Chapter 5: Establishing Consensus (I): Numerical Issues

I. Introduction

In this chapter and some that follow, I will take up a question which I have been deliberately suspending since Chapter 1: when is consensus considered to be established – or, differently put, when does lack of consensus turn into consensus?[710] Considering how crucial a question this is to determine whether consensus unfolds its rein effect or its spur effect, one might expect a relatively clear answer within the ECtHR's case-law, or at least suggestions clearly made in the literature. Yet to the contrary, the debate surrounding European consensus trades in large part on the ambiguities on when and how consensus is established.

Given that consensus (in)famously involves "counting" of States so as to establish whether commonality is present or not,[711] a particularly evident aspect of establishing whether or not consensus exists pertains to the *number of States* required to invoke the rein or spur effect, respectively. The ECtHR has been described as following a "statistical",[712] "mechanical" or "arithmetical" approach,[713] at least in some cases tending towards "a formal approach based purely on numbers".[714] On the other hand, however,

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710 See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 24.

711 Ibid., 175; see Chapter 1, III. for the notion of commonality which this involves.

712 Kanstantsin Dzehtsiarou and Pavel Repyeuski, "European Consensus and the EU Accession to the ECHR," in *The EU Accession to the ECHR*, ed. Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (Oxford and Portland: Hart, 2014) at 322.

713 Gless and Martin, "The Comparative Method in European Courts" at 40; Nazim Ziyadov, "From Justice to Injustice: Lowering the Threshold of European Consensus in Oliari and Others versus Italy," (2019) 26 *Indiana Journal of Global Legal Studies* 631 at 645; the mathematical connotation also shines through in the denomination as "consensus calculus": de Londras, "When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of *A, B & C* v. *Ireland* and Referendum-Emergent Constitutional Provisions" at 333.

714 Lock, "The Influence of EU Law on Strasbourg Doctrines" at 823; 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 271: "crude tallying".

the ECtHR's reluctance to provide a clear indication of when it considers consensus to be established is legendary. As early as 1993, Laurence Helfer summarised the state of affairs by stating that "the Court and the Commission have not specified what percentage of the Contracting States must alter their laws before a right-enhancing norm will achieve consensus status".[715]

Not much has changed, it would seem: despite increasing professionalization of its comparative endeavours and more explicit indications of the comparative materials underlying its analysis,[716] the ECtHR has not indicated with any degree of precision when it interprets those materials as constituting consensus.[717] As Frances Hamilton put it as recently as 2018: the ECtHR "has shown no consistent application as to determine when consensus exists", and "its case-law leaves no clues" as to when it should be considered established.[718] Tzevelekos and Dzehtsiarou conclude that the Court "has preserved flexibility in relation to how many contracting parties should adopt a particular standard to qualify for [European consensus]."[719] In fact, it has become something of a commonplace that whether or not consensus exists is itself open to interpretation – as evidenced, for

715 Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 140; see also Heringa, "The 'Consensus Principle': The Role of 'Common Law' in the ECHR Case Law" at 130.

716 Mahoney and Kondak, "Common Ground" at 119 and 126.

717 Critically e.g. Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 249 and 258; Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" at 145; McHarg, "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" at 691; Murray, "Consensus: Concordance, or Hegemony of the Majority?" at 36; Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (The Hague: Martinus Nijhoff Publishers, 1996), at 195; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 150; contra: Peat, *Comparative Reasoning in International Courts and Tribunals*, at 154-155.

718 Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 39.

719 Tzevelekos and Dzehtsiarou, "International Custom Making" at 321; see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 9.

example, in the conflicting takes on the issue sometimes found in majority and minority opinions of the ECtHR.[720]

One reaction to these inconsistencies and ambiguities is to call for greater methodological rigour on the part of the ECtHR. This reaction, too, goes back to early assessments of European consensus and continues until the present day: Helfer, while acknowledging the "inevitable controversies" involved, argued in favour of a more rigorous and consistent approach; and Hamilton devotes a recent article on the topic to arguing that the ECtHR should "outline how many domestic legislatures need to legislate in favour of" any given issue – her focus is on same-gender marriage – "before it will determine that a consensus exists".[721] Calls such as these resonate, in a sense, with the idea that relying on European consensus is or should be "objective". I mentioned this perspective in Chapter 3 as part of the ethos-focussed epistemology which incorporates facts as (ostensibly) less elusive than normative claims;[722] in a related though not identical sense, objectivity based on European consensus also carries connotations of clarity, legal certainty, and non-arbitrariness.[723] For example, Hamilton argues that clarifying the number of States required to establish consensus would have "major advantages of transparency, certainty and predictability".[724]

While I do think that the ECtHR's reasoning surrounding European consensus could be significantly improved, I do not think clarifying a definite number of States required to establish consensus is a particularly helpful starting point in that regard. This assessment builds on the oscillation between different kinds of normativity as discussed in the previous chapter: for one thing, in light of the tensions behind that oscillation, I do not

720 See Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 369; McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 31, both with further references.

721 Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 35.

722 Chapter 3, II.

723 Most vividly in Ambrus's argument that the ECtHR's use of comparative reasoning is subject to the requirements of the rule of law: see Ambrus, "Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law" at 354-356; see also e.g. Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 2.

724 Hamilton, "Same-Sex Marriage, Consensus, Certainty and the European Court of Human Rights" at 42.

think the ECtHR would ever let itself be pinned down to a definite number; and for another, I do not think this would be desirable since it would further consolidate the idea that consensus provides for some kind of pregiven objectivity, thus contributing to the naturalisation of European consensus in whatever numerical shape is proposed.[725]

Against this backdrop, my approach in this chapter (and the following chapters) is to view the ECtHR's case-law through the lens of the morality-focussed perspective and the ethos-focussed perspective, respectively.[726] This theoretical framework provides for a way of structuring the inconsistencies found within the case-law without, on the one hand, understanding them as entirely random while also, on the other hand, not aiming to reinterpret them as departing from some alternative which is posited as objective.[727] I begin by setting the framework developed over the course of the preceding chapters more clearly in relation to the *establishment* of European consensus: My argument, in brief, is that the various critical points raised in relation to using European consensus at all transfer over to the question of how it is operationalised, including the question of how it should be established; differently put, consensus *internalises* the triangular tensions between different forms of normativity. Even the morality-focussed perspective, which eschews reference to consensus in principle, can be reframed as depicting a kind of hypothetical or "reasonable" agreement (II.).

The controversies about the number of States parties required to establish consensus can then be seen as one way in which the internalised tensions between different kinds of normativity resurface. To demonstrate this, I will first give what I call the "conventional account" of European consensus: this is the account on which most commentators implicitly rely, and which I have likewise been assuming over the course of the preceding chapters in equating the use of consensus with the ethos-focussed view. Its hallmark, I will argue, is a focus on *lack* of consensus as an instance of

725 See Chapter 4, IV.

726 One might think of this as investigating the "reasons lying outside the exact numbers" involved in consensus, as Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 71 suggests.

727 For a similar point, though with different conclusions, see Jaroslav Větrovský, "Determining the Content of the European Consenus Concept: The Hidden Role of Language," 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 127.

the disagreement which carries such strong epistemological relevance for the ethos-focussed perspective, and which provides grounds for deference to democratic procedures as the best way of resolving it. To put this aspect into sharp relief, I will contrast it with some alternative approaches to European consensus, including the epistemic approach already mentioned in the last chapter (III.).

While there is, in the Court's case-law, considerable support for the conventional account and the ethos-focussed perspective which drives it, there are also several countervailing tendencies which bring the morality-focussed perspective into the picture during the stage of assessment. In this chapter, I will examine one of these tendencies: the flexibility with regard to the number of States needed for consensus – or a "trend", as the Court sometimes puts it in this context – to be established. It will emerge that the Court can reinterpret a lack of consensus as a trend in favour of the applicants, thus foregrounding an evolution in a certain direction rather than the disagreement among the States parties: in so doing, more substantive considerations of directionality enter the picture and thus bring the Court's approach closer to the morality-focussed perspective (IV.). By the end of the chapter, I thus hope to have substantiated my claim that the tension between the ethos-focussed and the morality-focussed perspective is in evidence within the ECtHR's case-law not only when it places consensus-based argument in relation to other forms of reasoning, but even when it establishes whether consensus exists – or not (IV.).

II. Consensus as Reasonable Agreement: But What Is Reasonable?

Kanstantsin Dzehtsiarou has distinguished between procedural and substantive criticism of European consensus.[728] The prior takes issue with the way in which consensus has been applied by the Court – in particular, many claim that it has hitherto been used in a haphazard and unpredictable way.[729] Criticism as to the lack of clarity regarding the number of States required to establish consensus is one instance of this. Substantive

728 Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights" at 539; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 115; see also Peat, *Comparative Reasoning in International Courts and Tribunals*, at 154, similarly distinguishing between methodological and principled criticism.

729 E.g. Helfer, "Consensus, Coherence and the European Convention on Human Rights"; Ambrus, "Comparative Law Method in the Jurisprudence of the Euro-

criticism, by contrast, cuts deeper since it rejects the use of consensus on a more conceptual level, not on the grounds of its incoherent application in practice but rather based on theoretical arguments that deny it any normative force in the first place – this is the kind of criticism commonly adduced by the morality-focussed perspective.

While there is some heuristic value in this distinction, my baseline assumption in what follows is that procedural and substantive criticism are not as categorically distinct as it may at first seem. Rather, if we take the *oscillations* between the morality-focussed perspective and the ethos-focussed perspective (with, additionally, the possibility of regarding different macrosubjects as the relevant ethe) as our starting point, then the general (substantive) criticisms made of European consensus will translate over into criticisms of its use in particular ways.[730] But these points of criticism will in turn remain controversial because their normative force depends on the perspective from which they are approached – each perspective, as Koskenniemi famously put it, "remaining open to challenge from the opposite argument".[731] Since the ECtHR gives priority to different kinds of normativity in different cases and there is no independent normative standpoint from which to evaluate this, its case-law is, in a sense, *bound* to seem incoherent. This should not be taken to mean that the justifications offered by the ECtHR cannot or should not be improved – quite the opposite – but merely to underline that substantive and procedural criticism are not entirely distinct, since the prior builds on tensions which will also resurface in considering the latter. Echoing Kapotas and Tzevelekos, we might say that "technical" issues as to how consensus is used are "but the tip of a pretty sizeable iceberg" which involves "the more abstract philosophical difficulties" in situating European consensus within the ECHR system.[732]

The continued presence of the tensions between different forms of normativity is perhaps most clearly in evidence in cases in which European

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pean Court of Human Rights in the Light of the Rule of Law"; Brauch, "The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law" at 138-145; Ost, "The Original Canons of Interpretation" at 305; a helpful overview is Kukavica, "National Consensus and the Eigth Amendment: Is There Something to Be Learned from the United States Supreme Court?" at 364-365.

730 See Chapter 4, IV. in fine.

731 Koskenniemi, *From Apology to Utopia*, at 60.

732 Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 6.

consensus and its counter-arguments are clearly juxtaposed to one another – the notion of "core rights" discussed in the preceding chapter is one register in which this juxtaposition can be conducted,[733] and Chapter 8 will consider other examples from the ECtHR's case-law. However, they can also be internalised in the sense that differing kinds of normativity influence the way in which consensus (or lack thereof) is established in the first place. One way in which this transpires is by shifts in the number of States required to take a certain position for the rein effect or spur effect to be invoked. Before turning to the ECtHR's case-law in that regard, let me briefly connect this issue back more explicitly to the different kinds of normativity at issue, particularly insofar as the differing epistemologies of the morality-focussed and ethos-focussed perspectives are concerned.

The morality-focussed perspective, as I have been presenting it thus far, is focussed on substantive argument independent of facts such as the opinions actually held by people or the positions actually taken by States – as reflected, for example, in its strong emphasis on the is-ought distinction.[734] However, even without any concessions to the ethos-focussed perspective, the morality-focussed perspective can present its conclusions as well as its reasoning as a form of agreement or consensus; in fact, following the work of John Rawls which re-popularised the notion of a social contract by way of his "original position", this way of presentation may even seem to be a matter of course. The very notion of a (social) contract carries connotations of agreement: in that vein, for example, Rawls states that the principles of justice are conceived of as "the object of the original agreement" in which we imagine those engaging in social cooperation as "choos[ing] together, in one joint act", those very principles.[735]

Precisely because the original position is an imaginary exercise,[736] however, the agreement implied by the reference to a contract remains entirely *hypothetical*.[737] It is *reasonable* agreement in a strongly circumscribed sense: the notion of "reasonableness" implies strong normative constraints as to

733 Chapter 4, III.2.
734 See Chapter 2, II.3.
735 Rawls, *A Theory of Justice*, at 10.
736 David Lyons, "Nature and Soundness of the Contract and Coherence Arguments," in *Reading Rawls: Critical Studies on Rawls' 'A Theory of Justice'*, ed. Norman Daniels (Stanford: Stanford University Press, 1989) at 150; Nussbaum, *Frontiers of Justice. Disability, Nationality, Species Membership*, at 28.
737 Rawls, *A Theory of Justice*, at 14; Rawls, *Political Liberalism*, at 24-27 and 271-275; see critically e.g. Dworkin, "Justice and Rights" at 186 ("A hypothetical contract […] is no contract at all").

permissible positions.[738] The ethos-focussed perspective, predictably, would approach the issue from the opposite direction. While its supporters also often make use of the term "reasonableness", they typically understand it in a broader sense which coheres with their general epistemology: because any strong normative constraints based on ostensible reasonableness will themselves be controversial, a more factually oriented understanding is likely to give less space to such constraints and instead understand any positions taken in good faith as reasonable.[739] The focus thus shifts from reasonable (hypothetical, normatively circumscribed) agreement to reasonable (factually oriented, unscrutinised) disagreement.

This factually oriented approach based on (reasonable) disagreement coheres with the epistemology of the ethos-focussed perspective discussed in Chapter 3 and, in particular, with its reliance on European consensus insofar as a form of ethical normativity at the transnational level is at issue.[740] Because the primary reference here is to the position *actually* taken by the States parties within their legal systems, there are few limits set on a numerical establishment of consensus. By contrast, proponents of the morality-focussed perspective may use the notion of a *hypothetical* agreement to pick up on the language of consensus and explain vertically comparative references, but the differing epistemology gives this kind of reference an entirely different meaning. As George Letsas puts it with regard to "hypothetical consensus" in contrast to "actual consensus", the question then is: "how *would* reasonable people agree to apply [the principles underlying the Convention] to concrete human rights cases?"[741]

These differing perspectives lead to differing readings of the ECtHR's case-law. Proponents of the ethos-focussed perspective argue that the

738 On the distinction between reasonable and actual agreement, see e.g. T.M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998), at 154; critically on the circumscribed notion of "reasonableness" Chantal Mouffe, "The Limits of John Rawls's Pluralism," (2005) 4 *Politics, Philosophy & Economics* 221 at 223.

739 Particularly clear in Devlin, "Morals and the Criminal Law" at 15; for more detail and a juxtaposition with the morality-focussed perspective, see Chapter 2, II.3.; see also the "empirical" account of reasonableness in Besson, *The Morality of Conflict. Reasonable Disagreement and the Law*, at 98, and the connection between "good faith disagreement" and reasonableness in Waldron, *Law and Disagreement*, at 274.

740 See Chapter 3, II.

741 Letsas, "Strasbourg's Interpretive Ethic: Lessons for the International Lawyer" at 531 (emphasis added); see also Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, at 79.

ECtHR operates primarily with a notion of consensus which "must be clearly substantiated", and that cases in which the Court proceeds otherwise are "considered unusual".[742] Proponents of the morality-focussed perspective, by contrast, argue that the Court's references to European consensus are often "altogether independent of the empirical data", "flimsy", or "yet to be rigorously tested", and thus "different from mere numerical majority of the member states".[743] This opens up space for understanding the ECtHR's use of European consensus as more closely related to the notion of hypothetical agreement (reasonable agreement in the normatively circumscribed sense), with only "lip-service" being paid to the positions of the States parties.[744] My point in what follows is not to vindicate either of these readings in the sense it should take clear precedence over the other. Instead, my interest is precisely in the fact that *both* readings can be substantiated to some extent by reference to various elements within the ECtHR's case-law. The tensions between the morality-focussed perspective and the ethos-focussed perspective thus play a role not only when pitting European consensus against other forms of reasoning, but even within the establishment of consensus itself. The following section will trace these tensions by exploring the different ways in which the ECtHR has established (lack of) consensus and connecting them back to the various forms of normativity discussed in the preceding chapters.

III. Factually Oriented Approaches to European Consensus

1. The Conventional Account: Asymmetry in Favour of the Rein Effect

Let me begin by setting out what I think is fair to call the "conventional account" of how European consensus is established. For all the controversies surrounding this issue, the ECtHR *has* indicated how it usually conceives of the establishment of consensus. Whether it follows this approach in any given case – even those in which it has recited its standard formula

742 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 45.

743 Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 88.

744 Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 116.

as a matter of general principle[745] – is a different matter, but the formula itself is both well-established in the case-law and commonly accepted in academic commentary.[746] Of crucial importance in that regard is that the options which the Court considers encompass not only consensus in favour of the applicant or the respondent State, but also a *lack* of consensus.[747]

On the Court's conventional account, lack of consensus becomes invested with normative force in a similar fashion to the way a finding of consensus in favour of the respondent State would: it speaks against the finding of a violation, i.e. unfolds the rein effect. As the Court has repeatedly emphasised:

> Where […] there is *no consensus* within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin [of appreciation] will be wider […].[748]

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745 See generally Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," (2018) *Human Rights Law Review* 495 at 509.

746 Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 488 calls it "cited and recited".

747 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 24; I will leave aside here the fourth option which Dzehtsiarou mentions (establishing neither consensus nor lack thereof), but of course it involves a further element of flexibility.

748 ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen v. Finland*, Judgment of 16 July 2014, at para. 67 (emphasis added); see also with identical or similar formulations (usually pertaining to the right to private life) e.g. ECtHR (GC), Appl. No. 6339/05 – *Evans v. the United Kingdom*, Judgment of 10 April 2007, at para. 77; ECtHR (GC), Appl. No. 44362/04 – *Dickson v. the United Kingdom*, Judgment of 4 December 2007, at para. 78; ECtHR (GC), Appl. Nos. 30562/04 and 30566/04 – *S. and Marper v. the United Kingdom*, Judgment of 4 December 2008, at para. 102; ECtHR, Appl. No. 23338/09 – *Kautzor v. Germany*, Judgment of 22 March 2012, at para. 70; ECtHR, Appl. No. 43547/08 – *Stübing v. Germany*, Judgment of 12 April 2012, at para. 60; ECtHR, Appl. No. 14793/08 – *Y.Y. v. Turkey*, Judgment of 10 March 2015, at para. 101; for other cases in which the lack of consensus (as opposed to a consensus in favour of the respondent State) led to the rein effect, see among many others e.g. ECtHR, Appl. No. 36515/97 – *Fretté*, at para. 41; ECtHR, Appl. No. 34438/04 – *Egeland and Hanseid v. Norway*, Judgment of 16 April 2009, at paras. 54-55; ECtHR (GC), Appl. No. 30814/06 – *Lautsi and Others*, at para. 70; ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123.

The establishment of consensus is thus *asymmetrical in favour of the rein effect*: for consensus to unfold the spur effect, there must be consensus – a "super-majority"[749] – in favour of the applicant, but for it to unfold the rein effect, it suffices that there be consensus in favour of the respondent State *or lack of consensus*. Proponents of consensus rarely elaborate on this asymmetry, yet it is consistently acknowledged as a matter of course[750] – in fact, Dzehtsiarou rightly notes that while lack of consensus is a fairly common basis for the rein effect, an established consensus in favour of the respondent State is not very commonly found within the Court's case-law.[751]

The introduction of this "middle ground" as a third category between consensus one way or the other complicates the stage of assessment quite significantly: instead of a clear dividing line at the fifty percent point, distinguishing consensus in favour of the applicant from consensus in favour of the respondent,[752] it becomes necessary to clarify which situations amount to a lack of consensus and how they are demarcated from an established consensus – how far the "middle ground" of "lack of consensus" extends, or when the relevant "super-majority" is reached.[753] Wildhaber, Hjartarson and Donnelly have concluded from their analysis of the ECtHR's case-law that the Court "frequently, but not consistently, opts

749 The term is from ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, joint dissenting opinion of Judges Sajó, Keller and Lemmens, at para. 5; differently put, the respondent State must be part of a "distinct" minority: ECtHR, Appl. No. 45245/15 – *Gaughran v. the United Kingdom*, Judgment of 13 February 2020, at para. 82.

750 E.g. Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 249; Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 87-89; Besson and Graf-Brugère, "Le droit de vote des expatriés, le consensus européen et la marge d'appréciation des États" at 942-943.

751 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 26.

752 As on Shai Dothan's account: see infra, III.3.

753 Arguably, the Court's occasional equivocation as to the existence of consensus or the extent of its argumentative force could be explained, in part, by the fact that the situation could reasonably be read both as a simple majority (lack of consensus, rein effect) or as a super-majority (existing consensus, spur effect), and it thus awkwardly compromises by acknowledging neither of the two: e.g. ECtHR (GC), Appl. No. 74025/01 – *Hirst v. the United Kingdom (No. 2)*, Judgment of 6 October 2005, at para. 81 ("cannot in itself be determinative"); ECtHR (GC), Appl. No. 27510/08 – *Perinçek v. Switzerland*, Judgment of 15 October 2015, at paras. 256-257 ("cannot play a weighty part in the Court's conclusion"); in this way, however, morality-focussed reasoning gains greater weight: see infra, text to note 758.

against the existence of consensus, as long as some 6 to 10 States adhere to solutions which differ from the majority view", whereas it usually assumes the existence of consensus where it finds that there are "only some 3 or 4 countries in the minority".[754]

Assuming that these numbers refer to the current number of member States within the Council of Europe, this would mean that consensus in favour of the applicant (and thus the spur effect) is established only when around 90% of the member States do not share the position of the respondent State: asymmetric indeed! In fact, even more extreme cases can be adduced: in *S.A.S. v. France*, the ECtHR found no consensus among the States parties on the permissibility of wearing a full-face veil in public although only *two* States – Belgium and the respondent State, France – provided for such a ban.[755] In some cases, the ECtHR finds a lack of consensus, discusses various positions taken by the States parties, and concludes that the respondent State is "not the only member State of the Council of Europe" to take a certain position – a formulation which, if taken seriously, would seem to imply e contrario that the spur effect can only be invoked if the respondent State is the sole outlier.[756]

I do not think too much weight should be given to these occasional formulations, although they do demonstrate the wide range of different ways in which the ECtHR might approach consensus; but even if we leave the more extreme cases aside, the asymmetry in favour of the rein effect remains by virtue of the fact that the "middle ground" – lack of consensus – is connected to the rein effect. My argument in what follows will be that the conventional account of European consensus involving this asymmetry coheres with the main tenets of the ethos-focussed perspective. For one thing, its focus on disagreement keeps it from ceding too much ground to moral normativity (III.2.), and for another, the asymmetry in favour of the

754 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 259; for a more extensive and nuanced analysis, see Senden, *Interpretation of Fundamental Rights*, at 245-255.

755 ECtHR (GC), Appl. No. 43835/11 – *S.A.S.*, at para. 156; the Court acknowledged that Belgium and France were "very much in a minority position in Europe" yet still found no consensus based, inter alia, on ongoing public debate in other States; this move is generally regarded as a badly reasoned front for the Court's political deferral to France: see critically e.g. Theilen, "Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium" at 395; Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 156.

756 ECtHR (GC), Appl. No. 46470/11 – *Parrillo*, at paras. 176-179.

rein effect pays homage to the continued relevance of national ethe as the primary location of democratic procedures (III.3.). To bring out these implications, I will juxtapose the conventional account with two alternate conceptualisations of European consensus: Christos Rozakis's suggestion to think of disagreement among the States parties as a kind of consensus-agnostic middle ground, which would provide more space for morality-focussed considerations, and the epistemic approach advocated for by Shai Dothan.

2. The Ethos-focussed Perspective versus Consensus-Agnostic Middle Ground

As a first counterpoint to the conventional account, I would like to contrast the Court's case-law on lack of consensus with an alternative approach proposed extra-judicially by Christos Rozakis. He would continue to uphold both the rein effect and the spur effect where a clear consensus exists one way or the other: where "wide acceptance" of a certain solution is established, the Court should "proceed to the establishment of a new jurisprudential pattern", whereas a consensus against the applicant – "a situation where […] a matter before [the Court] presents an issue which European States have not touched upon, or in respect of which they are strongly opposed to a particular solution" – the Court should refrain from finding a violation.[757] In between these two situations – that is, when there is a lack of consensus – Rozakis envisages a kind of consensus-agnostic middle ground: "in situations where there is no consensus, the Court is free to undertake its own assessment of the facts and produce its own reasoning".[758] A lack of consensus would thus unfold no normative force at all, freeing up space for other forms of reasoning which, besides references to precedent and the like, will be likely to include substantive reasoning of the

757 Rozakis, "Through the Looking Glass: An "Insider"'s View of the Margin of Appreciation" at 535-536.

758 Ibid., 536; other judges have given indications of similar views: see e.g. ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, joint dissenting opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and de Gaetano, at para. 15, noting that they "do not for a moment believe" that one should "give some weight to the alleged *lack of* consensus" (emphasis in original); similarly ECtHR (GC), Appl. No. 46470/11 – *Parrillo*, dissenting opinion of Judge Sajó, at para. 3 (in footnote 4), who even seems to argue in favour of an asymmetry in favour of the spur effect.

kind advocated for by the morality-focussed perspective[759] – the Court's "own reasoning", as Rozakis puts it.

Yet such a proposal stands in stark contrast with the epistemology advocated for by the ethos-focussed perspective. Recall its main tenets: for lack of an uncontroversial method of demonstrating moral truth, it is regarded as "unpleasantly condescending" to privilege once view over another in light of reasonable disagreement.[760] A morality-focussed reading of the ECHR is therefore rejected precisely because the ECtHR is said to face "an epistemological quandary"[761] due to the fact that "people can disagree about rights".[762] To advocate for a consensus-agnostic middle ground, then, turns the matter entirely on its head: Rozakis advocates for substantive reasoning where there is most disagreement among States, whereas foregrounding disagreement about rights, as the ethos-focussed perspective does, implies that substantive reasoning should be avoided in favour of democratic procedures precisely *because of* disagreement.

The conventional account of European consensus could thus be said to cohere with the ethos-focussed perspective in that the asymmetry in favour of the rein effect foregrounds disagreement about rights in defiance of the morality-focussed perspective.[763] The emphasis on disagreement also serves to explain the second parenthesis in the ECtHR's standard formulation of the rein effect as quoted above: lack of consensus leads to a wide margin of appreciation, "particularly where the case raises sensitive moral or ethical issues".[764] From a morality-focussed perspective, one might expect sensitive moral issues to heighten the ECtHR's scrutiny rather than weaken it: from within that perspective, moral sensitivity would require enhanced protection from majoritarian decisions, reminiscent perhaps of those cases in which the ECtHR deems a particularly important facet of an individual's

759 See also, in this vein, the proposal by Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 164.

760 Waldron, *Law and Disagreement*, at 303.

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

762 Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 154.

763 Indeed, in ECtHR (GC), Appl. Nos. 66069/09, 130/10 and 3896/10 – *Vinter and Others v. the United Kingdom*, Judgment of 9 July 2013, at para. 105 the ECtHR connected a broad margin of appreciation to topics which "are the subject of rational debate and civilised [sic!] disagreement".

764 Supra, note 748; on the connection see also Kapotas and Tzevelekos, "How (Difficult Is It) to Build Consensus on (European) Consensus?" at 6.

existence or identity to be at stake.[765] Yet from the context of the phrase referring to "sensitive moral or ethical issues" – or "delicate issues",[766] in some cases – we may deduce that this is not the way in which the Court understands it here. Instead, the notion of sensitivity is introduced to reinforce the relevance of disagreement about moral issues:[767] lack of consensus "reflects" the sensitivity of the issue.[768] Bearing in mind that the ethos-focussed perspective deems it "unpleasantly condescending" to privilege one view over another in light of disagreement, it seems *particularly* condescending – dangerous, even – to overrule the results of democratic procedures concerning issues that are deemed especially important or "sensitive", and to reduce complex issues to the ECtHR's own moral reasoning.[769]

The ethos-focussed perspective also shines through in other formulations used by the Court in relation to the lack of European consensus. In fact, in one of the classic cases to first argue in favour of the rein effect based on a lack of consensus – *Handyside v. the United Kingdom* – the Court noted that "it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals", but rather that "the requirements of morals" as reflected in the States parties' laws vary "from time to time and from place to place".[770] It thus explicitly made use of a conception of normativity which – far from the universalising beam of the morality-focussed perspective – is temporally and spatially *relative* to individual States and thus constitutes, in the terminology I have been using, a form of *ethical* normativity.[771] Disagreement across Europe

765 See Chapter 8, III.2.

766 ECtHR, Appl. No. 36515/97 – *Fretté*, at para. 41; ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at para. 85.

767 Or, perhaps, to hint at strategic concerns: see Chapter 10, III.2.

768 ECtHR, Appl. No. 65192/11 – *Mennesson v. France*, Judgment of 26 June 2014, at para. 79.

769 For the connection between "sensitivity" and "complexity", see ECtHR (GC), Appl. 27238/95 – *Chapman v. the United Kingdom*, Judgment of 18 January 2001, at para. 94; on complexity, see also e.g. ECtHR, Appl. No. 15450/89 – *Casado Coca v. Spain*, Judgment of 24 February 1994, at para. 55; ECtHR (GC), Appl. No. 44362/04 – *Dickson*, at para. 78; ECtHR, Appl. Nos. 48151/11 and 77769/13 – *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, Judgment of 18 January 2018, at para. 182.

770 ECtHR (Plenary), Appl. No. 5493/72 – *Handyside*, at para. 48.

771 One might also note in passing that the notion of sensitivity, discussed above, is introduced in relation to moral *or ethical* issues; since the adjective "ethical" is

thus served to justify the shift from a moral to an ethical form of normativity.

Finally, I should mention the infamous case of *Vo v. France*, which concerned the lack of criminal sanction of a doctor whose negligence had forced the applicant to undergo a therapeutic abortion. The ECtHR's decision in this case revolved around the assessment of whether harm to a foetus could be treated as relevant for the State's obligations under the right to life (Article 2 ECHR). In the Court's own wording, this issue required "a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins"[772] – an interesting formulation which already frames the issue as an ongoing "debate" into which the Court would "intervene", rather than a matter for it to decide. (The language of "sensitivity" was not used in this case, but it would surely have captured the spirit of the Court's approach.) Having then noted the diversity of views and the lack of European consensus on the issue,[773] the Court concluded that "it is neither desirable, *nor even possible* as matters stand, to answer in the abstract the question of whether the unborn child is a person" for the purposes of the right to life.[774]

The Court then attempted to defuse the issue by ruling that in any case, even *assuming* the applicability of Article 2 ECHR in the present case, France would have complied with its positive obligations relating to the preservation of life.[775] Nonetheless, several judges disagreed with the majority's inference from the lack of consensus on the status of the foetus. For example, Judge Costa argued that despite the "present inability of ethics to reach a consensus", it is nonetheless "the task of lawyers, […] especially human rights judges, to identify the notions […] that correspond to the words or expressions in the relevant legal instruments", be they philosoph-

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often used synonymously with its counterpart "moral", however, I do not think this terminological choice carries much weight. See generally on the terminology Chapter 1, IV.3.; on the ECtHR's use of "moral" in this context, see also Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 486.

772 ECtHR (GC), Appl. No. 53924/00 – *Vo v. France*, Judgment of 8 July 2004, at para. 81.

773 Ibid., at paras. 82-84.

774 Ibid., at para. 85 (emphasis added).

775 Ibid.; the lack of consensus as to "when the right to life begins" made a controversial come-back in ECtHR (GC), Appl. No. 25579/05 – *A, B and C*, at para. 237.

ical or technical concepts.[776] Judge Ress simply held that differences between the embryo and the child after birth do "not justify the conclusion [reached by the majority] that it is not possible to answer in the abstract the question whether the unborn child is a person" under Article 2 ECHR.[777]

My point here is not to resolve this particular controversy one way or the other, but rather to point out that the majority's position in *Vo v. France* is paradigmatic of the ethos-focussed perspective. In many respects, the case constitutes a standard application of the rein effect of consensus, with a lack of consensus among the States parties constituting a reason for the Court to not find a violation of the Convention.[778] It is unusual, above all, for the particularly strong conclusion that it is not "possible" to answer the question whether the right to life applies to the unborn child, given the lack of consensus among the States parties. From the perspective of the morality-focussed view, as evidenced in the separate and dissenting opinions mentioned above, this constitutes an abdication of the judicial function – but from the perspective of the ethos-focussed view, it neatly encapsulates the literal impossibility of demonstrating moral truth given the lack of an epistemology that would allow for the mitigation of disagreement. While the ECtHR is usually more reticent about providing a rationale for its use of the consensus argument, *Vo v. France* thus brings the ethos-focussed perspective which undergirds it to the foreground with refreshing clarity.

All this serves to illustrate that the ethos-focussed perspective coheres with the conventional account of European consensus. However, while the ethos-focussed perspective's emphasis on disagreement to avoid moral normativity explains the absence of a consensus-agnostic middle ground in the conventional account, its epistemological stance does not, in and of itself, explain the asymmetry in favour of the rein effect: moral normativity could also be avoided by conceptualising the rein effect and the spur effect as symmetrical and thus eschewing any kind of middle ground whatsoever in favour of a clear dividing line at fifty percent of the States parties. To explain the asymmetry, it is necessary to return to the ethos-focussed per-

776 ECtHR (GC), Appl. No. 53924/00 – *Vo*, separate opinion of Judge Costa, joined by Judge Traja, at para. 7.

777 Ibid., dissenting opinion of Judge Ress, at para. 3.

778 Although other arguable particularities (use of consensus at the stage of applicability rather than justification, comparative input at a high level of generality) could also be noted: see Chapter 7, II. and Chapter 8, II. for a discussion.

spective's response to the "circumstances of politics", i.e. how it proposes to react to reasonable disagreement.[779] The following sub-section takes up this task by contrasting the conventional account of European consensus with the epistemic approach.

3. The Ethos-focussed Perspective versus the Epistemic Approach

The epistemic approach provides a useful second counterpoint because the question of how many States are required for European consensus to be considered established is precisely the point at which it deviates most clearly from the conventional account of consensus. As I noted when discussing Shai Dothan's epistemic approach in Chapter 4, it often seems to work in parallel to the ethos-focussed perspective and reaches similar conclusions as to the normative force of consensus both in its rein effect and its spur effect, albeit based on a differing rationale. Situations involving a *lack* of consensus, however, bring the differing theoretical assumptions to the fore: on the epistemic approach, they become relevant only if framed as lack of comparability among States or as an intransitive plurality of options to choose from, i.e. as conditions for the applicability of the Condorcet Jury Theorem. With the logic of the Theorem itself once admitted, however, there is no space allotted to situations involving a lack of consensus as the basis for any kind of normative conclusion.

Thus, Dothan introduces what he calls the "Emerging Consensus" doctrine as examining whether "a particular practice has been outlawed by a *critical number* of states".[780] That "critical number" is later specified as "at least a *majority* of the countries in Europe"[781] – in other words, there is a clear cut-off mark at the half-way point, rather than demanding a "supermajority" for the spur effect. If the position of over half the States parties to the ECHR coheres with that of the respondent State, consensus unfolds its rein effect; conversely, if over half of the States parties' legal systems are in accordance with the applicant's position, then consensus unfolds its spur effect: Dothan's approach is *symmetrical* and there is thus no "middle ground" left to be conceptualised as "lack of consensus".

779 Waldron, *Law and Disagreement*, at 102.
780 Dothan, "The Optimal Use of Comparative Law" at 22 (emphasis added).
781 Dothan, "Judicial Deference Allows European Consensus to Emerge" at 397 (emphasis in original); see also ibid. at 399 with a further specification.

If one subscribes to the formality of the Condorcet Jury Theorem, then this approach makes perfect sense: given the comparatively large number of States involved – and the even larger number of people making democratic choices within those States – the statistical probability of even a slim majority reflecting the "correct" choice would be quite high. Stronger majorities both in favour of the respondent State and in favour of the applicant would serve to further heighten that probability and thus strengthen the normative force of consensus in its rein effect and spur effect, respectively[782] – but they would not be necessary to avoid a finding of "lack of consensus". Simple majorities, in principle, suffice.[783]

The ethos-focussed perspective differs from this approach by virtue of its different rationale for giving normative force to European consensus. The democratic procedures underlying it are taken to be relevant not because of their likelihood to produce truth given the large number of people involved, as on the epistemic approach, but because they constitute an expression of the general will of a population expressed in an egalitarian manner.[784] Accordingly, while the epistemic approach sees the move to the transnational level in a positive light (more people, hence a higher statistical likelihood of the correct decision), the volitionally oriented ethos-focussed perspective is more ambivalent given the lack of democratic procedures at the transnational level. This context is crucial for grasping the ethos-focussed perspective's approach to the number of States parties required to establish European consensus, for it takes us back to the continuing tensions between nationalist and internationalist precommitments or, differently put, between national ethe and a pan-European ethos.

At the national level, proponents of ethical normativity tend to advocate for majoritarian decision-making by way of democratic procedures because they view this as the fairest approach in circumstances of politics involving widespread disagreement. European consensus, however, is not itself a democratic procedure but only takes up the democratic credentials of national laws *even as it stands in tension to them* because it shifts from national ethe to a pan-European ethos.[785] These tensions cannot be *avoided* by shifting the number of States parties required to establish consensus: the focus remains on a pan-European ethos which has the potential to overrule at

782 See Dothan, "The Optimal Use of Comparative Law" at 26.
783 But see generally John O. McGinnis and Michael Rappaport, "The Condorcet Case for Supermajority Rules," (2008) 16 *Supreme Court Economic Review* 67.
784 See the juxtaposition in Chapter 4, II.1.
785 Chapter 3, IV.3.

least one national ethos, that of the respondent State. However, the continued importance of national ethe as the primary location of democratic procedures can be *accommodated* within the pan-European ethos by increasing the number of States parties required to establish European consensus in favour of the applicant.[786]

It follows from these considerations that the conventional account of European consensus can be read as a result of the continuing tensions, but also allegiances, between the notion of a pan-European ethos and national ethe. This is all the more so when combined with the emphasis on disagreement among States as discussed in the previous subsection. Since the ethos-focussed perspective conceives of disagreement as best resolved within democratic procedures, it makes sense to regard lack of consensus as a reason for deferral to national ethe, where such procedures exist – and hence to see lack of consensus as a reason for the ECtHR not to interfere with those procedures by finding a violation of the Convention. If anything, lack of consensus makes the concerns of the ethos-focussed perspective even more apparent than consensus in favour of the respondent State would, for it showcases the "diversity of responses to human rights issues"[787] and the "different cultural interpretation[s]"[788] among democratic States in all its force.

In sum, the asymmetry in favour of the rein effect which forms part of the conventional account of European consensus not only prevents morality-focussed considerations from gaining too much ground by avoiding a consensus-agnostic middle ground, it also differs from the cognitively oriented reasoning of the epistemic approach. Where the latter avoids a middle ground altogether in favour of a clear dividing line at fifty percent of the States parties to establish consensus either in favour of the applicant or the respondent State, the continuing tensions between the national ethe and a pan-European ethos point towards deferral to democratic procedures at the national level in cases of disagreement among States – hence the operationalisation of the rein effect in cases involving lack of consensus. By shifting the number of States required between fifty percent and almost-unanimity, the role of national ethe can be decreased or increased.

786 See in particular von Ungern-Sternberg, "Die Konsensmethode des EGMR. Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip" at 336.

787 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 252.

788 Arai-Takahashi, "The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry" at 87.

It comes as no surprise, then, that the conventional account of European consensus seems unacceptable to the morality-focussed perspective – on epistemological grounds, for one thing, but also more pragmatically because the asymmetry in favour of the rein effect means that precisely those situations which the morality-focussed perspective is concerned about are given more ground. Yet as the following section will demonstrate, there are also countervailing tendencies within the Court's case-law.

IV. Morality-focussed Elements: Trends and Directionality

There would be a number of ways in which to use vertically comparative reasoning in a manner more amenable to the morality-focussed perspective. One possibility would be to pay less attention to the number of States parties which have adopted a certain solution and instead focus primarily on the reasons which they provide for these solutions.[789] While certainly one attractive option, it is not commonly made use of by the ECtHR: it "more frequently utilizes the results of various legal regulations rather than looking into the reasoning behind them".[790] It is because of this approach to vertically comparative reasoning that European consensus builds on the notion of commonality as described in Chapter 1.

However, as the discussion of reasonable agreement above has shown, substantive reasoning of the kind deployed by the morality-focussed perspective can also be presented as a form of commonality, albeit hypothetical or reasonable in a normatively circumscribed sense. "Hypothetical consensus",[791] of course, stands in a certain tension with the positions *actually* taken by the States parties which European consensus builds on (or at least claims to). Yet there are several ways of approximating the two by shifting the way in which European consensus is approached. For the purposes of the present chapter, I would like to consider how the ECtHR interprets the tableau it finds within the States parties' legal systems by taking a different perspective on the number of States required to establish consensus in favour of the applicant – effectively shifting the boundary between the rein

789 As on the deliberative approach proposed by Fredman, "Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law".

790 Dzehtsiarou, "What Is Law for the European Court of Human Rights?" at 122; see further Chapter 1, III.

791 Supra, note 741.

effect and the spur effect to a more symmetrical picture than the conventional account considered above would offer.

Accordingly, this section will explore some cases in which the Court has dealt with lack of consensus in a way which de-emphasises disagreement among the States parties and instead uses comparative references in a manner more compatible with the morality-focussed perspective – as George Letsas has put it, cases in which "the Court does not consider […] whether the emerging practice is followed by *all or most* contracting states".[792] I should note at the outside that "comparative references" (or "emerging practice", in Letsas's wording) may, in this context, include both the domestic laws of the States parties and to their international commitments. The particularities of the latter will be treated in more detail in the next chapter. For present purposes, I will include them only insofar as they are of interest specifically because they raise numerical issues as to the establishment of consensus – or lack thereof.

The cases I will examine in this section are perhaps best described as those in which the Court relies on a "trend", since the comparative analysis is usually connected to notions of *movement, evolution and directionality*.[793] Letsas has emphasised this aspect by referring, in a chapter on the Court's "living instrument" approach, to its reliance "on *evolving* trends and *emerging* consensus".[794] As in previous chapters, the terminology should not be taken as gospel. Many commentators refer to consensus as a trend in order to distinguish it from consensus in the sense of unanimity,[795] and some have argued that "trend" would, in fact, be a better designation in general precisely because it does not carry a connotation of unanimity.[796] The Court has sometimes spoken of a "trend" or "general trend" even when a

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792 Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 119 (emphasis added); for an overview, see Senden, *Interpretation of Fundamental Rights*, at 245-258.

793 See also Sébastien Van Drooghenbroeck, *La Proportionnalité dans le Droit de la Convention Européenne des Droits de l'Homme* (Bruxelles: Bruylant, 2001), at 533; Djeffal, "Consensus, Stasis, Evolution: Reconstructing Argumentative Patterns in Evolutive ECHR Jurisprudence" at 92; Douglas-Scott, "Borges' *Pierre Menard, Author of the Quixote* and the Idea of a European Consensus" at 171-172.

794 Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 119 (emphasis in original).

795 E.g. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 12; Mahoney and Kondak, "Common Ground" at 122.

796 ECtHR (GC), Appl. No. 19010/07 – *X and Others v. Austria*, Judgment of 19 February 2013, joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos, at para. 15 ("moving from

large majority of the States parties shared a certain position,[797] i.e. when consensus was clearly established according to the standards of the ethos-focussed perspective. My focus here, by contrast, is on those cases where the numerical basis for a consensus in favour of the applicant is less clear and the Court nonetheless makes use of the spur effect – where lack of consensus was not interpreted in the usual manner as evidencing strong disagreement and thus leading to the rein effect. Conor Gearty memorably described these cases as those of an emerging consensus in which "the birth [of true consensus] needs to be induced, helped on its way by a judicial midwife that is certain of its importance".[798] It is in that sense that I will be using the term "trend".

The locus classicus – and quite probably still the most striking instance – of the Court's reliance on a trend is the early case of *Marckx v. Belgium*. Ruling on the permissibility of distinguishing between "legitimate" and "illegitimate" children, it began by noting that "the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve" away from that distinction[799] – it thus established a directionality while referring to the "great majority" of member States without further substantiating this latter claim with comparative references.[800] Instead, it referred to two international instruments (the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children and the European Convention on the Legal Status of Children born out of Wedlock). The ECtHR noted the "currently small number of Contracting States" to have signed and ratified these Conventions, but in-

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methodology to terminology, should we always adhere to the somewhat restrictive notion of 'consensus', which is rarely encountered in real life? Would it not be more appropriate and simpler to speak in terms of a 'trend'?").

797 E.g. ECtHR (GC), Appl. No. 36760/06 – *Stanev v. Bulgaria*, Judgment of 17 January 2012, at para. 243; ECtHR, Appl. No. 29865/96 – *Ünal Tekeli v. Turkey*, Judgment of 16 November 2004, at paras. 61-62; sometimes the term "trend" is even used in relation to unanimity: e.g. ECtHR (GC), Appl. No. 24888/94 – *V. v. the United Kingdom*, Judgment of 16 December 1999, at para. 77.

798 Gearty, "Building Consensus on European Consensus" at 459.

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

800 Indeed, as Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte" at 203 notes, the Court's reference to *continuing* evolution contains a "prognostic element"; this would be difficult if not impossible to substantiate at all, except perhaps by reference on ongoing debates on law reform. The dynamic element is also emphasised by 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 663.

sisted that in light of the more general "evolution" in standards, their mere "existence" denoted "a clear measure of common ground in this area amongst modern societies", i.e. a form of consensus sufficient to unfold the spur effect.[801]

Marckx is striking because it makes the importance of the notion of "evolution" particularly clear – in light of the directionality which it implies, even treaties *signed and ratified only by a minority of States parties to the ECHR* were used to argue in favour of the existence of "common ground".[802] While the reliance on positions found in *less* than half of the States parties never gained prominence within the ECtHR's later case-law, it is not entirely unheard of:[803] for example, in *Biao v. Denmark*, the Court referred to the Council of Europe's Convention on Nationality, then ratified by only 20 of the 47 States parties, and stated that it nonetheless "suggests a certain trend towards a European standard which must be seen as a relevant consideration".[804] In both these cases, however, the reference to international instruments ratified by less than half of the States parties to the ECHR must be read alongside the ECtHR's reference to their domestic laws: in *Marckx*, the "great majority" of domestic laws were said to align with the applicants' position,[805] and in *Biao*, the Court acknowledged a "degree of variation" regarding the conditions for family reunification, but

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

802 As emphasised by George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," (2004) 15 *European Journal of International Law* 279 at 300; Nußberger, "Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte" at 203; both treaties were ratified by only 4 of the then-21 member States of the Council of Europe; for criticism of this approach, see e.g. J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1988), at 225-226; Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 254.

803 A further example, again by reference to the European Convention on the Legal Status of Children born out of Wedlock (then in force for 21 of 47 States parties), is ECtHR, Appl. No. 3545/04 – *Brauer v. Germany*, Judgment of 28 May 2009, at para. 40; see also e.g. ECtHR (GC), Appl. No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*, Judgment of 1 December 2020, at para. 228, speaking of national laws in 19 out of 40 States surveyed as "already a considerable consensus"; in that case, though, the situation in many of the other States was deemed "undetermined", so a less clear counter-consensus than usual was found.

804 ECtHR (GC), Appl. No. 38590/10 – *Biao v. Denmark*, Judgment of 24 May 2016, at para. 132.

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

also found that of all the legal systems examined, *only* the respondent State, Denmark, upheld the particular distinction at issue in the case – between "different groups of their own nationals", and specifically between those who are nationals by birth and those who are not.[806] Both cases thus arguably involved a clear consensus in favour of the applicants which underlay the spur effect alongside the reference to a less established international trend.

Other cases have operated on a similar principle although they were concerned primarily with references to the domestic laws of the States parties. The ECtHR's case-law on gay rights is, in some respects, illustrative of this. Take the case of *Vallianatos v. Greece*, in which the applicants argued that the existence of a registered partnership other than marriage was discriminatory in that it was not open to same-gender couples. The ECtHR noted that "there is no consensus among the legal systems of the Council of Europe member States", yet it immediately relativized this statement by adding that "a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships".[807] While in principle an instance of favouring a trend over a clear consensus, the more decisive point was presumably the States parties' positions as to "the specific issue" which the case raised: out of the 19 States which provided for a registered partnership other than marriage, only two – Lithuania and the respondent State, Greece – reserved it exclusively for different-gender couples.[808] The trend was thus, once again, supported by a clear consensus once the question was framed differently.[809]

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806 ECtHR (GC), Appl. No. 38590/10 – *Biao*, at para. 133.

807 ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others v. Greece*, Judgment of 7 November 2013, at para. 91.

808 Ibid.; see also ECtHR, Appl. No. 14793/08 – *Y.Y.*, noting (at para. 111) that "certain States parties have recently changed their legislation" on access to gender confirmation surgery, but immediately following up (at para. 112) by emphasising the "specificity" of the Turkish law at issue, i.e. implying a consensus of which it does not form part; on the particularity of that law, see also Jens T. Theilen, "The Long Road to Recognition: Transgender Rights and Transgender Reality in Europe," in *Transsexualität in Theologie und Neurowissenschaften. Ergebnisse, Kontroversen, Perspektiven*, ed. Gerhard Schreiber (Berlin, Boston: de Gruyter, 2016) at 384, with further references.

809 For a similar case, also involving Article 14 ECHR, in which the ECtHR took the opposite route, see ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik* and particularly the criticism in the joint partly dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Standlmayer, at para. 19; on the importance of how the question is framed, see further Chapter 7, II.

The case-law on gay rights *also* illustrates, however, that the Court sometimes refers to a trend which *cannot* as easily be supported by a clear consensus in other respects. Helfer and Voeten cite the early report by the European Commission of Human Rights in the case of *Sutherland v. the United Kingdom*, which referred to the equal treatment of gay and straight people in respect of the age of consent as "now recognized by the great majority of Member States of the Council of Europe".[810] They argue that the ostensible "great majority" actually consisted of only around half of the States parties, and therefore that "the European consensus that the ECtHR often cites as a justification for finding a violation of the convention need not be a super-majority of states".[811]

The case of *Oliari v. Italy* provides a more recent example in that regard. In contrast to *Vallianatos*, it concerned not the more circumscribed issue of an existing form of registered partnership which excludes same-gender couples (as a discrimination case), but rather their access to a registered partnership *per se* (as a positive obligation of the State).[812] The consensus as to the "specific issue" in *Vallianatos* thus provided no support for the applicants, and the Court instead acknowledged that only 24 of the 47 States parties provide for some form of registered partnership (whether marriage or otherwise) for same-gender couples.[813] On the conventional account, this would be a clear indication of lack of consensus and thus lead to the rein effect – yet instead, the Court emphasised the "relevance" of "the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe".[814] In light of this evolution, lack of consensus was reinterpreted as a "thin majority" which gave rise to the spur effect.[815]

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810 EComHR, Appl. No. 25186/94 – *Euan Sutherland v. the United Kingdom*, Report of 1 July 1997, at para. 59

811 Helfer and Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" at 17.

812 Contrast ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 164 with ECtHR (GC), Appl. Nos. 29381/09 and 32684/09 – *Vallianatos and Others*, at para. 75.

813 ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 55.

814 Ibid., at para. 178; see also ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at paras. 93-94.

815 ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 178; besides morality-focussed considerations (infra, note 833) another factor which may well have influenced this reinterpretation was the societal and legal situation within Italy itself, i.e. different elements of the national ethos such as indications by "the general Italian population and the highest judicial authorities in

Similar tendencies are in evidence in some of the Court's judgments on trans rights. *Christine Goodwin v. the United Kingdom* has perhaps becomes as much of a classic as *Marckx*, with many proponents of the morality-focussed perspective enthusiastically endorsing it as an instance of comparative reasoning used in way that reinforces rather than delimits prepolitical rights[816] – and indeed, the Court's ruling that it "attaches less importance to the lack of evidence of a common European approach […] than to the […] continuing international trend"[817] in favour of a right to legal gender recognition differs quite strongly from the ethos-focussed perspective's take on the relevance of a lack of consensus. *Goodwin* remains a somewhat special case by virtue of its reliance on comparative developments in States outside Europe: the "international trend" was not, in other words, based on *vertically* comparative law.[818] It should also, I think, be read in the context of a long line of preceding judgments which reached opposing results.[819] I will therefore not consider *Goodwin* in detail here, except to note that the Court *did* make use of the spur effect based on a trend, despite having asserted the lack of consensus.

The reliance on a trend – undeniably European this time, rather than international – comes through even more clearly in the subsequent case of

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Italy" that the legislative status quo was insufficient (ibid., at para. 179); see in greater detail 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".

816 E.g. Erdman, "The Deficiency of Consensus in Human Rights Protection: A Case Study of Goodwin v. United Kingdom and I. v. United Kingdom"; Letsas, "The ECHR as a Living Instrument: Its Meaning and Legitimacy" at 116; Radačić, "Rights of the Vulnerable Groups" at 607 and 612.

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

818 On verticality, see generally Chapter 1, III.; arguably, an "unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment", i.e. a *European* trend, also existed: see ibid., at para. 55; the ECtHR was, however, prevented from relying on this trend since there had been no development since its preceding judgment in ECtHR (GC), Appl. Nos. 22985/93 and 23390/94 – *Sheffield and Horsham v. the United Kingdom*, Judgment of 30 July 1998; see Alexander Morawa, "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom," (2002) 3 *German Law Journal* at para. 33.

819 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 663 aptly speaks of "a fairly maladroit correction of [the ECtHR's] previous case law".

A.P., Garçon and Nicot v. France, in which the Court was called upon to judge, inter alia, the permissibility of sterilisation as a precondition for legal gender recognition. Having initially determined a lack of consensus among the States parties (with 22 of the 40 States providing for legal gender recognition at all retaining the precondition),[820] it noted in favour of the applicants that "this precondition has disappeared from the positive law of eleven States parties between 2009 and 2016", i.e. in the period preceding the judgment, and that there was thus "a tendency to abandon it".[821] While the rein effect due to the lack of consensus was thus initially retained, it was subsequently counterbalanced by the spur effect evidenced by the trend in favour of the applicants – even though the States having abandoned the sterilisation precondition were in the minority.

Having provided examples of the ECtHR relying on trends at some length, I must emphasise once again that it is not my intention to argue that this is the only or even the dominant approach of the Court.[822] Many contrary cases can be adduced in which the ECtHR not only deployed the rein effect based on a lack of consensus,[823] but did so despite explicitly taking note of developments which it *could* have emphasised to precisely the opposite effect.[824] Thus, in *Fretté v. France*, it spoke not of a "trend" but of legal systems "in a transitional stage" leading to a wide margin of appreciation.[825] In the case of *S.H. v. Austria*, concerning the use of ova and sperm from donors for in vitro fertilisation, the Court did acknowledge an "emerging European consensus", but specified that it was "not […] based on settled and long-standing principles" but rather a mere "stage of devel-

820 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at paras. 71 and 122.

821 Ibid., at para. 124.

822 Dean Spielmann, "Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine. Waiver or Subsidiarity of European Review?," (2012) 14 *Cambridge Yearbook of European Legal Studies* 381 at 406 states that a trend is not enough "most of the time".

823 See supra, in particular the cases cited in note 748.

824 E.g. ECtHR (Plenary), Appl. No. 9532/81 – *Rees v. the United Kingdom*, Judgment of 17 October 1986, at para. 37; ECtHR (Plenary), Appl. No. 10843/84 – *Cossey v. the United Kingdom*, Judgment of 27 September 1990, at para. 40; ECtHR (GC), Appl. No. 37112/97 – *Fogarty v. the United Kingdom*, Judgment of 21 November 2001; ECtHR (GC), Appl. No. 48876/08 – *Animal Defenders International*, at para. 123; ECtHR, Appl. No. 30141/04 – *Schalk and Kopf*, at para. 105; ECtHR (GC), Appl. Nos. 60367/08 and 961/11 – *Khamtokhu and Aksenchik*, at paras. 85-86.

825 ECtHR, Appl. No. 36515/97 – *Fretté*, at para. 41.

opment within a particularly dynamic field".[826] In light of this assessment, it ruled that "there is not yet clear common ground among the member States" and granted a wide margin of appreciation[827] – a standard case of the rein effect based on a lack of consensus.

These cases form part of the point I wish to make just as much as the previously discussed cases emphasising the importance of trends. Taken together, all these cases illustrate that, as a group of dissenting judges once put it in a rather understated manner, "the Court has some discretion regarding its acknowledgment of trends".[828] Sometimes, it will emphasise lack of consensus over any trends or developments which might be said to exist – but sometimes, it will focus on the directionality provided by certain trends rather than the lack of consensus.[829] My point is that the oscillation between these two approaches reflects the deeper tensions between the ethos-focussed perspective and the morality-focussed perspective, respectively. When the Court foregrounds the lack of consensus, it emphasises disagreement and defers to democratic procedures at the national level by means of the rein effect, in line with the ethos-focussed perspective.[830] When relying instead on a trend in a certain direction, the relevance of disagreement is dismissed and the ethos-focussed perspective thus side-lined.

More than that, the reliance on trends arguably connects to concerns which are entirely typical of the morality-focussed perspective. Why refer to trends in the first place? The context of the ECtHR's references may provide some clues: for example, in *A.P., Garçon and Nicot*, the Court refers to the lack of consensus and yet to the tendency among European States to abandon the sterilisation requirement in two separate paragraphs. Con-

826 ECtHR (GC), Appl. No. 57813/00 – *S.H. and Others*, at para. 96.

827 Ibid., at para. 97; see also ECtHR (Plenary), Appl. No. 5493/72 – *Handyside* on a "rapid and far-reaching evolution of opinions"; a summary of this temporal aspect is given by McGoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee" at 29; on "consistent" trends and *S.H.*, see Anja Seibert-Fohr, "The Effect of Subsequent Practice on the European Convention on Human Rights: Considerations from a General International Law Perspective," in *The European Convention on Human Rights and General International Law*, ed. Anne van Aaken and Iulia Motoc (Oxford: Oxford University Press, 2018) at 72.

828 ECtHR (GC), Appl. No. 37359/09 – *Hämäläinen*, joint dissenting opinion of Judges Sajó, Keller and Lemmens, at para. 5; see also Helfer and Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" at 17.

829 See also Senden, *Interpretation of Fundamental Rights*, at 249.

830 Supra, III.

necting them is a further paragraph which emphasises the genital integrity of trans persons as an essential aspect of their identity[831] – an aspect, in other words, which is in principle independent from consensus-related considerations and reminiscent, rather, of the kind of substantive reasoning employed by the morality-focussed perspective.[832] In much the same manner, the paragraph referencing the trend in favour of recognising same-gender partnerships in *Oliari* is immediately preceded by the claim that the case concerns not "supplementary" but rather "core rights".[833] In the preceding chapter, I considered the issue of "core rights" in more detail and connected it to the concerns and epistemology of the morality-focussed perspective. In that context, core rights were mostly used by commentators to described an area immune to consensus-based argument.[834] Here, it seems that they also impact the way in which consensus is operationalised. As Wildhaber, Hjartarson and Donnelly have summarised it: in "situations of core guarantees, […] the Court proceeded to find a European consensus without establishing a clear quantitative majority of States as punctiliously as in most other cases".[835] The tensions between the ethos-focussed perspective and the morality-focussed perspective thus become internal to the establishment of "consensus" itself.

The implication of cases such as *A.P., Garçon and Nicot* and *Oliari* is that lack of consensus is not decisive in and of itself, but may be reconceptualised as a trend *if there are good reasons to do so*.[836] The ethos-focussed perspective would not accept this references to "good reasons" since they would not be established by reference to ethical normativity: accordingly, when the ethos-focussed perspective is retained, as in *Fretté* or *S.H.*, then

831 ECtHR, Appl. Nos. 79885/12, 52471/13 and 52596/13 – *A.P., Garçon and Nicot*, at para. 123; see also ECtHR, Appl. No. 14793/08 – *Y.Y.*, at para. 109, similarly bringing up the importance of physical integrity in between references to trends à la *Goodwin* and recent changes in the legal systems of the States parties.

832 See further on this aspect (and this case) Chapter 8, III.2.

833 ECtHR, Appl. Nos. 18766/11 and 36030/11 – *Oliari and Others*, at para. 177.

834 Chapter 4, III.2.; see also the discussion of "core rights" or "key rights" within the ECtHR's case-law in Chapter 8, III.2.

835 Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 261; see also Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 161.

836 My point here is, of course, conceptual and not descriptive: I do not claim that the ECtHR's emphasis of lack of consensus in some cases and of trends in others actually reflects (what I take to be) good reasons, but rather that it is rooted in an oscillation between the ethos-focussed and the morality-focussed perspective, respectively.

the reconceptualization does not take hold.[837] The morality-focussed perspective, of course, has no such qualms about assessing the merits of reasons independently from factual disagreement in the form of lack of consensus, and thus more readily embraces the notion of trends. By connecting trends to good reasons for supporting them, however, the morality-focussed perspective also lessens their relevance. This is entirely in line with its general approach to the spur effect of consensus as described in Chapter 2 – the focus is on *better* understanding[838] or *progressive* developments,[839] with the comparative and international materials referred to thus being concurrent to substantive reasoning rather than constitutive of its result.[840]

V. *Interim Reflections: Statistical and Ideal Majorities*

I have argued in this chapter that the controversies surrounding the question of how many States parties are required to establish European consensus can be read as an internalised manifestation of the tensions between the different kinds of normativity discussed in previous chapters. In principle, the use of European consensus is based on ethical normativity established by reference to a pan-European ethos. However, as discussed in Chapter 4, it may strike up instrumental allegiances with both ethical normativity located within individual national ethe and with moral normativity, depending on the case at hand (the prior in cases involving the rein effect, the latter particularly in cases involving the spur effect). By shifting the number of States delineating the boundary between the rein effect and the spur effect, therefore, these allegiances can wax or wane in prominence. The conventional account of European consensus is asymmetrical in favour of the rein effect so as to defer to democratic procedures within individual States in cases of disagreement among the States parties; but lack of consensus can also be reconceptualised as a trend in favour of the applicant if it is approached in light of morality-focussed considerations which it aims to substantiate.

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837 Thus Wildhaber, Hjartarson, and Donnelly, "No Consensus on Consensus?" at 257 reject the reliance on trends, arguing that the Court should "wait for further consolidation and corroboration" of a strong consensus.

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

839 Radačić, "Rights of the Vulnerable Groups" at 612.

840 Chapter 2, III.

When viewed as an expression of the tensions between different kinds of normativity, it hardly seems surprising that the numerical issues involved in establishing European consensus sometimes appear difficult to grasp, with regard to individual cases but even more so with regard to the ECtHR's case-law as a whole.[841] As Ost has put it, when the Court refers to a "majority" of States, it is sometimes "difficult to decide whether the Court is referring to the statistical majority or an ideal majority of those States with a high level of protection of individual rights".[842] Differently put: sometimes the ECtHR seems to be interested in actual convergence or divergence between the legal systems of the States parties, as suggested by the ethos-focussed perspective; but sometimes it focusses instead on hypothetical or "reasonable" agreement while retaining a (merely) concurrent reference to European consensus or "trends".

As Rietiker has put it: "Taking into consideration the complexity of the questions that the Court has to face, its approach cannot be a mathematically precise one".[843] Interpreting vertically comparative materials through the lens of commonality – deciding, for example, whether to read them as "lack of consensus" or as a "trend" in a certain direction – presupposes a commitment to the morality-focussed or ethos-focussed perspective and hence cannot easily be answered in the abstract. To be sure, one might argue that morality-focussed considerations, in particular, could be incorporated into the ECtHR's reasoning at a later stage, after consensus (or lack thereof) has been established by reference to numerically precise standards.[844] While this is quite true, my impression is nonetheless that calls

841 There is perhaps a parallel here to customary international law and the "curiously inconclusive discussion about the generality of a practice to have eligibility for custom": Koskenniemi, *From Apology to Utopia*, at 442.

842 Ost, "The Original Canons of Interpretation" at 305; see also Van Drooghenbroeck, *La Proportionnalité dans le Droit de la Convention Européenne des Droits de l'Homme*, at 533 ("qualitatif ou quantitatif").

843 Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis," (2010) 79 *Nordic Journal of International Law* 245 at 265; see also Helfer, "Consensus, Coherence and the European Convention on Human Rights" at 159; Senden, *Interpretation of Fundamental Rights*, at 265; Ryan, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights" at 495.

844 For doctrinal constellations tending in that direction, see Chapter 8 – although it is worth noting, as argued there, that explicit counter-arguments to already-established (lack of) consensus are relatively rare in practice.

for a certain number of States parties to be clearly fixed as the relevant hurdle to establish consensus[845] implies a level of formal uniformity across cases which not only seems unlikely to transpire in practice, but also undesirable in that it would naturalise the use of European consensus and diminish the impact of other forms of normativity.[846]

We might summarise with Paul Johnson that, in establishing (lack of) consensus, the ECtHR "does not simply assess the existence of an 'objective' reality but actively constructs representations of consensus in particular ways".[847] Yet the idea that consensus does somehow form an "'objective' reality" external to the ECtHR persists, and it contributes to the idea that the ECtHR as comparatist is what Frankenberg describes as a "pure spectator, objective analyst, and disinterested evaluator" merely assessing "objective facts".[848] My worry is that if the ECtHR were to formalise a certain numerical standard as absolute, this would only serve to strengthen and consolidate that line of thinking, thus also lending more credence to the notion that this form of reality should take precedence over other, less "objective" forms of reasoning. Or, in the words of Andrew Legg, for the ECtHR "to prescribe a formulaic role to state practice in [its] reasoning would be for [it] to misrepresent that consensus is merely one factor amongst numerous other reasons, all of which are relevant in resolving the dispute".[849]

Last but not least, it is important to note once more that numerical issues are not the only aspect relevant to the controversies surrounding the establishment of European consensus – a consideration which threatens to be obscured by calls for an ostensible mechanical or arithmetical approach. One particularly important aspect is the way in which the question is framed, for example the level of generality at which the vertically comparative analysis is conducted.[850] Another question is which comparative materials are regarded as relevant in the first place. In line with most academic commentary, I have so far been referring primarily to the domestic legal

845 Supra, I., particularly note 721.

846 As when Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 142 deems consensus "one of the most objective criteria" in determining "the 'tipping point' for evolutive interpretation".

847 Johnson, *Homosexuality and the European Court of Human Rights*, at 78-79; see also Henrard, "How the ECtHR's Use of European Consensus Considerations Allows Legitimacy Concerns to Delimit Its Mandate" at 161.

848 Frankenberg, "Critical Comparisons: Re-thinking Comparative Law" at 424.

849 Legg, *The Margin of Appreciation*, at 127.

850 See Chapter 7.

systems of the States parties. But the discussion of trends, in particular, has already demonstrated that the ECtHR's comparative endeavours are of a broader reach: it refers not only to domestic statutes or judgments, but also to international legal materials associated with the States parties. The following chapter will take up this aspect of establishing European consensus in more detail.