 25; for a similar point, though not specifically on courts, see Simmons, "Ideal and Nonideal Theory" at 29.

1630 David A. Hollinger, "Debates with the PTA and Others," in *Michael Ignatieff: Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001) at 122; for strategic essentialism, see Gayatri Chakravorty Spivak, *In Other Worlds. Essays in Cultural Politics* (Abingdon: Routledge, 1998), chapter 12; Sarah Harasym, ed. *Gayatri Chakravorty Spivak: The Post-Colonial Critic. Interviews, Strategies, Dialogues* (New York and London: Routledge, 1990), chapter 1 (interview with Elizabeth Grosz); Spivak later disavowed the term (while remaining ambiguous as to the underlying project) precisely because it "became the union ticket for essentialism" without sufficient regard to the strategic aspect: Sara Danius, Stefan Jonsson, and Gayatri Chakravorty Spivak, "An Interview with Gayatri Chakravorty Spivak," (1993) 20 *boundary 2* 24 at 35; for reflections on strategic essentialism in the context of human rights, see Theilen, "Pre-existing Rights and Future Articulations: Temporal Rhetoric in the Struggle for Trans Rights", at 212.

1631 See Chapter 3, V. for an overview.

1632 Mann, "Non-ideal Theory of Constitutional Adjudication" at 27.

ment is indeed "imperceptible", it is difficult if not impossible to prove; and in any case, it is not my goal here to provide a genealogy of strategic and principled approaches to European consensus and to the ECtHR's role more generally. The suspicion that human rights are being drained of their transformative potential, however, remains – particularly in light of the strong emphasis that has recently been placed on the need for judicial deference (or, conversely, lack of "judicial activism") both in academic commentary[1633] and particularly in political discourse[1634] surrounding the ECtHR.

Simultaneously (and somewhat paradoxically), the danger involved in conflating strategy and principle with regard to the spur effect is that it normalises what one might call a maximalist conception of human rights, according to which a higher level of human rights protection is self-evidently accepted as an improvement. Differently put: if consensus is understood as the prudential base for incremental development of the ECtHR's case-law, there is an underlying sense that while the rein effect signifies wise restraint (perhaps welcomed,[1635] perhaps regrettable[1636]) in the face of controversial issues, the spur effect signifies a positive development to be pursued when it becomes possible.[1637] The spur effect becomes associated with a desirable level of increased human rights protection in "modern

1633 See e.g. Bates, "Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career… Its 'Coming of Age'?" at 276, who also provides a historical overview through this lens; very starkly Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties*, at 3: "judicial activism is incompatible with the rule of law and often generates legal uncertainty".

1634 See generally Chapter 1, IV.4.; as Dothan has summarised it, "Brighton crystalized a political atmosphere that is hostile to excessive ECHR intervention": Dothan, "Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies" at 150; on the effects of such an atmosphere regardless of formal legal changes, see Madsen, "Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?"; generally speaking, I find the description of a "mantra of judicial activism", raised against any case which a government disagrees with regardless of the underlying reasons, to be quite fitting in many cases: see Helfer and Alter, "Legitimacy and Lawmaking: A Tale of Three International Courts" at 502.

1635 Particularly in light of conflation of ideal and non-ideal theory also with regard to the rein effect, discussed in the previous paragraph.

1636 Supra, note 1566.

1637 See also Chapter 4, III.3. on approaches to the rein and spur effect which imply that the latter justifies the former, with the further implication being that results achieved by reference to the spur effect are desirable.

European societies"[1638] and thus *shifts the focus away from the foundational question of which direction the ECtHR's case-law should develop in* and whether "higher" human rights protection actually fulfils an emancipatory purpose. In this way, the strategic approach to consensus bleeds into the justification of the spur effect in ideal theory, making its potentially hegemonic idealisations shift into the background. If ideal and non-ideal theory are conjoined in this way, it becomes increasingly difficult to "know how to measure success"[1639] other than mere maximisation of human rights standards.

Such an approach is potentially problematic, it seems to me, not only because it reinforces harmonisation within Europe at the expense of minority positions among States, but also more generally in terms of the logic of maximisation. Even if one does not subscribe to the idea that more human rights necessarily lead to harmful "inflation" by devaluing other human rights,[1640] their thoughtless maximisation will lead to some measure of depoliticization[1641] and, relatedly, to a reinforcement of the status quo across Europe by elevating it to the transnational level and cloaking it in the language of human rights. The critical potential of human rights thus threatens to be transformed into its opposite – not only because the rein effect of consensus (potentially) makes the emancipatory use of human rights more difficult but also because the spur effect (potentially) narrows down the field within which new human rights standards are constituted[1642] in such a way that they tend to reinforce the status quo rather

1638 ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 106; on the implications of temporal standards of "progress", see Chapter 2, III. and Chapter 6, VI.

1639 Simmons, "Ideal and Nonideal Theory" at 34.

1640 See Chapter 2, III. on inflation in the context of the morality-focussed perspective; more generally on worries about inflation e.g. Stephen Bouwhuis, "Revisiting Philip Alston's Human Rights and Quality Control," (2016) *European Human Rights Law Review* 475; Dominique Clément, "Human Rights or Social Justice? The Problem of Rights Inflation," (2018) 22 *International Journal of Human Rights* 155; James W. Nickel, *Making Sense of Human Rights* (Malden: Blackwell, 2007), at 96; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), at 90; critically von Arnauld and Theilen, "Rhetoric of Rights: A Topical Perspective on the Functions of Claiming a 'Human Right to …'", at 49; Jens T. Theilen, "The Inflation of Human Rights: A Deconstruction," (2021) *Leiden Journal of International Law*, forthcoming.

1641 See generally Chapter 3, IV.1., Chapter 4, IV. and in more detail on possible implications Chapter 11.

1642 On field constitution, see Koskenniemi, "The Effect of Rights on Political Culture" at 140-142.

than challenging it. Both points can be raised as downsides of the use of European consensus in ideal theory, but if Mann's argument pertaining to the "gradual erosion" of ideal theory based on strategic considerations is correct, then conflating strategy and principle within the fulcrum of European consensus may well serve to intensify these effects.

3. The Normalisation of a Strategic Approach to Consensus

Even as the conflation of strategy and principle serves to obfuscate strategic considerations within the ECtHR's processes of justification, it also *normalises* them as a relevant background rationale by connecting them to a frequently-used, "well-established",[1643] and ostensibly principled way of reasoning. Normalisation has been described by Susan Marks as one of the ways in which ideology operates to make authority "seem valid and appropriate" by making "a particular set of arrangements […] seem normal" and, accordingly, making different arrangements "come to appear as deviations from the proper state of things".[1644] With regard to the ECtHR, I would suggest that this mode of normalisation applies both to the use of European consensus and to the relevance of strategy as "normal".

By way of contrast, consider once again what I called the dilemma of strategic concessions.[1645] Building on Roni Mann, I argued that it is important to recognise that whether or not to give weight to non-ideal considerations which deviate from ideal standards *does constitute a dilemma*. We may well grant that strategic concerns can be a helpful counterbalance to pure ideal theory so as to foreground the realisation of ideal principles rather than their mere proclamation, but their simultaneous tension with those very ideal principles makes strategic concessions problematic. Even when an argument can be made that strategy should trump principle in a certain case, and the strategic approach thus considered the "right" approach – even then, "this does not mean that there is *nothing wrong* with the outcome", since the non-ideal decision "remains at some level *not* a right deci-

1643 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 131; see also Senden, *Interpretation of Fundamental Rights*, at 264.
1644 Marks, *The Riddle of All Constitutions*, at 19.
1645 Supra, II.

sion".[1646] There is, as Laurence Helfer has acknowledged, a "price to pay" for focussing on the sociological legitimacy of a court.[1647]

If strategy and principle are conflated within the fulcrum of European consensus, however, then not only does this potentially lead to the dilution of ideal standards as discussed in the previous sub-section, it also distracts from the "price to pay" for strategic concessions given the constant reliance on a kind of reasoning which, by virtue of the popularity of legitimacy-enhancement as the rationale for the use of consensus, is understood to be (at least in part) strategically motivated. The fact that consensus constitutes a form of abstract strategizing based on incremental development of the ECtHR's case-law is also relevant here:[1648] this makes the strategic element less stark and less visible, but also *ubiquitous within the ECtHR's reasoning* since consensus as legitimacy-enhancement relies on the *consistent use of consensus over time*. This in turn exacerbates the problem of dilution since strategic considerations will consistently water down ideal standards which the ECtHR might otherwise have set. It comes as no surprise that ubiquitous strategy can easily make a court "lose sight of a truly transformative vision".[1649]

Normalising the strategic element involved in European consensus as legitimacy-enhancement further makes it more difficult to challenge its implications in any given case since it will increasingly be taken for granted.[1650] Indeed, there is a tendency to discount any opposition to European consensus as "unrealistic": setting aside European consensus has been said to "lose touch with reality",[1651] whereas its use, by contrast, is "solidly an-

1646 Mann, "Non-ideal Theory of Constitutional Adjudication" at 52 (emphases in original).

1647 Although his point is that it is a "modest" price to pay; I am not so sure. See Laurence R. Helfer, "Populism and International Human Rights Institutions: A Survival Guide" (iCourts Working Paper Series, No. 133, 2018), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202633>, at p. 19; see also Gearty, "Building Consensus on European Consensus" at 453, arguing against "disregarding the politics of the day" via consensus but also acknowledging that it is "dangerous".

1648 See Chapter 9, IV.

1649 Mann, "Non-ideal Theory of Constitutional Adjudication" at 43.

1650 See generally e.g. Supreme Court of the United States, *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting): "Habit, rather than analysis, makes [traditional legal justifications] seem acceptable and natural".

1651 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 117-118; see also Legg, *The Margin of Appreciation*, at 114 ("not

chored in reality".[1652] Consensus is "essential" in light of "the world in which we actually happen to find ourselves, as opposed to that of our imagining or our dreams".[1653] Robert Wintemute has used particularly dramatic terms: European consensus "serves to anchor the court in legal, political and social reality on the ground", whereas human rights law at the global level "often loses all contact with Earth, and floats off into the stratosphere".[1654] The ECtHR itself has taken on board this kind of rhetoric by holding, in *Demir and Baykara v. Turkey*, that "the common international or domestic law standards of European States reflect a reality that the Court cannot disregard".[1655]

Statements such as these are telling. They demonstrate, first, that normalisation works dialectically to undergird both the use of European consensus and the reliance on strategic considerations in the form of legitimacy-enhancement.[1656] The reference to a harsh "reality" external to the ECtHR takes it as a given that strategic concessions are preferable to taking a principled stance; discounting results which do not cohere with (whatever is interpreted to constitute) European consensus as "unrealistic" simultaneously positions the use of consensus as the appropriate way of making these strategic concessions. The reference to a reality that the Court *cannot*

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consonant with international legal reality"); Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 251 ("amazingly distant from the realities of democratic politics"); less critically Ost, "The Original Canons of Interpretation" at 308 ("fear of detaching [the Court] from legal reality"); Lau, "Rewriting Schalk and Kopf: Shifting the Locus of Deference" at 257 (a "realist perspective as opposed to utopianism").

1652 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 262; see also Petkova, "The Notion of Consensus as a Route to Democratic Adjudication" at 695 ("the notion of consensus provides the Court with a link to […] empirical realities").

1653 Gearty, "Building Consensus on European Consensus" at 453 and 449-451; the juxtaposition with imagination and dreams invokes airy utopianism as an unsatisfactory contrast to realism, as Lau does more explicitly (supra, note 1651); contrast Theilen, Hassfurther, and Staff, "Towards Utopia - Rethinking International Law" for a more positive spin on utopianism.

1654 Wintemute, "Consensus Is the Right Approach for the European Court of Human Rights".

1655 ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 76; but see also the less drastic re-renderings of this passage e.g. in ECtHR (GC), Appl. No. 72508/13 – *Merabishvili v. Georgia*, Judgment of 28 November 2017, at para. 306.

1656 On the latter, see generally Koskenniemi, "Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism" at 367.

disregard demonstrates, second, how normalisation makes both the use of consensus and the reliance on strategic considerations seem *necessary*. Echoing Susan Marks, we might say that disregarding them is made to appear like a deviation from the "proper state of things":[1657] reference to consensus in the interest of legitimacy-enhancement is presented as "*in the design* of the Convention".[1658] Incrementalism based on consensus thus becomes the only possible option.

An alternative approach would not necessarily posit that "realism" of some kind should be avoided entirely – indeed, in a sense references to the circumstances at any given time and place which can be called "reality" is inherent in the very notion of non-ideal theory.[1659] Disregarding alternatives to consensus as "unrealistic", however, not only naturalises the use of consensus, but also implies a static notion of reality which takes no account, for example, of the ECtHR's power to influence the circumstances in which it finds itself. Mann calls this the problem of endogeneity, describing it as an over-emphasis on strategy which "does not take into account the role of the court in influencing preferences: the court is a player, the material is given".[1660] Instead of fatalistically approaching non-ideal theory through the lens of such a static notion of reality, one might make reference to what Ernst Bloch calls those "elements of reality geared towards the future",[1661] hence implying a procedural conception of reality as open-ended and evolving.[1662] Or, to return to Rawls: "the limits of the possible are not given by the actual, for we can to a greater or lesser extent change political and social institutions, and much else".[1663]

1657 Supra, note 1644.

1658 Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights" at 63 (emphasis in original).

1659 See e.g. Mann, "Non-ideal Theory of Constitutional Adjudication" at 38 ("reality as it happens to be at the moment from which we begin acting, with the limitations of existing practices, institutions, convictions").

1660 Ibid., 42.

1661 Ernst Bloch, *Das Prinzip Hoffnung*, 10th ed. (Frankfurt a.M.: Suhrkamp, 2016), at 165 (my translation).

1662 Ibid., 226; see also Jens T. Theilen, "Of Wonder and Changing the World: Philip Allott's Legal Utopianism," (2017) 60 *German Yearbook of International Law* 337 at 350.

1663 John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), at 5; see also Gilabert and Lawford-Smith, "Political Feasibility: A Conceptual Exploration" at 813-814; in the context of adjudication, see Mann, "Non-ideal Theory of Constitutional Adjudication" at 42 ("a court's position affects the way others think").

A somewhat more nuanced version of the above-mentioned claims might posit that it is "unrealistic", for strategic reasons, to set aside European consensus *at the current point in time*. This point is at least implied by those who invoke a "legitimacy crisis" of the ECtHR to promote the use of consensus:[1664] there is a sense of periodisation, with strategy being more or less necessary depending on the level of diffuse support for the ECtHR[1665] and, accordingly, with the ECtHR having more leeway to deviate from European consensus in some phases of general contentment or "serendipitous governance".[1666] Yet the implication remains that, at the current point in time, the use of consensus is necessary to counter the assumed "legitimacy crisis", leading to the normalisation of strategy at least for the time being. It is worth keeping in mind, in that regard, that the "legitimacy crisis" is no less constructed than the notion of a "reality" ostensibly disconnected from the ECtHR. Crises "are produced: they are negotiable narratives that can mask as well as reveal".[1667]

Even if we were to accept that the ECtHR currently faces more challenges to its authority than at other times, then, this does not mean that we must normalise the prioritisation of strategy across the board; rather, we can deconstruct the narrative of crisis to *also* take into account elements of

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1664 See in more detail Chapter 9, II.2., as well as supra, note 1634 on the current atmosphere.

1665 See in particular Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity" at 487-488 on "highs and lows" with regard to "approval ratings", also holding that current criticism is "unprecedented"; the very phrase "*age* of subsidiarity", coined by Spano, implies periodisation; Jörg Polakiewicz and Irene Suominen-Picht, "Aktuelle Herausforderungen für Europarat und EMRK: Die Erklärung von Kopenhagen (April 2018), das Spannungsverhältnis zwischen EMRK und nationalen Verfassungen und die Beteiligung der EU an dem europäischen Menschenrechtskontrollmechanismus," (2018) *Europäische Grundrechte-Zeitschrift* 383 at 383 also note that the Council of Europe is currently facing "unprecedented" (*beispiellos*) institutional challenges; see also e.g. Ralph Janik, "How Many Divisions Does the European Court of Human Rights Have? Compliance and Legitimacy in Times of Crisis," (2015) 20 *Austrian Review of International and European Law* 125.

1666 Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechts im europäischen Mehrebenensystem*, at 172 (*glückliche Herrschaft*, on times in which acceptance and legitimacy come together unnoticed).

1667 Authers and Charlesworth, "The Crisis and the Quotidian in International Human Rights Law" at 38; for a similar point with regard to "reality", see Orna Ben-Naftali, "Sentiment, Sense and Sensibility in the Genesis of Utopian Traditions," (2012) 23 *European Journal of International Law* 1133 at 1141.

reality which resonate with more optimistic visions.[1668] Criticism may fade.[1669] The States parties' governments and legislatures may refuse to implement judgments in some cases, but States are not unitary actors: non-governmental organisations or grassroots movements may nonetheless use the judgments to drive and support their activism;[1670] national courts may refer to them,[1671] particularly if prompted by activists;[1672] in brief – all those actors side-lined as agents of legitimacy in accounts of European consensus may yet play a role,[1673] and resistance to the ECtHR may face counter-resistance.[1674]

My point here is not that we should naively assume that all these things will come to pass,[1675] but simply that we should also be wary of leaving them out of our accounts of "crisis" or "reality" which serve to normalise strategic concessions and to position European consensus as an inevitable

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1668 For such more optimistic visions in general, by reference to the use of European consensus, see Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards" at 852-853; Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 124-125; see also, more generally, e.g. O'Boyle, "The Future of the European Court of Human Rights" at 1866 and 1868.

1669 Costa, "On the Legitimacy of the European Court of Human Rights' Judgments" at 174 (in footnote 2).

1670 Bill Bowring, "Does Russia Have a Human Rights Future in the Council of Europe and OSCE?," in *Shifting Power and Human Rights Diplomacy: Russia*, ed. Doutje Lettinga and Lars van Troost (Amnesty International Netherlands, 2017) at 53 sees "grounds for optimism" in the case of Russia based on a "new generation of activists"; on the importance of local activism for human rights in general, see Beth A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), at 371-373; see also Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," (1998) 52 *International Organization* 887 at 893.

1671 Helfer and Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" at 13; Anagnostou and Mungiu-Pippidi, "Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter" at 225.

1672 Simmons, *Mobilizing for Human Rights*, at 362.

1673 See Chapter 9, II.3.

1674 As mentioned in Chapter 9, III. in fine; see generally Madsen, Cebulak, and Wiebusch, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" at 205-206; on the role of civil society in that regard (in the context of the IACtHR), see Soley and Steininger, "Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights" at 254.

1675 See Theilen, Hassfurther, and Staff, "Towards Utopia - Rethinking International Law" at 331-332.

part of the ECtHR's reasoning. Doing so would contribute to the normalisation of strategy to the point that only (a certain kind of) consensus-based reasoning is accepted as "realistic", which severely limits the imaginative space which human rights might otherwise open up.[1676] If one accepts the realisation of certain values as the ultimate goal for regional human rights, then strategy cannot be discounted entirely; but this should not lead to its normalisation to such an extent that a principled stance is indefinitely postponed.[1677]

IV. Interim Reflections: Rethinking the Role of the Court

My goal in this chapter has been to question the position of European consensus as a fulcrum of strategy and principle. Even if we accept connections between these different modes of argument (e.g. strategy geared towards a principled goal, principle dependent on strategy for its realisation), they may nonetheless point in different directions in practice; I have called this the dilemma of strategic concessions. It is important to recognise, I have suggested, that cases in which strategic concessions are considered do constitute a dilemma: while strategic and principles justifications of consensus are often advanced alongside one another and may indeed have a significant area of overlap, they are not identical and foregrounding one or the other will have implications for the way in which consensus is applied. Sweeping these tensions under the rug may lead to the dilution of ideal theory, in the sense that principled and strategic considerations become indistinguishable and the latter increasingly seep into the prior. Si-

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1676 See generally Chapter 1, IV.5., and in more detail Chapter 11.

1677 See Marks, *The Riddle of All Constitutions*, at 60, citing William I. Robinson, *Promoting Polyarchy: Globalization, US Intervention and Hegemony* (Cambridge: Cambridge University Press, 1996), at 65, on how "supposedly 'transitional' trade-offs tend to 'become a structural feature [...]'", leading to the "postponement of social justice"; see also ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, dissenting opinion of Judge Pinto de Albuquerque, at para. 49, holding (though without specific reference to non-ideal theory) that a "wait-and-see position does not correspond to the role and vocation of the Court"; by contrast, Bates, "Consensus in the Legitimacy-Building Era of the European Court of Human Rights" at 67 deems criticism of consensus to imply "a type of impatience"; such a perspective underestimates, I think, the element of power which waiting implies: see Pierre Bourdieu, *Pascalian Meditations*, trans. Richard Nice (Stanford: Stanford University Press, 2000), at 228.

multaneously (and somewhat paradoxically), the constant background presence of a strategic rationale within academic discourse leads to the normalisation of both strategic considerations and European consensus as the appropriate way of integrating them into the ECtHR's reasoning, to the point that other approaches are discounted as "unrealistic".

I have already indicated some elements within "reality" which might counteract such claims. In the end, though, I suspect that the reluctance to question how "realistic" it would be to not use consensus – or to use it differently from the way in which proponents of consensus as legitimacy-enhancement conceive of it – relates primarily to underlying images as to the appropriate role of the ECtHR vis-à-vis the States parties.[1678] The intuitive connection between European consensus as a form of vertically comparative reasoning and the positions of the States parties resurfaces once again here, for it conjures an image of the ECtHR in which the Court is closely connected to, indeed *responsive* to the States parties.[1679] I would like to end this chapter, therefore, by briefly reflecting on different roles or figures which the ECtHR might inhabit and how these relate to the position of the Court in the area of tensions between strategy and principle.

In evaluating the role of the ECtHR in this context a crucial point to note, I think, that it *does not have the choice of remaining neutral*. If it chooses to "abstain" from intervening in the political struggle underlying certain human rights claims by not finding a violation of the ECHR, then this does not imply, as Article 53 ECHR would have it on formal legal terms, that "the situation after a 'no violation' finding [is] the same as without an intervention" by the ECtHR.[1680] Rather, as Eva Brems has put it, "the public and political perception of such an ECtHR judgment in practice is that of a Court clearance of a restrictive practice as such"[1681] – in other words, where a finding of a violation challenges the status quo, a finding of no vi-

1678 See supra, note 1556.

1679 I would emphasise that the counter-image here need not be that of an autarkic court; see further Chapter 11, III. and IV.3.

1680 Brems, "Human Rights: Minimum and Maximum Perspectives" at 353.

1681 Ibid.; for a recent example, see the responses to the judgment in ECtHR, Appl. No. 62007/17 – *L.F. v. Ireland*, Decision of 10 November 2020; e.g. Máiréad Enright, "Symphysiotomies and an Overlooked Violation of Article 3 ECHR" (2021), available at <https://ichrgalway.wordpress.com/2020/12/21/symphysiotomies-and-an-overlooked-violation-of-article-3-echr/>: "the judgment will be read in Ireland as endorsing the continuing marginalisation of women wounded by symphysiotomy" and "legitimates" the omission of symphysiotomy from apologies for historical gender-based violence.

olation reinforces it.[1682] In fact, the ECtHR itself has implicitly acknowledged as much by claiming that an evolutive approach to its case-law is necessary so as not to become "a bar to reform or improvement".[1683]

I would submit that this effect of reinforcing the status quo needs to be kept in mind when considering the role which the ECtHR should inhabit vis-à-vis the States parties on strategic grounds. Seeking proximity to the States parties positions it as a respected institution which, in a broad sense, might be regarded as part of the legal and administrative procedures of the States parties since its judgments are regularly followed.[1684] The clear advantage is the realisation, at least usually, of the standards which the ECtHR sets – but the price to pay is that those standards will be less oriented at social transformation and thus not only ignore but *reinforce* some forms of injustice rather than challenging them.

In a sense, this is a broader reformulation of the dilemma of strategic concessions, geared at the institutional level rather than at individual judgments – a fundamental question of "political action and strategy", as Koskenniemi has put it in the context of human rights mainstreaming.[1685] He describes the dilemma involved as follows:

> The more 'revolutionary' one is, the more difficult it is to occupy those administrative positions in which the main lines of policy are being set. The more influential one is as an administrative or regulatory agent, the less 'revolutionary' one's policies can be.[1686]

There is something to be said for a human rights court which maintains a high level of legal authority vis-à-vis the States parties and can thus be considered a "policy-setter"; and the reliance on European consensus may be

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1682 See also Mégret, "The Apology of Utopia" at 488; and more generally Koskenniemi, "The Effect of Rights on Political Culture" at 134; Koskenniemi, *From Apology to Utopia*, at 614. I would add a caveat that findings of a violation may in some scenarios also serve to reinforce the status quo: see briefly supra, III.2. in fine.

1683 ECtHR (GC), Appl. No. 46295/99 – *Stafford v. the United Kingdom*, Judgment of 28 May 2002, at para. 68; ECtHR (GC), Appl. No. 28957/95 – *Christine Goodwin*, at para. 74; ECtHR (GC), Appl. No. 63235/00 – *Vilho Eskelinen and Others*, at para. 56; ECtHR (GC), Appl. No. 34503/97 – *Demir and Baykara*, at para. 153; ECtHR (GC), Appl. No. 23459/03 – *Bayatyan*, at para. 98.

1684 There is, of course, also an element of accumulating institutional power at play here, as noted in Chapter 9, II.5.

1685 Martti Koskenniemi, "Human Rights Mainstreaming as a Strategy for Institutional Power," (2010) 1 *Humanity* 47 at 55.

1686 Ibid.

one way of achieving this.[1687] But, conversely, this implies that it is (a certain interpretation of) European consensus which determines, at least in large part, the content of those very policies. The important point to underline once again is, therefore, that nothing about this is inevitable. The ECtHR is not inextricably bound to one side of the spectrum that unfolds between the administrative and the revolutionary agent. Courts are hardly known for being revolutionary, but that does not mean that they cannot at least tend in that direction. In considering the merits and disadvantages of (only) incrementally developing standards based on a strategic account of European consensus, we might borrow from Sara Ahmed and keep in mind that "if we proceed along a path in order to disrupt it, we can end up not disrupting it in order to proceed".[1688]

1687 Subject to the practical doubts raised in Chapter 9, III.

1688 Ahmed, "Uses of Use. Diversity, Utility and the University", available at <https://www.youtube.com/watch?v=avKJ2w1mhng>, at 1:01:50.