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ARTICLE

Shaping Rights Through European Consensus or Trend

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Abstract

The question of when and how a European consensus or trend contributes to shaping rights guaranteed by the European Convention on Human Rights and its Protocols is controversial. The European Court of Human Rights quite often performs an analysis of the laws and practices of the Council of Europe's Member States or of relevant international material. However, the cases where rights have actually been shaped by a European consensus or trend are quite rare. In the last twenty-five years, some 27 out of 424 judgments on the merits of the Grand Chamber of the Court established a consensus or trend having a "shaping impact" on these rights. Further, only one advisory opinion based on Protocol No. 16 contained comparative law material having such an influence. This Article assesses the intensity of the impact of a consensus or a trend analysis on a judgment's or an advisory opinion's *ratio decidendi*, shows what shaping a right actually means, and suggests that cases that are more prone to a potentially persuasive consensus or trend analysis will typically deal with matters of political or general policy, sensitive moral or ethical issues, or changes in the case law.

Keywords: Fundamental rights; margin of appreciation; European consensus; trend; European Convention on Human Rights; European Court of Human Rights

A. Introduction

The European Court of Human Rights ("ECtHR" or "the Court") uses various methods to interpret and apply the rights guaranteed by the European Convention on Human Rights ("ECHR" or "the Convention")[1] and its Protocols. The search for a possible European consensus or trend on a given issue is part of these methods. This comparative analytical approach is both well established and, at the same time, controversial and subject to various criticisms. The question of when and how a European consensus or trend contributes to shaping rights guaranteed by the Convention and its Protocols lies at the heart of the present Article.

This Article mainly aims at listing the judgments of the Grand Chamber of the Court ("the Grand Chamber") in the last twenty-five years where a consensus or trend analysis had an impact on the *ratio decidendi* of the case, at measuring this impact, and at showing what shaping of rights actually means in each case. Such a triple study has never been conducted before. Based on the results obtained and of doctrinal considerations, this Article also intends, on the one hand, to address some methodological and conceptual challenges raised by the use of a European consensus or trend to shape rights and, on the other hand, to determine if some cases are more prone than others to a potentially persuasive consensus or trend analysis.

[1]European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

Shaping a right is an elusive notion in many ways. It relates to the delimitation of the actual protection conferred by that right. Human rights are usually formulated in a vague way. When issuing a judgment, the Court sometimes defines the scope of a right in a general way—not solely confined to the case at hand, in other words—or it indicates which points must be examined to apply a right or determine whether it has been violated. From this perspective, judicial adjudication leads to the shaping of human rights as understood in the present Article. Interestingly, shaping rights is not synonymous with defining a given right's scope. Indeed, balancing, notably in the proportionality test, surely relates to the specific circumstances of a case, but may also reveal general considerations on the steps to be taken in the analysis.

The judgments of the Court offer an inexhaustible source of developments shaping the Convention's rights. From a methodological standpoint, this Article examines the judgments rendered by the Grand Chamber since the entry into force of Protocol No. 11 to the Convention (November 1998–September 2024), in which the question of the existence of a European consensus or trend is addressed. This Protocol fundamentally restructured the Convention's protection mechanism and ushered in a new era for the Court. This period of just over twenty-five years is long enough to provide an adequate perspective on the methods followed by the Court. The judgments handed down at the Grand Chamber's level deal, as a rule, with serious questions affecting the interpretation or application of the Convention and its Protocols or with serious issues of general importance[2] and have supposedly been subject to a particular analytical and methodological effort. The set of judgments gathered will be carefully analyzed, and the cases where rights are actually shaped by a European consensus or trend will constitute the core of this Article, as they show the Court's approach to its final stage. It should be noted, however, that consensus or trend analyses are also performed by Chamber formations. Several Chamber judgments are quoted in the present Article.

The present Article provides information on the impact of the consensus or trend analysis performed by the Court on the outcome of its judgments. Methodologically, this impact assessment is based on the written judgments of the Grand Chamber and, more specifically, on their *ratio decidendi*. Of course, many considerations, written or not, affect a case's outcome. At the end of the day, the written judgment is what counts, what transcribes the Court's opinion and position, and what constitutes jurisprudence and, thus, builds the case law. Consensus and trend are both used in this Article to reflect the Court's case law. The Court does not make a clear distinction in this respect, and the difference between one and the other seems gradual rather than conceptual. As such, a trend may be seen as a stage towards consensus. This Article does not address this difference as such and takes into account the judgments where these notions and similar ones are used.

This Article starts with some comments on the task of the court to interpret rights and balance these rights or related interests, which leads to shaping rights—in certain cases with the help of a consensus or trend analysis.[3] The Court quite often conducts such an analysis, but the cases where the latter actually shapes the rights at stake are rare.[4] Moreover, shaping rights through European consensus or trend is not without conceptual and methodological challenges[5] and also raises the fundamental—though unanswered—question as to whether some cases are more prone than others to a potentially persuasive consensus or trend analysis.[6] A nuanced approach appears inevitable in this complex and multifaceted context, as does the Court in most of its consensus or trend analyses.[7]

[2]*See* European Convention on Human Rights, art. 30, 43(2).
[3]*See infra* Part B.
[4]*See infra* Part C.
[5]*See infra* Part D.
[6]*See infra* Part E.
[7]*See infra* Part F.

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B. Interpreting, Balancing, and Shaping

Interpreting rights and balancing them or interests are two different judicial tasks, at least at first glance. In various ways, however, they can be part of a continuum and help shape rights guaranteed by the Convention and its Protocols.[8] At each stage of this continuum, the European Court may search for a European consensus or trend.[9]

I. The Process of Shaping Rights

Interpreting rights involves defining their scope. This aspect of rights' interpretation can be a rather abstract exercise, even if the judges may not, depending on the circumstances, ignore or may even explicitly take into account the concrete situation with which they are confronted. As the Convention is an international treaty, its interpretation is notably governed by Articles 31 to 33 of the Vienna Convention on the Law of Treaties signed on May 23, 1969 ("the Vienna Convention").[10] In order to identify the context in which the Convention ("ECHR") applies, its Preamble, as amended by Protocol No. 15, refers to, among other things, "a common heritage of political traditions, ideals, freedom and the rule of law," the principle of subsidiarity and the margin of appreciation of the "High Contracting Parties." For its part, balancing not only involves weighing competing rights or interests against each other, but also relates to proportionality[11] and, to some extent, reasonableness or fairness tests. It is mostly performed by the Court's judges regarding the concrete circumstances of a case. Of course, judges may consider the expected consequences of their judgment and, in this regard, adopt a more general and abstract approach. Many rights, but not all of them, allow for some balancing in their application, if only because they contain indeterminate legal terms such as necessity or fairness.

In the rich, complex and evolutive case law of the Court, a clear line cannot always—it is a euphemism—be drawn between interpreting the scope of rights and balancing interests or rights.[12] Regrettably or not, a back and forth continuum can be observed in a significant number of the Court's judgments between these two tasks or, in other words, between pure interpretation of a right's scope and pure balancing. This also means that both may contribute to shaping rights, or in other words, to define their actual, precise and effective meaning, not only in the case at hand, but also in other actual or future similar cases. The last four columns of the chart in the Appendix show at what stages the process of shaping rights[13] may take place.

[8] *See infra* Part B, Section I.

[9] *See infra* Part B, Section II.

[10] *See, e.g.*, *Ukraine v. Russia (re Crimea)* [GC], App. Nos. 20958/14 & 38334/18, para. 912 (June 25, 2024), https://hudoc.echr.coe.int/fre?i=001-234982; *Magyar Helsinki Bizottság v. Hungary* [GC], App. No. 18030/11, paras. 35, 118–125, 134 & 138 (Nov. 8, 2016), https://hudoc.echr.coe.int/fre?i=001-167828; *Rantsev v. Cyprus* [GC], App. No. 25965/04, para. 274 (Jan. 7, 2010), https://hudoc.echr.coe.int/fre?i=001-96549.

[11] *See, e.g.*, Matthias Klatt, *Balancing Rights and Interests: Reconstructing the Asymmetry Thesis*, 41 Oxford J. Legal Stud. 321, 347 (2021) (concluding that proportionality adjudication includes the balancing of rights and interests).

[12] Nikos Vogiatzis, *The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court*, 25 European Pub. L. 445, 463 (2019). *See also* Christian Djeffal, Static and Evolutive Treaty Interpretation: A Functional Reconstruction 314–43 (2016); George Letsas, *The Scope and Balancing of Rights: Diagnostic or Constitutive?*, *in* Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights 38, 64 (Eva Brems & Janneke Gerards eds., 2013) (arguing that "[w]hat matters is the substantive reasoning that goes into the various stages of the judicial test, rather than its formalistic, rule-like application").

[13] Regarding this process, *see* Janneke Gerards & Eva Brems, *Introduction*, *in* Shaping Rights in the ECHR, *supra* note 12, at 1, 2. *See also* Corina Heri, *Deference, Dignity and 'Theoretical Crisis': Justifying ECtHR Rights Between Prudence and Protection*, 24 Hum. Rts. L. Rev. 1, 11 (2024) (noting that "the consensus approach [. . .] conceivably allows any interpretation to shape the ECHR if it is predominant among the Member States").

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In the present Article, shaping rights refers to the multidimensional judicial adjudicative work, performed by the Court, which leads to defining the scope of a right or to indicating which points must be examined to apply a right or determine whether it has been violated. Through interpretation of the scope of a given right or the Convention as a whole, and through balancing rights and interests, the Court defines the actual, precise and effective meaning of the rights guaranteed by the Convention or its Protocols. The last column of the chart in the Appendix illustrates what "shaping rights" through European consensus or trend may actually mean in each judgment listed, something that has never been done before.

It is not argued in this Article that defining the scope of a right is equal to the balancing of rights and interests. These are two different steps in the analysis that the Court is supposed to perform, even if they are not always clearly distinguished and are sometimes overlapping. However, the point is made that a consensus or trend analysis can and does actually take place at either stage, as is apparent from the judgments listed in the Appendix.

In interpreting a constitution, a court sometimes also defines unenumerated or unwritten rights. Until now, the Court has not explicitly used this technique and has always sought to link the most significant developments in case law to the rights expressly guaranteed in the Convention and its Protocols. However, some cases explore the limits of explicitly guaranteed rights and may even venture beyond. When the Court asks whether there is a general right to repatriation under Article 3 § 2 of Protocol No. 4, it—rightfully in my view—looks at international law and material, the Council of Europe's material and European Union law or case law and also examines whether a consensus between the Council of Europe's Member States ("the Member States") can be established on this issue.[14] Indeed, such a consensus analysis is notably advocated for "when the Court intends to add new rights."[15]

The process of shaping rights is certainly influenced by many factors, sources and circumstances. This Article is dedicated to one of those—European consensus or trend. Furthermore, the process is evolutive and dynamic, reflecting the idea that the Convention is a "living instrument." From this perspective, it can prove quite unpredictable. One of the main challenges facing the Court consists of framing this process and making it more predictable. In many cases, the Court has felt the need to search for an eventual European consensus or trend.

II. Use of a European Consensus or Trend by the European Court of Human Rights

A consensus or trend analysis may help circumscribe the Member States' margin of appreciation in an area or on a specific issue and, as the case may be, define the scope, the meaning[16] or, depending on the context, the most appropriate application of a given right. From this perspective, the quest for legitimacy cannot be an independent goal, and the Court's legitimacy "cannot be solely dependent on a comparative exercise across forty–seven states."[17] That said, the performed analysis may help, little by little, build the Court's legitimacy.[18] In reality though, a consensus or trend analysis can serve several functions, such that a consensus or trend "licenses and restrains, persuades and substantiates."[19]

[14]*H.F. v. France* [GC], App. Nos. 24384/19 & 44234/20, paras. 84–142 & 257–59 (Sept. 14, 2022), https://hudoc.echr.coe.int/fre?i=001-219333.

[15]Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights 127 (2d ed. 2016).

[16]*See, e.g.*, Daniel Peat, Comparative Reasoning in International Courts and Tribunals 151–52 (2019); Dzehtsiarou, *supra* note 15, at 153.

[17]Vogiatzis, *supra* note 12, at 470.

[18]Dzehtsiarou, *supra* note 15, at 149–76, 207–11.

[19]Fiona 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, in* Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond 311, 317 (Panos Kapotas & Vassilis P. Tzevelekos eds., 2019).

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For all that, not every European consensus or trend really shapes the right at stake, for two reasons at least. First, the Court sometimes disregards the consensus or trend for other reasons that it deems overriding, as shown at the beginning of Section III of Part C below. Second, a European consensus or trend can simply provide the Court with some general indications on the way to balance the interests at stake. In such a case, it would be a stretch to consider that the Court significantly shapes the right in question. Furthermore, a consensus can exist at the level of rules or simply at the level of principles.[20] When the Court, for instance, considers that there is a European consensus to duly consider the best interests of children when applying Article 8 of the ECHR and, more concretely, the proportionality test foreseen in the second paragraph of this provision,[21] it does not really shape the right to respect private and family life. Similarly, the observation that the "existence of a broad consensus at the international and European level" concerning the need for special protection of asylum-seekers as a particularly underprivileged and vulnerable population group[22] has a relatively low normative density.

By contrast, when the Court recognized a right of conscientious objection for the first time, it directly shaped Article 9 of the ECHR.[23] In the Court's case law, a proportionality analysis can also have a shaping impact on the right at hand. When, for instance, the Court tries to determine whether the right of working prisoners to unionize is covered by Article 11 of the ECHR and looks for an eventual consensus, which it denies in the proportionality analysis,[24] it addresses a question that may shape the right in question.

It follows from the foregoing that a consensus or trend analysis also relates to matters of interpretation of the Convention. Christian Djeffal refers to Articles 31 to 33 of the Vienna Convention when he considers that "[t]he use of the consensus method should be restricted to questions of balancing, no use should be made of it in the process of interpretation."[25] However, the reference to "context" in Article 31 is flexible enough[26] to allow for—or, at least, not to prohibit—an interpretation of human rights from a multi-level perspective. This may lead to look for an eventual European consensus or trend in the process of interpreting rights.[27]

One may argue that international norms require an autonomous interpretation, so it is not obvious why reliance on the Member States' laws and practices should be relevant to the determination of the scope of protection of international norms. While this is a valid point, human rights are, for most of them, formulated in rather vague terms and are not isolated, autopoietic creatures. Their interpretation and, thus, their actual meaning are affected by many factors, including the environment in which they are immersed. From an inter-level perspective, said laws

[20]Janneke Gerards, General Principles of the European Convention on Human Rights 169–70 (2d ed. 2023); Dzehtsiarou, *supra* note 15, at 17, 59.

[21]*See, e.g.*, *Vavřička and Others v. Czech Republic* [GC], App. Nos. 47621/13 & 5 others, para. 287 (Apr. 8, 2021), https://hudoc.echr.coe.int/fre?i=001-209039.

[22]*M.S.S. v. Belgium* [GC], App. No. 30696/09, para. 251 (Jan. 21, 2011), https://hudoc.echr.coe.int/fre?i=001-103050.

[23]*See Bayatyan v. Armenia* [GC], App. No. 23459/03, paras. 101–08, 110 & 122–24 (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105611.

[24]*Yakut Republican Trade-Union Federation v. Russia*, App. No. 29582/09, para. 46 (Dec. 7, 2021), https://hudoc.echr.coe.int/fre?i=001-213908. *See Meier v. Switzerland*, App. No. 10109/14, paras. 77 & 79 (Feb. 9, 2016), https://hudoc.echr.coe.int/fre?i=001-160800 (Regarding work by prisoners under Article 4 of the ECHR).

[25]Djeffal, *supra* note 12, at 335.

[26]*See, e.g.*, Gerards, *supra* note 20, at 158; Eszter Polgári, *The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or Source of Inspiration?*, 15 Erasmus L. Rev. 82, 92–95 (2021); Oliver Dörr, *Article 31*, *in* Vienna Convention on the Law of Treaties: A Commentary 559, paras. 44 & 49 (Oliver Dörr & Kirsten Schmalenbach eds., 2d ed. 2018).

[27]*See, e.g.*, Dzehtsiarou, *supra* note 15, at 120–22; Luzius Wildhaber, Arnaldur Hjartarson & Stephen Donnelly, *No Consensus on Consensus? The Practice of the European Court of Human Rights*, 33 Hum. Rts. L.J. 248, 252 (2013); Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System 66–69, 111–43, 241–44 (2011).

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and practices may signal how an issue is perceived and dealt with by the Member States.[28] Is this completely irrelevant on principle when the Court is faced with the very same issue? Is it out of the question for the Court to consider a consensus between the Member States in such a context—a consensus which *may* then influence the interpretation of the scope of the right in question? The Court's well-established case law provides a negative answer to these two questions, as can be seen, for instance, from the judgments listed in the Appendix. Furthermore, this inter-level dynamic can relate to countless issues, as many rights are vaguely formulated and, therefore, uncertain, but potentially broad in scope.

Anyway, shaping rights, as understood here, is a broad notion that can relate to the scope of rights, the balancing of rights and interests or a blend of both.[29] It has already been used, for example, in a book that covered many aspects of the case law of the Court, in particular the determination of the scope of human rights.[30] As we shall see, the judgments rendered by the Grand Chamber during the last twenty-five years show when and how a consensus or trend analysis helped defined the contours of a right. In some cases, the Court uses such an analysis to determine the scope of the right it must interpret, while in other cases to balance the rights and interests at stake. This observation[31] is clearly supported, for instance, by the judgments listed in the Appendix.

C. Rights Shaped by European Consensus or Trend in the Last Twenty-Five Years

The Court quite often performs an analysis of the Member States' laws and practices or of relevant international material.[32] However, the cases where rights have actually been shaped by European consensus or trend are quite rare. In our count, in the last twenty-five years, 27 out of 424 judgments on the merits[33] by the Grand Chamber established a consensus or trend having a "shaping impact" on the protections conferred by rights guaranteed by the Convention or its Protocols, and only one advisory opinion based on Protocol No. 16 contained a section on comparative law material having such an impact.[34] No decision of the Grand Chamber on admissibility during this period offered significant developments from this perspective. In at least

[28]*See, e.g.*, Bosko Tripkovic, *A New Philosophy for the Margin of Appreciation and European Consensus*, 42 OXFORD J. LEGAL STUD. 207, 227–34 (2022). *See also* Heri, *supra* note 13, at 11 (considering that rights "are based on contingent moral values and principles, but also safeguarded by institutions and shaped by and directed against political processes and powers").

[29]*See* Bilyana Petkova, *The Notion of Consensus as a Route to Democratic Adjudication?*, 14 CAMBRIDGE Y.B. EUROPEAN LEGAL STUD. 663, 683 (table 25.1) (2012); Wildhaber, Hjartarson & Donnelly, *supra* note 27, at 256, 262.

[30]SHAPING RIGHTS IN THE ECHR, *supra* note 12.

[31]*See* Tripkovic, *supra* note 28, at 227 (noting that the European consensus doctrine "is used for interpretation of all the rights from the Convention (including absolute rights), and in relation to both the scope of the right and its potential balancing with other rights and societal interests" [footnotes omitted]).

[32]*See* David Peat, *The Tyranny of Choice and the Interpretation of Standards: Why the European Court of Human Rights Uses Consensus*, 53 N.Y.U.J. INT'L L. & POL. 381, 422 (2021) (showing that between 1994 and 2019, David Peat mentions 105 judgments in which the Court carried out a consensus analysis and used in its reasoning). In Part C of this Article, only forty-five judgments are highlighted (27 in Part C, Section I, 6 in Part C, Section II, and 12 in Part C, Section III). However, David Peat did not provide a list of the 105 judgments he had selected. *Id.* That being said, the difference for the relevant period from November 1, 1998 can likely be explained by the cases in which the Court does not really need the consensus or trend analysis to reach its conclusion (*see infra* the examples mentioned in Part E, Section II, fifth paragraph) and by the many cases in which the Court conducts a consensus or trend analysis, notes the lack of it, and uses this finding in its reasoning to not further shape the right at stake (*see infra* the many examples mentioned in Part E, Section II, third paragraph, and Part E, Section III, third paragraph). *See also id.* at 472 (noting that "the consensus doctrine is used not as a tool of judicial activism but as a means of structuring broad discretion").

[33]HUDOC (European Court of Human Rights, https://hudoc.echr.coe.int/eng (last visited on Oct. 7, 2024) (stating that there have been 473 judgments of the Grand Chamber from November 1, 1998 until September 30, 2024. Judgments relating to Article 46 § 4 of the ECHR (1), to just satisfaction only (16), to the lack of jurisdiction of the Court (1), or to preliminary objections only (4), and cases struck out of the list (27), are not relevant for the study conducted in this Article).

[34]*See infra* Part C, Section I.

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six other cases during the last twenty-five years, a European consensus or trend confirmed existing case law.[35] Finally, a European consensus or trend was established in a few other cases, and the Court refrained from evolving the protection conferred by the right at hand.[36]

I. Consensus or Trend Having a "Shaping Impact"

Measuring the full impact of a consensus or a trend analysis on a judgment's or an opinion's outcome is a very difficult task, as many factors come into play—some hardly measurable. The written judgment is and should remain the main point of reference, as it reflects what the judges want to communicate to the outside as relevant. This Article is based on this source.

Methodologically, the study adopts a four-stage process. First, the selection retained the judgments using notions such as "consensus," "trend," "tendency," "majority of the Contracting Parties," "majority of the Member States," "number of Contracting Parties," "number of Member States," "common European standard," "commonly accepted standards," "common ground," "common approach," or "uniform approach."[37] The words used by the Court in the twenty-seven selected judgments is indicated in the fifth column of the chart in the Appendix. Second, the selection has been narrowed down to only those cases in which the consensus or trend analysis also appears in the reasoning of the judgment. Third, the final selection consists of keeping the judgments in which this analysis is used in the judgements' *ratio decidendi* to shape the right at stake—in other words, to define the right's scope or to indicate which points must be examined to apply the right or determine whether it has been violated. Fourth, the strength of this impact is evaluated in the last step of the process. All these steps have been double-checked. Moreover, a final cross-check has been made with all the legal literature cited in this Article to see whether their authors have selected other judgments of the Grand Chamber.

The impact can qualify as strong when the consensus or trend explicitly and prominently appears in the *ratio decidendi* of the judgment and contributes in a significant way in determining the outcome of the decision.[38] The impact is of medium intensity when the consensus or trend appears in the *ratio decidendi* of the judgment but the Court also mentions other important elements that affect the outcome.[39] The impact is weak when the Court conducts some comparative analyses or mentions some international treaties or documents but barely refers to them in the actual rationale of its decision. Similarly, the consensus or trend analysis sometimes only fulfils a supporting function, such as when it is mentioned but the rationale of the decision is already in place and the conclusion made. When international or comparative material are mentioned by the Court in the section on the relevant legal framework and practice but not at all referred to in its assessments,[40] an impact cannot be established in the *ratio decidendi* and those judgments will not be considered here. Of course, one may wonder why the Court would go through the trouble of including international or comparative material in the judgment if it intended this material to play no role whatsoever in the interpretation of the Convention. However, this material is logically collected before the Court carries out its assessment. Once this

[35] *See infra* Part C, Section II.

[36] *See infra* Part C, Section III.

[37] *See* Peat, *supra* note 32, at 417–18 (giving a similar perspective).

[38] *See* Dzehtsiarou, *supra* note 15, at 119, 211 (explaining more on this issue). *See also* Jens T. Theilen, European Consensus Between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication 431 (2021).

[39] *See* Alastair Mowbray, Between the Will of the Contracting Parties and the Needs of Today, in Shaping Rights in the ECHR, *supra* note 12, at 17, 36 (explaining the distinction between "the dominant" and "one of a multitude [. . .] of mechanisms for establishing the contemporary context in which the wording of the Convention should be interpreted").

[40] *See, e.g.*, *Sanoma Uitgevers B.V. v. The Netherlands* [GC], App. No. 38224/03, paras. 43–45 & 81–100 (Sept. 14, 2010), https://hudoc.echr.coe.int/fre?i=001-100448.

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has been done, the Court may feel it is appropriate to leave a trace of this collection in the judgment. This is, however, only conjecture outside the scope of the present Article.

The chart in the Appendix provides an analytical overview of the twenty-seven judgments and the one advisory opinion of the Grand Chamber in which some European or international consensus or trend helped shape rights guaranteed by the Convention or its Protocols. It should be emphasized that the analysis in this chart provides an order of magnitude, as some judgments may well fall into a grey zone. In other words, choices have been made that can be debated. In particular, the difference between strong and medium impacts is not clear-cut, but rather gradual. For the sake of transparency, the points on which a classification is based are indicated in the penultimate column of the chart in the Appendix. The total number of relevant judgments or their classifications may also be discussed, but different assessments in one case or the other will not change the overall picture.

The relevant column in the chart in the Appendix evaluates the impact of the consensus or trend on the *ratio decidendi* of the selected judgments and shows that this impact was strong[41] or rather strong[42] in fifteen of them.[43] The consensus or trend is established based on an analysis of both international, European or other regional texts on the one hand and the Member States' laws or practices on the other. The number of Member States considered varies widely, from around twenty up to all of them. The three judgments on Article 6 of the ECHR reflect rather incremental evolutions in the case law.[44] Furthermore, four judgments relating to Article 8 of the ECHR,[45] Article 14 in conjunction with Article 8 of the ECHR[46] or Article 3 of Protocol No. 1[47] are focused on balancing interests in rather specific situations. This means that very significant rights' shaping prominently and, to a certain extent, predominately occurred through consensus or trend only seven times—six judgments[48] and two twin judgments.[49] These eight judgments relating in

[41]*Yumak and Sadak v. Turkey* [GC], App. No. 10226/03, paras. 128–32 & 147 (July 8, 2008), https://hudoc.echr.coe.int/fre?i=001-87363; *Demir and Baykara v. Turkey* [GC], App. No. 34503/97, paras. 60–86, 98–106, 122–25, 147–54 & 165–66 (Nov. 12, 2008), https://hudoc.echr.coe.int/fre?i=001-89555; *Scoppola v. Italy (No 2)* [GC], App. No. 10249/03, paras. 105–09 (Sept. 17, 2009), https://hudoc.echr.coe.int/fre?i=001-94135; *Micallef v. Malta* [GC], App. No. 17056/06, paras. 78–81 (Oct. 15, 2009), https://hudoc.echr.coe.int/fre?i=001-95031; *Bayatyan v. Armenia*, App. No. 23459/03 at paras. 101–08 & 122–24; *Vinter and Others v. United Kingdom* [GC], App. Nos. 66069/09, 130/10 & 3896/10, paras. 113–21 (July 9, 2013), https://hudoc.echr.coe.int/fre?i=001-122664; *Biao v. Denmark* [GC], App. No. 38590/10, paras. 131–38 (May 24, 2016), https://hudoc.echr.coe.int/fre?i=001-163115; *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11 at paras. 138–53; *Guðmundur Andri Ástráðsson v. Iceland* [GC], App. No. 26374/18, para. 228 (Dec. 1, 2020), https://hudoc.echr.coe.int/fre?i=001-206582; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], App. No. 53600/20, paras. 456 & 543 (April 9, 2024), https://hudoc.echr.coe.int/fre?i=001-233206.

[42]*Christine Goodwin v. United Kingdom* [GC], App. No. 28957/95, paras. 84–85 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596; *I. v. United Kingdom* [GC], App. No. 25680/94, paras. 64–65 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60595; *S. and Marper v. United Kingdom* [GC], App. Nos. 30562/04 & 30566/04, paras. 107–12 (Dec. 4, 2008), https://hudoc.echr.coe.int/fre?i=001-90051; *Stanev v. Bulgaria* [GC], App. No. 36760/06, paras. 243–45 (Jan. 17, 2012), https://hudoc.echr.coe.int/fre?i=001-108690; *Khoroshenko v. Russia* [GC], App. No. 41418/04, paras. 133–36, 143 & 145 (June 30, 2015), https://hudoc.echr.coe.int/fre?i=001-156006.

[43]*See* Wildhaber, Hjartarson & Donnelly, *supra* note 27, at 256 (arguing that "in a sizable number of cases, the consensus factor has probably played a decisive role").

[44]*Micallef v. Malta*, App. No. 17056/06 at para. 85; *Stanev v. Bulgaria*, App. No. 36760/06 at para. 245; *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18 at paras. 228 & 235–52.

[45]*S. and Marper v. United Kingdom*, App. Nos. 30562/04 & 30566/04 at para. 125; *Khoroshenko v. Russia*, App. No. 41418/04 at paras. 146 & 148.

[46]*Biao v. Denmark*, App. No. 38590/10 at para. 138.

[47]*Yumak and Sadak v. Turkey*, App. No. 10226/03 at para. 147.

[48]*Demir and Baykara v. Turkey*, App. No. 34503/97, at paras. 107 & 154; *Scoppola v. Italy (No 2)*, App. No. 10249/03 at para. 109; *Bayatyan v. Armenia*, App. No. 23459/03 at para. 110; *Vinter and Others v. United Kingdom*, App. Nos. 66069/09, 130/10 & 3896/10 at paras. 110, 119 & 121; *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11 at para. 156; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 456 & 543.

[49]*Goodwin v. United Kingdom*, App. No. 28957/95 at para. 93 (showing that paras. 101 & 103 relate to Article 12 of the ECHR where the impact of the analysis was weak); *I. v. United Kingdom*, App. No. 25680/94 at para. 73 (demonstrating paras. 81 & 83 relate to Article 12 of the ECHR where the impact of the analysis was weak).

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particular to Articles 3, 7, 8, 9, 10, and 11 of the ECHR are based on an analysis of the vast majority of the Member States' laws and practices, as shown in the fourth column of the chart in the Appendix. The comparative analysis is, however, very succinct and indirect in at least one case[50] and the case law on climate change of only eight Member States is mentioned in another one.[51] This small number of judgements immediately puts into perspective, and even somewhat demystifies, the real scope of the consensus or trend analysis on the evolution of the Court's jurisprudence from the perspective of actual rights shaping.

These judgments show that the use of the consensus or trend analysis to shape a right can occur when the Court delimitates the right's scope[52] or when it assesses the proportionality of the challenged interference,[53] as shown in the sixth and seventh columns of the chart in the Appendix. The shaping of rights may relate to procedural or substantial aspects, as shown in the last column of the chart in the Appendix. For instance, the Court considers that a life sentence remains compatible with Article 3 of the ECHR only when there are "both a prospect of release and a possibility of review,"[54] or that "the principle of retrospectiveness of the more lenient criminal law" is implicitly guaranteed by Article 7 of the ECHR.[55] From a more substantial perspective, the Court, for example, deduced a right to obtain legal recognition of "gender re-assignment" from Article 8 of the ECHR,[56] a right for individuals to effective protection by state authorities from serious adverse effects of climate change on their life, health, well-being and quality of life from the same provision of the Convention[57] and a right to conscientious objection from Article 9 of the ECHR.[58]

According to our reading, in the twelve other judgments and in the advisory opinion listed in the chart in the Appendix, the consensus or trend established by the Grand Chamber had a medium[59] or weak[60] impact on the shaping of the rights at stake or fulfilled a rather supportive function in this regard.[61] The consensus or trend may have contributed to the outcome of these cases, but to a lesser extent than in the other fifteen judgments. In any event, it does not form the

[50] *Scoppola v. Italy (No 2)*, App. No. 10249/03 at paras. 35–41.

[51] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 235–72.

[52] *See, e.g.*, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 519 & 543–53; *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11 at paras. 151–56.

[53] *See, e.g.*, *Bayatyan v. Armenia*, App. No. 23459/03 at paras. 122–24 & 128.

[54] *Vinter and Others v. United Kingdom*, App. Nos. 66069/09, 130/10 & 3896/10 at para. 110.

[55] *Scoppola v. Italy (No 2)*, App. No. 10249/03 at para. 109.

[56] *Goodwin v. United Kingdom*, App. No. 28957/95 at para. 93; *I. v. United Kingdom*, App. No. 25680/94 at para. 73.

[57] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 519 & 544.

[58] *Bayatyan v. Armenia*, App. No. 23459/03 at para. 110.

[59] *T. v. United Kingdom* [GC], App. No. 24724/94, para. 85 (Dec. 16, 1999), https://hudoc.echr.coe.int/fre?i=001-58593; *V. v. United Kingdom* [GC], App. No. 24888/94, para. 87 (Dec. 16, 1999), https://hudoc.echr.coe.int/fre?i=001-58594; *Kozacıoğlu v. Turkey* [GC], App. No. 2334/03, paras. 70–71 (Feb. 19, 2009), https://hudoc.echr.coe.int/fre?i=001-91413; *Tănase v. Moldova* [GC], App. No. 7/08, paras. 171–78 (Apr. 27, 2010), https://hudoc.echr.coe.int/fre?i=001-98428; *Paksas v. Lithuania* [GC], App. No. 34932/04, paras. 106–11 (Jan. 6, 2011), https://hudoc.echr.coe.int/fre?i=001-102617; *Konstantin Markin v. Russia* [GC], App. No. 30078/06, paras. 140–43 & 147–48 (March 22, 2012), https://hudoc.echr.coe.int/fre?i=001-109868; *Vallianatos and Others v. Greece* [GC], App. Nos. 29381/09 & 32684/09, paras. 86–92 (Nov. 7, 2013), https://hudoc.echr.coe.int/fre?i=001-128294; *Buzadji v. The Republic of Moldova* [GC], App. No. 23755/07, para. 101 (July 5, 2016), https://hudoc.echr.coe.int/fre?i=001-164928; *Macatė v. Lithuania* [GC], App. No. 61435/19, paras. 210–16 (Jan. 23, 2023), https://hudoc.echr.coe.int/fre?i=001-222072; *Hurbain v. Belgium* [GC], App. No. 57292/16, paras. 183, 202–05 & 210 (July 4, 2023), https://hudoc.echr.coe.int/fre?i=001-225814.

[60] *Dickson v. United Kingdom* [GC], App. No. 44362/04, paras. 81–84 (Dec. 4, 2007), https://hudoc.echr.coe.int/fre?i=001-83788.

[61] *S.M. v. Croatia*, App. No. 60561/14 [GC], para. 293 (June 25, 2020), https://hudoc.echr.coe.int/fre?i=001-203503; Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law [GC], requested by the Armenian Constitutional Court, Request P16-2019-001, paras. 70–71 (May 29, 2020), https://hudoc.echr.coe.int/fre?i=003-6708535-9909864 (discussing the eventual medium impact with respect to the principle of concretization [*see* para. 79]).

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backbone of the decision. The key findings drawn from the first fifteen judgments also apply, *mutatis mutandis*, to the other twelve. Some judgements relate to the scope of the right, others to the proportionality of the interference with the right at stake, some to rather procedural aspects and others to more substantial issues, as shown in the chart in the Appendix.

Under these circumstances, the consensus or trend analysis may simply show that a given solution is not unknown or is widespread among the Member States or in international material. It is not referred to in a significant way in order to shape the rights guaranteed by the Convention or its Protocols. Accordingly, the scope of the analysis—especially in terms of the Member States considered when the impact is weak—can be reduced in a more admissible way. Finally, the impact can be strong or rather strong for one aspect of a case, but medium or weak for another aspect.[62]

II. Consensus or Trend Having a "Confirming Impact"

In at least six other cases during the last twenty-five years, a European consensus or trend was used by the Grand Chamber to confirm existing case law. Quite recently, it again noted the ongoing European trend—now deemed as clear—towards legal recognition and protection of same-sex couples.[63] In another case, the Court confirmed and consolidated the principles established in its case law with regard to the protection of whistleblowers, "by refining the criteria for their implementation in the light of the current European and international context."[64]

More than ten years ago, the Grand Chamber emphasized the "common ground between the Member States of the Council of Europe regarding the importance of equal treatment of children born within and children born outside marriage" and mentioned the "uniform approach today by the national legislatures on the subject" as well as the "social and legal developments definitively endorsing the objective of achieving equality between children."[65] Referring to a previous judgment,[66] it again mentioned, more than fifteen years ago, "an emerging international consensus among the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle."[67] However, the translation of this general recognition into more precise rules regarding the schooling arrangements for Roma Children was not based on a consensus or trend analysis.[68]

In 2012, the Grand Chamber confirmed previous judgments[69] in which landowners' obligations to tolerate hunting on their property was considered to impose a disproportionate burden on landowners who were opposed to hunting for ethical reasons, observing that various Member States had "amended their respective legislation or modified their case-law in order to

[62]*See Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 436, 451, 456, 542–43 & 633–37; *Goodwin v. United Kingdom*, App. No. 28957/95 at para. 103; *I. v. United Kingdom*, App. No. 25680/94 at para. 83; *Guðmundur Andri Ástráðsson v. Iceland*, App. No. 26374/18 at para. 243.

[63]*Fedotova and Others v. Russia* [GC], App. Nos. 40792/10, 30538/14 & 43439/14, paras. 172–78, 186–87 & 190 (Jan. 17, 2023), https://hudoc.echr.coe.int/fre?i=001-222750 (Article 8 of the ECHR).

[64]*Halet v. Luxembourg* [GC], App. No. 21884/18, paras. 120–207 (quotation from para. 120) (Feb. 14, 2023), https://hudoc.echr.coe.int/fre?i=001-223259 (Article 10 of the ECHR).

[65]*Fabris v. France* [GC], App. No. 16574/08, para. 58 (Feb. 7, 2013), https://hudoc.echr.coe.int/fre?i=001-116716 (Article 14 of the ECHR in conjunction with Article 1 of Prot. No. 1).

[66]*Chapman v. United Kingdom* [GC], App. No. 27238/95, paras. 93–94 (Jan. 18, 2001), https://hudoc.echr.coe.int/fre?i=001-59154.

[67]*D.H. and Others v. Czech Republic* [GC], App. No. 57325/00, para. 181 (Nov. 13, 2007), https://hudoc.echr.coe.int/fre?i=001-83256 (Article 14 of the ECHR in conjunction with Article 2 of Prot. No. 1). In this judgment, the Court also referred to EU case law and information furnished by third-party interveners with respect to reliable and significant statistics as *prima facie* evidence of an indirect discrimination (para. 187) but, here again, this rather confirms previous judgments (*see* paras. 179–80 & 187, quoting three previous judgments).

[68]*D.H. and Others v. Czech Republic*, App. No. 57325/00 at paras. 196–210; *see* DZEHTSIAROU, *supra* note 15, at 163.

[69]*Chassagnou v. France* [GC], App. Nos. 25088/94, 28331/95 & 28443/95 (Apr. 29, 1999), https://hudoc.echr.coe.int/fre?i=001-58288; *Schneider v. Luxemburg*, App. No. 2113/04 (July 10, 2007), https://hudoc.echr.coe.int/fre?i=001-81437.

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comply with the principles set out in these judgments."[70] Based on an analysis of international and European material, as well as comparative-law information, it also discerned that year some "trend, if anything—towards fewer restrictions on convicted prisoners' voting rights."[71]

III. Consensus or Trend without Evolving Protection

In a few other cases, the Grand Chamber admitted the existence of a European consensus or trend but refrained from evolving the protection conferred by a right guaranteed by the Convention and thus from shaping it. These judgments related to the death penalty,[72] the interdiction for a lawyer to conduct her or his own defense in criminal proceedings,[73] restrictions on obtaining an abortion,[74] and the prohibition on the use of ova and sperm from donors for *in vitro* fertilization.[75]

Finally, in about eight cases during the last twenty-five years, the Grand Chamber referred to a European consensus or a trend when the vast majority, or a large number of, Member States supported the position of a respondent state, at least in some respects, and the Court thus refrained from evolving the protection conferred by a right guaranteed by the Convention or its Protocols. The judgments concerned Swiss courts' refusal to examine a compensation claim relating to alleged acts of torture in Tunisia,[76] the notion of "continuous criminal offence,"[77] criminal sanctions to prevent the disclosures of certain confidential items of information,[78] the absence of a special status for journalists when they fail to comply with police orders to leave the scene of a demonstration,[79] disciplinary measures applicable to members of parliament for disorderly conduct in Parliament,[80] a national legal and administrative framework aimed at achieving pluralism in audio-visual media,[81] employers' discretion in determining sanctions that are best adapted to accusations against employees,[82] and mechanisms for transferring title in accordance with principles similar to adverse possession in common law systems.[83]

[70]*Herrmann v. Germany* [GC], App. No. 9300/07, para. 79 (June 26, 2012), https://hudoc.echr.coe.int/fre?i=001-111690 (Article 1 of Prot. No. 1).

[71]*Scoppola v. Italy (No 3)* [GC], App. No. 126/05, para. 95 (May 22, 2012), https://hudoc.echr.coe.int/fre?i=001-111044 (Article 3 of Prot. No. 1).

[72]*Öcalan v. Turkey* [GC], App. No. 46221/99, para. 164 (May 12, 2005), https://hudoc.echr.coe.int/fre?i=001-69022 (Articles 2, 3 and 14 of the ECHR). In this judgment, the Court noted an "abolitionist trend in the practice of the Contracting States."

[73]*Correia de Matos v. Portugal* [GC], App. No. 56402/12, paras. 131 & 137 (Apr. 4, 2018), https://hudoc.echr.coe.int/fre?i=001-182243; (Article 6 of the ECHR).

[74]*A, B and C v. Ireland* [GC], App. No. 25579/05, para. 235 (Dec. 16, 2010), https://hudoc.echr.coe.int/fre?i=001-102332 (Article 8 of the ECHR).

[75]*S.H. v. Austria* [GC], App. No. 57813/00, paras. 96 & 106 (Nov. 3, 2011), https://hudoc.echr.coe.int/fre?i=001-107325 (Article 8 of the ECHR).

[76]*Naït-Liman v. Switzerland* [GC], App. No. 51357/07, paras. 182–87 & 200–02 (March 15, 2018), https://hudoc.echr.coe.int/fre?i=001-181789; (Article 6 § 1 of the ECHR).

[77]*Rohlena v. Czech Republic* [GC], App. No. 59552/08, para. 72 (Jan. 27, 2015), https://hudoc.echr.coe.int/fre?i=001-151051 (Article 7 of the ECHR).

[78]*Stoll v. Switzerland* [GC], App. No. 69698/01, para. 155 (Dec. 10, 2007), https://hudoc.echr.coe.int/fre?i=001-83870 (Article 10 of the ECHR).

[79]*Pentikäinen v. Finland* [GC], App. No. 11882/10, para. 109 (Oct. 20, 2015), https://hudoc.echr.coe.int/fre?i=001-158279 (Article 10 of the ECHR).

[80]*Karácsony and Others v. Hungary* [GC], App. Nos. 42461/13 & 44357/13, para. 145 (May 17, 2016), https://hudoc.echr.coe.int/fre?i=001-162831 (Article 10 of the ECHR). In this case, the interference with the applicants' right to freedom of expression was finally not proportionate to the legitimate aims pursued, but no consensus or trend analysis was used in this part of the judgment as can be seen in paras. 161–62.

[81]*Noile Idei Televizate v. Republic of Moldova* [GC], App. No. 28470/12, paras. 110–112 & 208 (Apr. 5, 2022), https://hudoc.echr.coe.int/?i=001-216872 (Article 10 of the ECHR).

[82]*Sánchez and Others v. Spain* [GC], App. Nos. 28955/06, 28957/06, 28959/06 & 28964/06, para. 75 (Sept. 12, 2011), https://hudoc.echr.coe.int/?i=001-106178 (Article 10 read in light of Article 11 of the ECHR).

[83]*Pye Ltd. v. United Kingdom* [GC], App. No. 44302/02, para. 72 (Aug. 30, 2007), https://hudoc.echr.coe.int/?i=001-82172 (Article 1 of Prot. No. 1).

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While eight judgments may provide an order of magnitude, other judgments may be relevant because the Court uses very fluctuating terminology[84] and sometimes conducts very cursory comparative analyses. Furthermore, a consensus may exist on some general principles followed by the defendant state, but not on the specific policy it has chosen.[85] All in all, it seems difficult to contend that rights guaranteed by the Convention or its Protocols have actually been shaped in these cases. Rather, a European consensus or trend shaped the area outside the rights' scope or the area within the right's reach but where the latter can be limited.

D. Some Conceptual and Methodological Challenges

Shaping rights through a European consensus or trend, as in the cases listed in the Appendix, raises several fundamental issues, among which some of them shall be addressed here, especially in light of the findings that can be drawn from the most significant judgments of the Grand Chamber in this field. Quite naturally, the first one which comes to mind relates to the duty or, on the contrary, the freedom to conduct a consensus or trend analysis.[86] When such an analysis is performed, the material at which the Court looks is of special interest.[87] Finally, the weight of a European consensus or trend may vary considerably depending on several factors.[88]

I. Duty or Freedom to Conduct a Consensus or Trend Analysis

On the one hand, the Convention does not expressly impose any obligation on the Court to conduct a consensus or trend analysis. Moreover, there is no general principle of international law that would entail this duty. Nor does the Court's well established and unambiguous jurisprudence suggest a systematic obligation. Indeed, in none of the judgments listed in the Appendix, nor, more broadly, in those mentioned in Parts C and E of this Article, did the Court mention any duty to conduct such an analysis, even if some of these cases are particularly sensitive because the Court shapes rights.

On the other hand, a purely discretionary power left to the Court, without criteria of exercise, may lead to arbitrariness.[89] Can the Court simply cherry pick when to conduct a consensus or trend analysis? A positive answer to this question would make the case law extremely unpredictable, including from a methodological standpoint. Moreover, this can create inequalities, not to mention discriminations, in the sense that whether or not a consensus or trend analysis is carried out possibly affects the outcome of the judgment. On the one hand, the parties in a case before the Court do not have the same resources to conduct such an analysis themselves, which could then convince the Court of the value of such an approach *in casu*. On the other hand, two cases raising questions of interpretation of a right or balancing of rights or interests of comparable difficulty could be treated differently by the Court without stated reasons. Any analytical inconsistency can weaken the case law and, consequently, the legitimacy of the Court itself.[90]

The lack of express obligation to conduct a consensus or trend analysis and the risk of cherry–picking naturally leads to the question of a middle ground. A quasi-duty to conduct such an

[84]*See, e.g.*, Carl Emilio Lewis, *The European Court of Human Rights and Its Search for Common Values*, 15 EUROPEAN CONVENTION ON HUM. RTS. L. REV. 179, 192–93 (2023).

[85]*See, e.g.*, *Vavřička and Others v. Czech Republic*, App. Nos. 47621/13 & 5 others at paras. 277–80, 285, 287 & 300 (holding a consensus exists on the principles of compulsory child vaccination but not on related policy).

[86]*See* discussion *infra* Part D, Section I.

[87]*See* discussion *infra* Part D, Section II.

[88]*See* discussion *infra* Part D, Section III.

[89]*See, e.g.*, Paweł Łącki, *Consensus as a Basis for Dynamic Interpretation of the ECHR*, 21 HUM. RTS. L. REV. 186, 195–96 (2021). *See also* Andreas Follesdal, *A Better Signpost, Not a Better Walking Stick, in* BUILDING CONSENSUS ON EUROPEAN CONSENSUS, *supra* note 19, 189, 202, 208–09.

[90]*See, e.g.*, DZEHTSIAROU, *supra* note 15, at 207–08.

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analysis may exist when certain criteria are met. The difficulty lies in defining these criteria, which may be apparent from judgments in which the Court feels the need to conduct a comparative study. Cases with which Part E below deals are particularly prone to a potentially persuasive consensus or trend analysis, at least when judgments are rendered by the Grand Chamber. Should the latter consider significantly evolving its case law but not conduct such an analysis in those cases, then it would show some inconsistency. Considering its own legitimacy, the Court will thus likely tend to conduct such an analysis.

II. Relevant Material

In order to establish either a consensus or a trend, the Court especially looks at the Member States' laws and practices[91] and at international material,[92] as shown in the third and fourth columns of the chart in the Appendix.

1. Laws and Practices of the Council of Europe's Member States

The Member States' laws and practices, examined in their relevant national or local context,[93] constitute material that the Court is interested in when it conducts a consensus or trend analysis, as shown in the fourth column of the chart in the Appendix. This approach raises many questions. Three fundamental ones will be addressed here.

First, consensus is not just about the vast majority of the Member States. The Court is also willing to consider trends that point in a certain direction, as seen in the fifth column of the chart in the Appendix. This seems admissible provided that the trend is robust and established in a transparent way. Generally speaking, the Court should also state why it does not take into account some Member States or why it has not been able to assess the content of other Member States' laws and practices.[94] Full transparency in this regard is especially needed when the impact of the consensus or trend on the shaping of the right at stake is strong or rather strong. More flexibility can probably be acceptable when the impact is less important like in the cases where the impact of the consensus or trend analysis has been qualified as weak at the end of Section I of Part C. In light of the above, the idea that "in order for comparative legal research to achieve its persuasive purpose, it should take into account the law and practice of all or nearly all Contracting Parties"[95] is relevant but may have to be nuanced.

Second, a certain stability in each Member State considered is required to define its position on a given issue. Ever-changing laws and practices usually neither indicate a trend nor allow classifying the state in one category or another. The Court should also include this aspect in its analysis.[96] In the same vein, the Court may expect some settled and quite long-standing principles, rules, or practices in a very dynamic field before significantly developing its case law further.[97] Some caution may also be justified when a matter is or has been a subject of debate in a number of European states[98] or when "fluctuating developments" in a very sensitive matter have recently

[91] *See infra* Part D, Section II, Subsection 1.

[92] *See infra* Part D, Section II, Subsection 2.

[93] DZEHTSIAROU, *supra* note 15, at 105–09.

[94] *Id.* at 103.

[95] *Id.* at 101.

[96] *See* Łącki, *supra* note 89, at 202 (showing a very strict and, probably, too restrictive view on this issue).

[97] *See S.H. and Others v. Austria*, App. No. 57813/00 at paras. 96 & 106 (talking about gamete donation for *in vitro* fertilization).

[98] *S.A.S. v. France* [GC], App. No. 43835/11, para. 156 (July 1, 2014), https://hudoc.echr.coe.int/?i=001-145466 (talking about the ban of a full-face veil).

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occurred in the Member States' legal systems.[99] A similar approach can make sense in a dynamic area where new developments are possible in the future.[100]

Third, are any laws and practices relevant or should they rank quite high in the legal order of the Member States? In other words, does the consensus or trend also have to be about the fundamental nature of the aspect of the right in question?[101] The Grand Chamber does not appear to make such a requirement, as the comparative analysis conducted in the cases listed in Sections I and II of Part C covers various material such as constitutional and statutory provisions and case law, to name a few. Nevertheless, the eventual constitutional foundation of an issue in a state also constitutes a factor to be considered by the Court when it examines a possible European consensus or trend, especially regarding the stability and strength[102] of one or the other.

2. International Material

The Court also refers to international treaties, customary law, case law, or published practices when it examines the existence or the lack of a consensus or trend on a given matter, as shown in the third column of the chart in the Appendix. It sometimes mentions an *international* consensus or trend on a given issue.[103] When an international treaty has been or is being ratified by many Member States, it may reflect some European consensus or a trend in this direction. Here also, any trend should be clearly and transparently established by the Court. In the twenty-seven judgments and the one advisory opinion where some consensus or trend contributed to shaping a right guaranteed by the Convention or its Protocol No. 1, *international* also meant *European*, as the international treaty or treaties relied upon by the Court had actually been ratified by the vast majority—if not all—of the Member States. Note that European consensus has been conceptualized as "an implicit consent which can act as a substitute to formal consent within the Strasbourg system."[104] Caution is required here, since this consensus does not fulfil this function.[105]

Documents emanating from the Council of Europe may also indicate the existence of a European consensus or trend. The same applies to EU law, practices or case law, as all EU members are Council of Europe's Member States, but non-EU members should not be left out of the picture. As shown in the third column of the chart in the Appendix, the Court extensively refers to Council of Europe and European Union materials.

For their part, international treaties ratified by a few Member States should not suffice to build a European consensus. However, they may point towards a trend. Furthermore, the practices of international committees, such as the Human Rights Committee of the United Nations, may influence the Court, but should not in principle be considered as part of some European consensus. Yet, none of the judgments and opinion listed in the Appendix were based on international treaties, practices or case law that are not relevant for most—if not all—of the Council of Europe's Member States.

[99] *But see Perinçek v. Switzerland* [GC], App. No. 27510/08, paras. 255–56 & 280–81 (Oct. 15, 2015), https://hudoc.echr.coe.int/?i=001-158235 (talking about the criminal penalty imposed on a person for publicly denying the Armenian genocide).

[100] *See Naït-Liman v. Switzerland*, App. No. 51357/07 at para. 220.

[101] *See* Janneke Gerards, *The Scope of ECHR Rights and Institutional Concerns*, *in* SHAPING RIGHTS IN THE ECHR, *supra* note 12, 84, 88–89, 98.

[102] Gerards, *supra* note 101, at 98.

[103] *See, e.g.*, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at para. 456; *M.S.S. v. Belgium and Greece*, App. No. 30696/09 at para. 251 ("broad consensus at the international and European level"); *Goodwin v. United Kingdom*, App. No. 28957/95 at paras. 84–85; *I. v. United Kingdom*, App. No. 25680/94 at paras. 64–65.

[104] DZEHTSIAROU, *supra* note 15, at 152–55 (quotation from p. 155).

[105] *See, e.g.*, Follesdal, *supra* note 89, at 203–05.

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In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the Court based its judgment both on scientific consensus and a consensus resulting from international material.[106] The two are in fact interrelated with respect to climate change. As far as the second is concerned, the Court explicitly referred to "the international-law mechanisms to which the member States voluntarily acceded and the related requirements and commitments which they undertook to respect"[107] and to "the Contracting Parties' accepted commitments to achieve carbon neutrality."[108] In this context, it specifically mentioned the Paris Agreement[109] and the United Nations Framework Convention on Climate Change ("UNFCCC").[110] It noted that all Council of Europe Member States are members of the UNFCCC system[111] and—one may add—parties to the Paris Agreement.

Any diverging or, *a fortiori*, opposite consensus or trend between, on the one hand, Member States' laws and practices and, on the other hand, international material must probably be assessed on a case-by-case basis. Depending on their respective strengths and magnitudes, one may prove preponderant or even overriding compared to the other. However, it should be observed that a conflict between the various sources of a consensus or trend analysis did not occur in any of the judgments and opinion listed in the Appendix or, more broadly, mentioned in Part C, except, to some extent, in the now-dated twin judgments *Christine Goodwin v. United Kingdom* and *I. v. United Kingdom*.[112]

Finally, the reference to international material by the Court can also reflect the search for harmony between various sources of international law, including the Convention.[113] *Harmonization*, rather than consensus or trend, is the key word from this perspective. Granted, the difference between these notions is not clear-cut, and the Court should clarify the approach it takes when relying, in a judgment, on international material. Is it seeking to harmonize the Convention with the latter or is it trying to establish a consensus or trend? The two terms of this alternative are not dogmatically equivalent, and this double question should not be left unanswered.

III. Weight of Consensus or Trend

The weight of a consensus or trend varies from case to case. The Court has not yet developed a convincing methodology in this regard, nor has it set weighing factors. One reason for the difficulty the Court faces in this regard can be explained by the fact that this issue also amounts to one of degree—degree of consensus intensity, strength of trend, and degree of clarity of comparative analysis, among other things. Some characteristics of the impact of a possible consensus or trend on the outcome of a case nevertheless derive from the Court's jurisprudence.

[106] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 436, 456 & 543.

[107] *Id.* at para. 456.

[108] *Id.* at para. 543.

[109] Paris Agreement, Dec. 12, 2015, United Nations, 3156 U.N.T.S. *See also Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 543, 546–547 & 571.

[110] United Nations Framework Convention on Climate Change, May 9, 1992, United Nations, 1771 U.N.T.S. 107. All Council of Europe Member States are members of the UNFCCC system. *See also Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 546, 558 & 571.

[111] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at para. 104 n.73.

[112] *See Goodwin v. United Kingdom*, App. No. 28957/95 at para. 85 ("The Court [. . .] attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."); *I. v. United Kingdom*, App. No. 25680/94 at para. 65. *See* DZEHTSIAROU, *supra* note 15, at 65–71 (talking more about this issue).

[113] *See, e.g.*, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], App. No. 5809/08, paras. 138 & 140 (June 21, 2016), https://hudoc.echr.coe.int/?i=001-164515.

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First, a European consensus or trend may influence the outcome of a case and support the conclusions reached by the Court, but it cannot be used as the sole basis for a decision.[114] None of the judgments listed in the Appendix or, more broadly, mentioned in Part C are solely based on a consensus or trend analysis. Thus, the structured step-by-step examination of the scope and restrictions of many rights guaranteed by the Convention and its Protocols is not supplanted by the consensus analysis alone. In sum, the latter fulfills at most a persuasive function to the Court's argumentation.

Second, a tricky question is whether the existence of a European consensus or trend creates a rebuttable presumption in favor of the solution to which the analysis points. Kanstantsin Dzehtsiarou argues in this direction.[115] However, one should observe that no provision of the Convention or its Protocols foresees such a presumption. Legally and technically, there is no room for the latter. The Court remains free to decide a case without following a European consensus or trend. That said, when the Court considered that a comparative analysis was justified in a given case, but then disregards the European consensus or a "strong trend" shown by this analysis, it should give reasons for the decision in a transparent manner.[116] At this point, I agree in substance with Kanstantsin Dzehtsiarou.

Third, should the weight of a European consensus or trend be determined on a case-by-case basis, or should it be framed by certain criteria? An affirmative answer to each part of this double question seems justified. On the one hand, the Court should always assess the merit of the case at stake. On the other hand, this process should not prove arbitrary. From this perspective, at least two main criteria make sense.

The first criterion relates to the strength of the consensus or trend when it is deemed by the Court as relevant. The greater the number of Member States that have chosen, or are directly or indirectly associated with, a solution—through their laws and practices, through the international treaties they have ratified or through texts discussed and enacted within the Council of Europe, etc.—and the clearer and more stable that solution is or, when the Court observes a trend, the clearer and firmer the trend is, then the more weight the analysis is, *ceteris paribus*, likely to carry in a given case.[117] The same holds true when a solution clearly results from multiple international sources relevant to the Member States and thus to the Court. However, the latter remains free to judge the case otherwise, which then implies providing reasons for its decision. The analysis is both quantitative *and* qualitative. From a quantitative perspective, the size or number of inhabitants of a country is not considered by the Court, which provides no details in this regard in a given judgment, as shown in the fourth column of the chart in the Appendix. To some extent, all the Member States are treated equally in this context, except for very specific situations. This is debatable, but no less problematic solution comes to mind. However, in some judgments listed in Sections I and I of Part C, the Grand Chamber put some emphasis on the case law of a few—large—countries.[118] Therefore, a kind of asymmetry—not to say inequality—can still be observed. From a qualitative perspective, the careful weighing of a solution by the Member States and the

[114]*See, e.g.,* Vogiatzis, *supra* note 12, at 464; Dzehtsiarou, *supra* note 15, at 119, 211.

[115]*See* Dzehtsiarou, *supra* note 15 at 2, 9, 29–37, 119, 204–06, 208.

[116]*See Humpert and Others v. Germany* [GC], App. Nos. 59433/18, 59477/18, 59481/18 & 59494/18, paras. 125–47 (Dec. 14, 2023), https://hudoc.echr.coe.int/fre?i=001-229726 (providing an illustration that in this case, the Court first noted "a strong trend towards considering that civil servants should not per se be prohibited from strike action" (para. 125), but then emphasized that, in Germany, "a variety of different institutional safeguards have been put in place to enable civil servants and their unions to defend occupational interests" (para. 144) and went on to conclude that there had been no violation of Art. 11 of the ECHR (para. 147)).

[117]*See* Wildhaber, Hjartarson & Donnelly, *supra* note 27, at 258 (offering a similar perspective on this issue).

[118]*See, e.g.*, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, App. No. 53600/20 at paras. 235–272 (giving an overview of domestic case law concerning climate change covering France, Germany, Ireland, The Netherlands, Norway, Spain, The United Kingdom and Belgium); *Hurbain v. Belgium*, App. No. 57292/16 at paras. 94–132 (using case law of France's highest courts, of the High Court of England and Wales, of the Spanish Constitutional Court, of the German Federal Constitutional Court and the Federal Court of Justice, and of the Italian Court of Cassation).

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thoroughness of the Court's comparative analysis, for instance, should play a role. Thus, a consensus or trend analysis cannot be diminished to merely counting states.[119]

The second criterion deals with the nature of the case and the issues it raises. Certain cases may be more prone than others to a potentially persuasive consensus or trend analysis. Still, this question remains unsolved, by the Court itself and also by legal scholars who have dealt with this type of analysis.[120] In the judgments listed in the Appendix or, more broadly, mentioned in Part C, the Grand Chamber did not develop criteria in this regard. Due to this issue's importance, it will be addressed separately from a doctrinal and empirical perspective.

E. Cases More Prone to a Potentially Persuasive Consensus or Trend Analysis

Most of the judgments of the Court that shape rights through a European and international consensus or trend involve indeterminate legal terms.[121] The ones more prone to a potentially persuasive consensus or trend analysis would typically deal with matters of political or general policy,[122] sensitive moral or ethical issues,[123] or changes in the case law,[124] as reflected in judgments rendered in Grand Chamber and Chamber formations. The emphasis is on the former, but some of the latter are also mentioned in Part E.

I. Interpretation of Indeterminate Legal Terms

Most judgments of the Court that shape rights through a European consensus or trend involve indeterminate legal terms such as necessity, fairness,[125] law, private and family life, property, or free elections, as evidenced by the cases listed in the chart in the Appendix. These terms and the balancing they may imply create an uncertain environment. The case law reduces this uncertainty, but the Court constantly faces new issues and, more seldomly, may wish to revisit its case law. In this context, the search for a European consensus or trend may help structure the analysis of the Court, make it more predictable or even transparent[126] and acceptable from a multi–level perspective.[127]

The existence of an indeterminate legal term to be interpreted and applied in a concrete situation does not suffice to justify a consensus or trend analysis. This is a first door that potentially leads to the latter. Before this, the next door usually relates to the states' margin of appreciation which is quite often—but by no means always—inversely correlated with a European consensus on the issue in question.[128] In other words, when the Court considers reducing a supposedly wide margin of appreciation, it may wish and, actually, feel the need to conduct a

[119]Petkova, *supra* note 29, at 692–93. *See also* THEILEN, *supra* note 38, at 207–08; 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*, 79 NORD. J. INT. LAW 245, 265 (2010).

[120]*See, e.g.,* PEAT, *supra* note 16, at 166; Vogiatzis, *supra* note 12, at 448.

[121]*See infra* Part E, Section I.

[122]*See infra* Part E, Section II.

[123]*See infra* Part E, Section III.

[124]*See infra* Part E, Section IV.

[125]*See* PEAT, *supra* note 16, at 146–54.

[126]*See* Vogiatzis, *supra* note 12, at 470–71; DZEHTSIAROU, *supra* note 15, at 132. *See also* Follesdal, *supra* note 89, at 209.

[127]*See* Vogiatzis, *supra* note 12, at 475–76.

[128]*See, e.g.*, *Dubská and Krejzová v. Czech Republic* [GC], App. Nos. 28859/11 & 28473/12, para. 178 (Nov. 15, 2016), https://hudoc.echr.coe.int/?i=001-168066 (considering that "[w]here 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."). *See* DZEHTSIAROU, *supra* note 15, at 132–42, 209 ("European consensus is the most objective determinant of the scope of the margin of appreciation and the moment when it is appropriate for the Court to deploy evolutive interpretation"). *See also* Heri, *supra* note 13, at 10; GERARDS, *supra* note 20, at 254, 258–60.

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consensus or trend analysis. However, some margin of appreciation may, for instance, depend on the specific local or national context[129] and, thus, makes a consensus or trend analysis, if not fully superfluous, at least inconclusive. Furthermore, the protection of minority rights may still lead to an intervention of the Court despite the existence of various approaches to the matter at issue among the Member States.[130] The case law in this respect lacks, regrettably, sufficient coherence, and a test should be developed to identify the appropriate relationship between a European consensus or trend and minority protection.[131]

Another favorable setting to a potentially persuasive consensus or trend analysis exists when the Court envisages changing its case law. True, overturning jurisprudence, especially when it is well established, is based on the merits of the case, but the Court may search for a European consensus or trend for such an important step that conflicts, to a certain extent, with the stability and predictability of the case law. From this perspective, overturning jurisprudence may be positively correlated with a European consensus or trend.

For all that, these two hypotheses—an important margin of appreciation that the Court intends to reduce or, *a fortiori*, suppress, on the one hand, and overturning well-established case law, on the other hand—do not exhaust the reflection. They may be the main doors to a potentially persuasive consensus or trend analysis, but they are not the only ones. Moreover, in certain situations, a relatively narrow, but possibly evolutive, concept needs to be interpreted in the absence of any governing case law. In such a situation, the Court may wish to conduct a comparative analysis as well.

II. Cases on Matters of Political or General Policy

Cases on matters of political or general policy imply balancing several interests and making institutional or policy choices. They are usually decided by recognizing a wide margin of appreciation left to the states, while, at the same time, they may raise issues whose examination can shape rights. Matters of political and general policy are indeed decided by the Member States. From this perspective, it makes sense for the Court to examine how the Member States address an issue. This comparative analysis which is focused on the laws and practices of the states—international treaties or documents possibly fulfilling a supporting function—can also help frame and structure the application of the subsidiarity principle.[132]

Based on a—brief—consensus analysis, the Court has, for instance, established a European consensus on the need for strict regulation of tobacco advertising.[133] In the judgments listed in the

[129]*See Humpert and Others v. Germany*, App. Nos. 59433/18, 59477/18, 59481/18 & 59494/18 at paras. 109–10, 120–22, 127 & 142 (finding that the prohibition of strikes by teachers with civil-servant status did not render their trade-union freedom devoid of substance, as the variety of different institutional safeguards which had been put in place enabled civil servants and their unions to effectively defend their professional interests); *see, e.g.,* DZEHTSIAROU, *supra* note 15, at 73 (explaining more on this issue).

[130]*See D.H. and Others v. Czech Republic*, App. No. 57325/00 at paras. 205–10 (addressing schooling arrangements for Roma children). *See also* Tripkovic, *supra* note 28, at 232–33; DZEHTSIAROU, *supra* note 15, at 123–24, 127, 163, 208.

[131]Dimitrios Kagiaros, *When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights, in* BUILDING CONSENSUS ON EUROPEAN CONSENSUS, *supra* note 19, 283, 292–310 (emphasizing the discrepancy regarding the weight the Court places on European consensus in Roma cases compared to same-sex marriage).

[132]*See* Vogiatzis, *supra* note 12, at 477 (showing a similar perspective). *See also* PEAT, *supra* note 16, at 167–70, 177 (regarding "structuring discretion"); Heri, *supra* note 13, at 11, 17; DZEHTSIAROU, *supra* note 15, at 166, 210. *See Fedotova and Others v. Russia*, App. Nos. 40792/10, 30538/14 & 43439/14 at para. 189 (providing an illustration).

[133]*Hachette Filipacchi Presse Automobile and Dupuy v. France*, App. No. 13353/05, paras. 47 & 52 (March 5, 2009), https://hudoc.echr.coe.int/?i=001-91612; *Société de Conception de Presse et d'Édition et Ponson v. France*, App. No. 26935/05, paras. 57 & 63 (Mar. 5, 2009), https://hudoc.echr.coe.int/?i=001-91609.

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Appendix, a consensus or trend analysis was particularly relevant and justified in cases such as *Bayatyan v. Armenia*[134] or *Yumak and Sadak v. Turkey*. The definition of the obligation to perform military service and the sanctions for refusal raise fundamental policy issues for a state. The same applies to electoral thresholds for an election. In these two judgments, the analysis conducted by the Court revealed a consensus or common practices whose impact on the evolution of the case law was strong. The Court obviously remains free to deviate from this or to consider the particular context prevailing in a state, as it did in the second judgment.

By contrast, public health and healthcare policy matters,[135] penal policy,[136] models of criminal adjudication,[137] the right to vote of citizens living abroad,[138] political advertising,[139] parliamentary proceedings,[140] planning measures[141] or—without being exhaustive by any means—relations between States and churches, other religious communities,[142] or even religious symbols in official settings[143] are matters where the Court has conducted an analysis of comparative law and practice or of international material and, in the absence of a consensus or trend, or for other reasons, has renounced to further shape the rights at stake. Complex social security complaints belong to the same category of cases.[144] Accordingly, a comparative analysis can also provide useful insights when the Court envisages jurisprudential developments in this field based on a dynamic and extensive interpretation of the rights guaranteed by the Convention and its Protocols. Unfortunately, the Court has not been consistent in this regard.[145]

A consensus and—more precisely in this context—comparative analysis is not necessarily required in all cases on matters of general policy. In cases infringing, for instance, on human

[134]*See* GERARDS, *supra* note 20, at 156; DZEHTSIAROU, *supra* note 15, at 141; Łącki, *supra* note 89, at 197. *But see* Lewis, *supra* note 84, at 216.

[135]*See Vavřička and Others v. Czech Republic,* App. Nos. 47621/13 & 5 others at paras. 278–80. *See* DZEHTSIAROU, *supra* note 15, at 166.

[136]*See Khamtokhu and Aksenchik v. Russia* [GC], App. Nos. 60367/08 & 961/11, paras. 85–86 (Jan. 24, 2017), https://hudoc.echr.coe.int/?i=001-170663 (discussing the exemption of certain groups of offenders from life imprisonment). *See also Nealon and Hallam v. United Kingdom* [GC], App. Nos. 32483/19 & 35049/19, paras. 94–97 (June 11, 2024), https://hudoc.echr.coe.int/fre?i=001-234468 (addressing rejection of claims for compensation for miscarriage of justice).

[137]*See Taxquet v. Belgium* [GC], App. No. 926/05, paras. 43–60 & 83–84 (Nov. 16, 2010), https://hudoc.echr.coe.int/?i=001-101739 (discussing models of lay adjudication).

[138]*See Sitaropoulos and Giakoumopoulos v. Greece* [GC], App. No. 42202/07, paras. 74–75 (Mar. 15, 2012), https://hudoc.echr.coe.int/?i=001-109579.

[139]*See Animal Defenders International v. United Kingdom* [GC], App. No. 48876/08, para. 123 (Apr. 22, 2013), https://hudoc.echr.coe.int/?i=001-119244 (mentioning paid political advertising in broadcasting).

[140]*See Karácsony and Others v. Hungary*, App. Nos. 42461/13 & 44357/13 at para. 145.

[141]*Chapman v. United Kingdom*, App. No. 27238/95 at paras. 93–94.

[142]*Sindicatul "Păstorul cel Bun" v. Romania* [GC], App. No. 2330/09, paras. 61 & 171 (July 9, 2013), https://hudoc.echr.coe.int/?i=001-122763 (talking about the refusal to register a trade union for priests on account of the autonomy of religious communities).

[143]*See, e.g.*, *Lautsi and Others v. Italy* [GC], App. No. 30814/06, paras. 26–28 & 70 (March 18, 2011), https://hudoc.echr.coe.int/?i=001-104040 (discussing crucifixes in classrooms of state schools).

[144]*See Stummer v. Austria* [GC], App. No. 37452/02, paras. 130–32 (July 7, 2011), https://hudoc.echr.coe.int/?i=001-105575 (affiliation of working prisoners to an old-age pension system).

[145]*See Di Trizio v. Switzerland*, App. No. 7186/09, paras. 80–104 (Feb. 2, 2016), https://hudoc.echr.coe.int/eng?i=001-160692 (explaining that in this case, the Court did not use any international material, nor did it refer to the laws and practices of the Member States, even though this case related to the methods of calculation of a disability allowance and a comparative perspective might have been helpful. While it is true that the Court found the existence of a discrimination, making a consensus or trend analysis less relevant, the case was not clear-cut. The Court quite weakly concluded that it was "not persuaded that the difference in treatment to which the applicant was subjected [. . .] had a reasonable justification" (para. 103) and three judges wrote a joint dissenting opinion in which they considered that the complaint did not even come within the ambit of Art. 8 of the ECHR (joint dissenting opinion of Judges Keller, Spano and Kjølbro, para. 1). *See also* Gerards, *supra* note 101, at 98–99.

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dignity, *a fortiori* of vulnerable persons,[146] or the prohibition of discrimination,[147] such an analysis cannot, in principle, justify any tolerance by the Court.[148] However, some flexibility may remain with respect to distinctions based, for instance, on age. Furthermore, the specific context existing in one country may be considered by the Court[149] and, depending on the circumstances, justify a breach with an established consensus or trend.[150]

Finally, the need to perform a consensus or trend analysis and the value thereof are not obvious in cases regarding specific procedural guarantees in concrete situations. For instance, the Court looked at comparative law material in a case where it found violation of Article 1 of Protocol No. 7 in view of significant limitations imposed on the right to be informed of reasons for expulsion.[151] In this case, "the applicants received only very general information about the legal characterization of the accusations against them"; "[n]or were they provided with any information about the key stages in the proceedings or about the possibility of accessing classified documents in the file through a lawyer."[152] The value of a comparative analysis is hard to see in these circumstances. The same prevails for a judgment that may regard a matter of general policy, such as combating large-scale tax fraud, but is closely related to the circumstances of the particular case.[153] In its—short—advisory opinion on impeachment legislation,[154] the Court did not proceed to any consensus or trend analysis, except that it briefly quoted some international material.[155] This seems admissible in view of the rather banal conclusions it reached. If the court had been interventionist on that issue, it would have been well advised to conduct such an analysis.[156]

III. Cases Raising Sensitive Moral or Ethical Issues

Cases may raise sensitive moral or ethical issues, for which Member States traditionally enjoy a wide margin of appreciation, notably because of the national or even local context's relevance.[157]

[146]*See Lacatus v. Switzerland*, App. No. 14065/15, paras. 105, 107 & 115 (Jan. 19, 2021), https://hudoc.echr.coe.int/?i=001-207377 (mentioning the penalty for begging in public); *Opuz v. Turkey*, App. No. 33401/02, paras. 159–60 & 171 (June 9, 2009), https://hudoc.echr.coe.int/fre?i=001-92945 ("violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband" [para. 176], even though "[t]he Court note[d] at the outset that there seem[ed] to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints" [para. 138]). *See also Y v. France*, App. No. 76888/17, paras. 53, 77 & 91 (Jan. 31, 2023), https://hudoc.echr.coe.int/?i=001-222780 (discussing the refusal to replace reference to male sex on birth certificate with neutral sex or intersex). *See, e.g.*, Heri, *supra* note 13, at 12–17 (explaining that in this last judgment, the Court should have gone deeper into the analysis and not basically stopped at the lack of a European consensus on the matter).

[147]*Cf.* Gerards, *supra* note 101, at 89.

[148]*See Beeler v. Switzerland* [GC], App. No. 78630/12 (Oct. 11, 2022), https://hudoc.echr.coe.int/?i=001-220073. *But see S.A.S. v. France*, App. No. 43835/11 at para. 129 (talking about the discriminatory treatment of a widower, the Court did not conduct—and rightfully so—a comparative analysis).

[149]*Leyla Şahin v. Turkey* [GC], App. No. 44774/98, para. 109 (Nov. 10, 2005), https://hudoc.echr.coe.int/?i=001-70956.

[150]*See* George Letsas, A Theory of Interpretation of the European Convention on Human Rights 126 (2007).

[151]*Muhammad and Muhammad v. Romania* [GC], App. No. 80982/12, paras. 79–87, 131 & 148 (Oct. 15, 2020), https://hudoc.echr.coe.int/?i=001-205509 (providing a critical view on this approach). *See also* the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Elósegui, annexed to this judgment, paras. 30–36.

[152]*Muhammad and Muhammad v. Romania*, App. No. 80982/12 at para. 204.

[153]*See Vegotex International S.A. v. Belgium* [GC], App. No. 49812/09, paras. 92–124 (Nov. 3, 2022), https://hudoc.echr.coe.int/?i=001-220415 (showing where the Court does not make any use—and rightfully so—of its brief comparative analysis at paras. 56–58.

[154]Advisory opinion on the assessment, under Article 3 of Protocol No. 1 to the Convention, of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings [GC], requested by the Lithuanian Supreme Administrative Court, Request P16-2020-002, (April 8, 2022), https://hudoc.echr.coe.int/fre?i=003-7306062-10811239.

[155]Advisory opinion on the assessment of the proportionality of a general prohibition on standing for election, paras. 58–59.

[156]*See Paksas v. Lithuania*, App. No. 34932/04 at paras. 60–62 & 106.

[157]*See, e.g.*, *S.H. and Others v. Austria*, App. No. 57813/00 at para. 94.

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On some issues, a certain consensus may appear among most of them. This *may* signal to the Court the need to reduce the states' margin of appreciation and to tighten the interpretation of a right or the balancing of rights or interests.[158]

To some extent, the legal recognition of same–sex couples, which has been regarded as a sensitive issue in numerous jurisdictions, illustrates this approach. The debate may be somehow closed in many European countries which have made marriage available to these couples, but it is ongoing in several others. Historically, the Court has felt the need to look for evolutions at the Member States' level, most recently in the *Fedotova and Others v. Russia* case mentioned in Section II of Part C.[159] This does not mean that it should wait for a consensus,[160] nor that any trend should necessarily be widespread, but the Court could hardly have acted as first mover on this issue. When a consensus or trend is established, then the states' margin of appreciation may be reduced and the Court may shape the right at stake, for instance, in judging disproportionate, under Article 8 § 2 of the ECHR, an interdiction of home births.[161]

By contrast, the Member States keep enjoying a wide margin of appreciation, for instance, with respect to the scientific and legal definition of the beginning of life,[162] assisted suicide,[163] physician-assisted dying,[164] the withdrawal of artificial life-sustaining treatment,[165] the prohibition of surrogacy arrangements,[166] or the ban of human embryos to scientific research.[167] In the area of abortion, the Court noted a European consensus in the *A, B and C v. Ireland* case mentioned in Section III of Part C, but then retreated behind the margin of appreciation of the states[168] in a shallow analysis.[169] The Court could have gone further and reduced the margin of interpretation in this regard, especially when the travel to a neighboring, more liberal state is costly, entails a number of practical difficulties, or is psychologically and physically arduous.[170]

The lack of consensus among the Member States does not mean, however, that they can freely address all sensitive moral or ethical issues. The Convention and its Protocols set limits in this

[158]*See* Dzehtsiarou, *supra* note 15, at 136–37 & 188 (quoting several Judges); *see also* Lewis, *supra* note 84, at 218–19 (arguing that the Court "must go beyond a comparative analysis" and try to identify "joint value commitments").

[159]*See Fedotova and Others v. Russia*, App. Nos. 40792/10, 30538/14 & 43439/14 at paras. 152–90.

[160]*See* Claerwen O'Hara, *Consensus, Difference and Sexuality: Que(e)rying the European Court of Human Rights' Concept of 'European Consensus'*, 32 Law and Critique 91, 103–11 (2021). *See also* Heri, *supra* note 13, at 16–17.

[161]*See*, the joint dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller, paras. 28–30 & 35, annexed to *Dubská and Krejzová v. Czech Republic*, App. Nos. 28859/11 & 28473/12.

[162]*See*, from a general perspective, *Evans v. United Kingdom* [GC], App. No. 6339/05, para. 54 (Apr. 10, 2007), https://hudoc.echr.coe.int/?i=001-80046; *Vo v. France* [GC], App. No. 53924/00, paras. 82 & 84 (July 8, 2004), https://hudoc.echr.coe.int/?i=001-61887.

[163]*See Haas v. Switzerland*, App. No. 31322/07, para. 55 (Jan. 20, 2011), https://hudoc.echr.coe.int/?i=001-102940; *Koch v. Germany*, App. No. 497/09, para. 70 (July 19, 2012), https://hudoc.echr.coe.int/?i=001-112282; *see also Pretty v. United Kingdom*, App. No. 2346/02, para. 71 (Apr. 29, 2002), https://hudoc.echr.coe.int/fre?i=001-60448.

[164]*See Dániel Karsai v. Hungary*, App. No. 32312/23, paras. 123, 125, 142–143 & 165 (June 13, 2024), https://hudoc.echr.coe.int/fre?i=001-234151 (denying the existence of a consensus [paras. 123, 125 & 142], but noting "that a certain trend is currently emerging towards decriminalization of medically assisted suicide, especially with regard to patients who are suffering from incurable conditions" [para. 143]).

[165]*See Lambert and Others v. France* [GC], App. No. 46043/14, paras. 72, 147, 165 & 168 (June 5, 2015), https://hudoc.echr.coe.int/?i=001-155352.

[166]*See Paradiso and Campanelli v. Italy* [GC], App. No. 25358/12, paras. 81 & 203 (Jan. 24, 2017), https://hudoc.echr.coe.int/?i=001-170359.

[167]*See Parrillo v. Italy* [GC], App. No. 46470/11, paras. 176–82 (Aug. 27, 2015), https://hudoc.echr.coe.int/?i=001-157263.

[168]*A, B and C v. Ireland*, App. No. 25579/05 at paras. 235–41.

[169]*See, e.g.,* Vogiatzis, *supra* note 12, at 455; Petkova, *supra* note 29, at 684.

[170]*See* the joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, para. 8, annexed to *A, B and C v. Ireland*, App. No. 25579/05. *See, e.g.,* Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right: The Long-Lasting Dispute with Sovereignty in ECHR Jurisprudence*, 15 Hum. Rts. L. Rev. 569, 577 (2015); Daniel Fenwick, *'Abortion Jurisprudence' at Strasbourg: Deferential, Avoidant and Normatively Neutral?*, 34 Legal Stud. 214, 228 (2014).

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respect. Here, again, infringements on human dignity,[171] the prohibition of discrimination,[172] notably subject to the above qualification relating to issues such as the legal recognition of same–sex couples, or the protection of a particularly important facet of an individual's existence or identity[173] can justify a strict case law of the Court even though a European consensus or trend is lacking on the matter at hand or, as the case may be, a European consensus or trend goes in the opposite direction. In certain cases, a consensus or trend analysis may even prove superfluous. For instance, the Court has noted that "there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms." A consensus or trend analysis was not necessary on this point.[174] In the same vein, the Court rightly considered that the right to respect for private life[175] of a child born abroad through a gestational surrogacy arrangement and conceived using the gametes of the intended father and a third–party donor requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother,"[176] despite the lack of consensus in Europe on this issue.[177]

IV. Cases Where the Court Considers Changing its Jurisprudence

Stability and continuity in the case law make it predictable for individuals, non-governmental organizations, legal entities, and states. They can also contribute to the Court's legitimacy. Evolution in society and modification of circumstances may provide the basis for a change in jurisprudence. How can the Court establish such evolution and modification? A consensus or trend analysis may prove relevant and useful in this context.[178] However, it should be done properly, and, in any event, the Court should keep in mind that a state's laws and practices are proxies in this respect, as society may be much more diverse. As reflected in the chart in the Appendix, the Court made a quite extensive analysis in its judgment *Bayatyan v. Armenia*. It considered all Member States as well as various international and regional texts.[179] This approach has proven to be compelling. In other judgments listed in the Appendix where the Court changed,

[171]Joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, paras. 12–13 annexed to *Evans v. United Kingdom*, App. No. 6339/05 (discussing destruction of embryos of a woman who underwent an operation to remove her ovaries due to an ovarian cancer, as a result of the withdrawal of the man's consent, whose sperm fertilized the woman's eggs). *See also* Joint dissenting opinion of Judges Wildhaber, Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, paras. 3 & 15–16), annexed to *Odièvre v. France* [GC], App. No. 42326/98 (Feb. 13, 2003), https://hudoc.echr.coe.int/?i=001-60935 (regarding access to information about one's origin). *See also* DZEHTSIAROU, *supra* note 15, at 190–91 (quoting Judge Garlicki).

[172]*See X and Others v. Austria* [GC], App. No. 19010/07, paras. 148–149 & 153 (Feb. 19, 2013), https://hudoc.echr.coe.int/?i=001-116735 (talking about the impossibility of second-parent adoption in a same-sex relationship judged discriminatory in comparison with situation of unmarried different-sex couples). *See, e.g.,* LETSAS, *supra* note 150, at 124.

[173]*See* the joint dissenting opinion of Judges Sajó, Keller and Lemmens, paras. 2 & 5 annexed to *Hämäläinen v. Finland* [GC], App. No. 37359/09 (July 16, 2014), https://hudoc.echr.coe.int/?i=001-145768 (regarding the requirement of a change of marital status for a transgender person in order to obtain full official recognition of gender re-assignment).

[174]*Bayev and Others v. Russia*, App. Nos. 67667/09, para. 66 (June 20, 2017), https://hudoc.echr.coe.int/?i=001-174422.

[175]Article 8 of the ECHR.

[176]Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], requested by the French Court of Cassation, Request P16-2018-001, conclusion 1 (April 10, 2019), https://hudoc.echr.coe.int/fre?i=003-6380464-8364383; *see also D.B. and Others v. Switzerland*, App. Nos. 58817/15 & 58252/15, paras. 87–90 (Nov. 22, 2022), https://hudoc.echr.coe.int/?i=001-220955 (regarding, though, the parent-child relationship between the intended father and the child born through surrogacy in the United States).

[177]Advisory opinion concerning the recognition of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, paras. 23 & 43.

[178]*See* DZEHTSIAROU, *supra* note 15, at 138–42.

[179]*Bayatyan v. Armenia,* App. No. 23459/03 at paras. 46–70.

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"reconsidered" or "clarified" its case law, the analysis was much more cursory and, to some extent, lacked sufficient transparency or predictability.[180] There is—or, at least, was—undoubtedly substantial room for improvement in this respect.

Such an analysis will be especially—but not exclusively—appropriate when the lack of consensus has been established in a previous judgment and was part of *ratio decidendi*. Even if no consensus analysis was conducted in an initial judgment, this does not close the door for one in later judgments. On the contrary, such an analysis can enrich the argumentative and decision-making process.

In any event, the outcome of a consensus or trend analysis can be persuasive, but the Court retains the ability to judge otherwise. Put differently, the lack of a European consensus on a given issue does not prevent the Court from changing its case law, especially if it identifies some trend pointing in this direction. It will thus have to provide adequate justification. Likewise, the existence of a European consensus or, *a fortiori*, trend does constrain the Court to follow it, as it can favor other, more decisive arguments and circumstances.

F. Conclusion

A European consensus or trend can shape rights guaranteed by the Convention and its Protocols. It usually fulfils a supporting function to the interpretation of rights and the balancing they may imply. Depending on the circumstances and the issues at stake, it can prove persuasive in the sense that it significantly, but not exclusively, serves to define a right, fix its scope or extent, and sets its limits.

In our count, in the last twenty–five years, 27 out of 424 judgments on the merits by the Grand Chamber established a consensus or trend having a "shaping impact" on the protections conferred by rights guaranteed by the Convention or its Protocols. Only one advisory opinion based on Protocol No. 16 contained a section on comparative law material having such an impact. No decision of the Grand Chamber on admissibility during the last twenty-five years offered significant developments from this perspective. This study shows that strong or rather strong rights' shaping through consensus or trend only occurred seven times—six judgments and two twin judgments. This immediately puts into perspective, and even somewhat demystifies, the real scope of the consensus or trend analysis on the evolution of the Court's jurisprudence with respect to actual rights shaping. Of course, the total number of relevant judgments or their classification may be discussed, but different assessments in one case or the other will not change the overall picture.

Cases more prone to a potentially persuasive consensus or trend analysis are usually linked with the Member States' wide margin of appreciation. Consequently, the states' margin of appreciation is quite often—but by no means always—inversely correlated with European consensus on the issue at stake. When consensus is deemed relevant by the Court, the greater the number of the Member States that have chosen, or are directly or indirectly associated with, a solution, and the clearer and more stable that solution is or, when the Court observes a trend, the clearer and firmer the trend is, then the more weight the European consensus or trend is, *ceteris paribus*, likely to carry in a given case.

In any case, the risk of incomplete or low-quality and, therefore, truncated analysis should not be underestimated. Thus, the quality, transparency, and completeness of the consensus or trend analysis—covering, in other words, all Member States or close to it when it is comparative, except for states in which the issue at stake is not relevant or for which reliable information is lacking—

[180] *See Goodwin v. United Kingdom*, App. No. 28957/95 at paras. 55–58; *I. v. United Kingdom*, App. No. 25680/94 at paras. 38–41; *Demir and Baykara v. Turkey*, App. No. 34503/97 at paras. 37–52; *Scoppola v. Italy (No 2)*, App. No. 10249/03 at paras. 35–41; *Micallef v. Malta*, App. No. 17056/06 at paras. 31–32; *Magyar Helsinki Bizottság v. Hungary*, App. No. 18030/11 at paras. 37–52.

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are parameters on which the Court should not compromise, at least when the consensus or trend is going to have a strong or medium impact on the *ratio decidendi* of the case. The approach followed and the analysis conducted by the Court in *Bayatyan v. Armenia* is compelling in this regard. More flexibility may be admissible in other cases, especially when the Court barely refers to comparative material in its assessment.

Finally, the risk of inconsistency also deserves special attention from the Court. The latter can follow a systematic approach and, for instance, decide that a consensus or trend analysis should be conducted in all cases allocated to the Grand Chamber, but only in these. Alternatively, the Court may prefer a more flexible solution by defining criteria for conducting such an analysis when it decides cases in Grand Chamber or Chamber formations. A combination of the two approaches is also perfectly feasible. Accordingly, a consensus or trend analysis would, in principle, be systematic for cases allocated to the Grand Chamber if and when relevant for the matters at hand, and possible but subject to the fulfilment of criteria for cases decided in Chambers of seven judges. The criteria highlighted in Part E of this article could guide the Court in its choice to carry out, or dispense with, a consensus or trend analysis, regardless of whether the judgment is delivered by the Grand Chamber or a Chamber. This article supports the idea that the Court cannot simply cherry–pick when to conduct such an analysis. Otherwise, the case law would become extremely unpredictable, including from a methodological standpoint. Moreover, an unprincipled practice on the part of the Court may create inequalities. Any analytical inconsistency can thereby weaken the case law and, consequently, the legitimacy of the Court itself. The status quo being unsatisfactory, the Court needs to clarify its practice in this area. On this issue, there must be a European consensus within the Court.

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Appendix

Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
Art. 3 of the ECHR	*Vinter and Others v. the United Kingdom* [GC], App. Nos. 66069/09, 130/10 & 3896/10 (July 9, 2013), https://hudoc.echr.coe.int/fre?i=001-122664	material of the Council of Europe (CoE); international criminal law; EU law (paras. 60-67 & 76-81)	all Member States (paras. 68-72); case law of other jurisdictions (paras. 73-75)	"clear support in European and international law" (para. 114); "large majority of Contracting States" (no life sentences or review; para. 117)	interpretation of Art. 3 of the ECHR (para. 119; see also para. 110)	n/a	strong (see paras. 113-121)	"for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review" (para. 110; see also paras. 119 & 121)
Art. 4 of the ECHR	*S.M. v. Croatia* [GC], App. No. 60561/14 (June 25, 2020), https://hudoc.echr.coe.int/fre?i=001-203503	UN instruments; ILO conventions; CoE material; other international and regional instruments; EU law and other material (paras. 107-209)	39 Member States (paras. 210-212)	"universal recognition that human trafficking involving sexual exploitation is a serious crime" (paras. 210 & 293)	interpretation of Art. 4 of the ECHR (paras. 292-293, 296-297 & 303)	n/a	rather a supporting function (see para. 293: "This conclusion also finds support . . ."), but reliance on the definition under international law of "trafficking in human beings" (paras. 296 & 303)	Human trafficking (whether national or transnational, connected with organized crime or not) falls within the scope of Article 4, in so far as the constituent elements of the international definition of trafficking in human beings are present (paras. 296-297 & 303)
Art. 5 of the ECHR	*Buzadji v. the Republic of Moldova* [GC], App. No. 23755/07 (July 5, 2016), https://hudoc.echr.coe.int/fre?i=001-164928	none	31 Member States (paras. 45-60)	"great majority of the thirty-one High Contracting Parties to the Convention covered by the comparative law survey" (para. 101; see also para. 54)	interpretation of Art. 5 § 3 of the ECHR (para. 102)	n/a	medium (see paras. 101-102: "The Court further notes . . ." [para. 101 *in initio*])	"the requirement on the judicial officer to give relevant and sufficient reasons for the detention—in addition to the persistence of reasonable suspicion—applies already at the time of the first decision ordering detention on remand" (para. 102)

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Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
Art. 6 of the ECHR	*T. v. the United Kingdom* [GC], App. No. 24724/94 (Dec. 16, 1999), https://hudoc.echr.coe.int/fre?i=001-58593 | *V. v. the United Kingdom* [GC], App. No. 24888/94 (Dec. 16, 1999), https://hudoc.echr.coe.int/fre?i=001-58594	UN and CoE material (paras. 43-47 | paras. 45-49)	Apparently all Member States (para. 48 | para. 50)	"international tendency in favour of the protection of the privacy of juvenile defendants" (paras. 75 & 85 | paras. 77 & 87)	interpretation of Art. 6 § 1 of the ECHR ("criminal limb", para. 84 | para. 86)	n/a	Medium (see para. 85 | para. 87) since the Court emphasizes the specific circumstances of the case, especially the applicant's immaturity and disturbed emotional state (paras. 86-88 | paras. 88-90)	"it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his [or her] ability to understand and participate in the proceedings. [. . .] in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition." (paras. 84 & 85 | paras. 86 & 87, shaping *in concreto*)
—	*Micallef v. Malta* [GC], App. No. 17056/06 (Oct. 15, 2009), https://hudoc.echr.coe.int/fre?i=001-95031	EU law (para. 32)	"a relevant number of Member States" (23 are quoted; para. 31)	"widespread consensus" among Member States (paras. 31 & 78)	interpretation of Art. 6 § 1 of the ECHR ("civil limb", paras. 83-86)	n/a	strong (see paras. 78-81); change in the case law	"Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, Article 6 will be applicable" (para. 85)

(*Continued*)

(*Continued.*)

Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
—	*Stanev v. Bulgaria* [GC], App. No. 36760/06 (Jan. 17, 2012), https://hudoc.echr.coe.int/fre?i=001-108690	UN Convention; recommendation of the Committee of Ministers of the CoE; reports of the European CPT (paras. 72-87)	20 Member States (paras. 88-95)	"trend at European level" (para. 243)	interpretation of Art. 6 § 1 of the ECHR ("civil limb", para. 245)	n/a	rather strong (see para. 243 ["The Court further observes . . . "] - 245 [" . . . in particular the trends . . . "])	"Article 6 § 1 of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable [. . .] has direct access to a court to seek restoration of his or her legal capacity." (para. 245)
—	*Guðmundur Andri Ástráðsson v. Iceland* [GC], App. No. 26374/18 (Dec. 1, 2020), https://hudoc.echr.coe.int/fre?i=001-206582	UN, CoE and EU material; other international case law or texts (paras. 117-147)	40 Member States (paras. 148-153)	"considerable consensus among the States surveyed" (19 out of 40!) to "interpret the requirement of a 'tribunal established by law' as clearly encompassing the process of the initial appointment of a judge to office" (para. 228)	interpretation of Art. 6 § 1 of the ECHR ("tribunal established by law", see paras. 218 & 228-229); formulation of a test to assess the respect of the right to a tribunal established by law (paras. 235-252)	n/a, but the test is supposed to allow for an assessment "of whether the balance between the competing principles has been struck fairly and proportionately" (para. 243)	strong with respect to the scope of Article 6 § 1 of the ECHR (see para. 228); weak with respect to the test's formulation (see only para. 243)	the requirement of a "tribunal established by law" encompasses "the process of the initial appointment of a judge to office" (para. 228); formulation of a three-step test to determine whether irregularities in a judicial appointment procedure were so serious that they entailed a violation of the right to a tribunal established by law (paras. 235-252)
Art. 7 of the ECHR	*Scoppola v. Italy (No 2)* [GC], App. No. 10249/03 (Sept. 17, 2009), https://hudoc.echr.coe.int/fre?i=001-94135	UN CCPR; American Convention on Human Rights; EU law and case law; statute of the International Criminal Court; international case law (paras. 35-41 & 105)	None, but indirect reference to the "constitutional traditions common to the Member States" of the EU (paras. 38 & 105)	"consensus [that] has gradually emerged in Europe and internationally" (para. 106)	Interpretation of Art. 7 of the ECHR (para. 109)	n/a	strong (see paras. 105-109), change in the case law	"Article 7 § 1 of the Convention guarantees [. . .] also, and implicitly, the principle of retrospectiveness of the more lenient criminal law" (para. 109)

(*Continued*)

(*Continued.*)

Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
—	Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court, Request P16-2019-001 (May 29, 2020), https://hudoc.echr.coe.int/fre?i=003-6708535-9909864	none	41 Member States (paras. 29-40)	26 Member States with respect to the extension of the "requisite level of precision to the legal provisions referred to"; "some legal systems" regarding further requirements (paras. 34-35 & 72); "more than half of the States surveyed" with respect to the use of the principle of concretization (para. 79)	Interpretation of Art. 7 of the ECHR (paras. 72-74 & 92)	n/a	rather a supporting function with respect to the "quality of law" as a limit to the use of the "blanket reference" or "legislation by reference" technique (see para. 72: "... and is also supported ..."); eventually medium with respect to the principle of concretization (see para. 79)	"The referencing provision and the referenced provision, read together, must enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable, including in situations where the referenced provision has a higher hierarchical rank or a higher level of abstraction than the referencing provision." (conclusion 2) In the search for the *lex mitior* for the accused, "regard must be had to the specific circumstances of the case" (conclusion 3). This principle of concretization "also applies to cases involving a comparison between the definition of the offence at the time of its commission and a subsequent amendment." (para. 90)

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Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
Art. 8 of the ECHR	*Dickson v. the United Kingdom* [GC], App. No. 44362/04 (Dec. 4, 2007), https://hudoc.echr.coe.int/fre?i=001-83788	UN & CoE material (paras. 29-36)	number unspecified, at least "more than half of the Contracting Parties" (para. 81)	"more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination" (para. 81)	no significant new development on the interpretation of Art. 8 of the ECHR	disproportionate interference with the right to the protection of private and family life (paras. 81 & 84)	weak (see para. 81) due to the effective exclusion of any real weighing of the competing individual and public interests (paras. 82-84) and to reference to other considerations (para. 83)	A State cannot go so far as to prevent a serving prisoner and his wife, who is at liberty, from attempting to conceive a child through access to artificial insemination facilities in circumstances like those in the applicants' case (paras. 82-85, shaping *in concreto*)
—	*S. and Marper v. the United Kingdom* [GC], App. Nos. 30562/04 & 30566/04 (Dec. 4, 2008), https://hudoc.echr.coe.int/fre?i=001-90051	CoE material (paras. 41-44)	number unspecified, at least "a majority of the Member States" (paras. 45-49)	"great majority of the Contracting States" (para. 108); "strong consensus existing among the Contracting States" (para. 112)	no significant new development on the interpretation of Art. 8 of the ECHR	disproportionate interference with the right to the protection of private life (para. 125)	rather strong (paras. 107-112: consensus "of considerable importance" [para. 112]), but additional reference to the risk of stigmatization, the presumption of innocence and the protection of minors, young persons and minorities (paras. 122 & 124)	"the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences [. . .] fails to strike a fair balance between the competing [. . .] interests" (para. 125)

(*Continued*)

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Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
—	*Khoroshenko v. Russia* [GC], App. No. 41418/04 (June 30, 2015), https://hudoc.echr.coe.int/fre?i=001-156006	CoE and UN material; international case law (paras. 58-80)	35 Member States (paras. 81-84)	consensus with respect to the "minimum frequency of prison visits as regards life-sentence prisoners" (para. 135)	no significant new development on the interpretation of Art. 8 of the ECHR	disproportionate interference with the right to the protection of private and family life (paras. 146 & 148)	rather strong (paras. 133-136, 143 & 145), but also mention of the need for rehabilitation and reintegration of life-sentence prisoners (paras. 144-145 & 148)	duty to have "regard to the combination of various long-lasting and severe restrictions on the [...] ability to receive prison visits and the failure of the impugned regime [...] to give due consideration to the principle of proportionality and to the need for rehabilitation and reintegration of life-sentence prisoners" (para. 148, shaping *in concreto*; see also para. 146)
Art. 8 and 6 of the ECHR	*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* [GC], App. No. 53600/20 (April 9, 2024), https://hudoc.echr.coe.int/fre?i=001-233206	UN, CoE & EU material; material from other regional human rights mechanism (paras. 133-231; see also paras. 448 & 456)	38 Member States with respect to the Aarhus Convention (paras. 232-234); 8 Member States with respect to domestic case law relating to climate change (paras. 235-272)	"growing international consensus regarding the critical effects of climate change on the enjoyment of human rights" (para. 456; see also paras. 436 & 635); "general consensus as to the stakes involved in ensuring the overarching goal of effective climate protection through overall	interpretation of Art. 8 of the ECHR (paras. 519 & 543-553)	no analysis of Art. 8 para. 2 of the ECHR; "pressing need to ensure the legal protection of human rights as regards the authorities' allegedly inadequate action to tackle climate change" (para. 635 regarding Art. 6 § 1 of the ECHR).	strong with respect to Art. 8 of the ECHR, in view of the combination of "scientific consensus" and international consensus (paras. 436, 451, 456 & 542-543; see also paras. 103-120); medium (scientific consensus) with respect to Art. 6 § 1 of the ECHR (paras. 436 & 634-635), due	Article 8 of the ECHR encompasses "a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life" (paras. 519 & 544). States are required to undertake measures to reduce their GHG emission levels, with a view to reaching net neutrality, in principle within the next three decades, and need to put in place

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				GHG [greenhouse gas] reduction targets" (para. 543)			to other important considerations relating to the domestic level (paras. 633-634 & 636-637).	relevant targets and timelines (paras. 546 & 548). Duty to take account of "the urgency of addressing the adverse effects of climate change" in the assessment of the proportionality of a limitation on the right to access to a court under Art. 6 § 1 of the ECHR (paras. 635 & 637, shaping *in concreto*)
Art. 8 and 12 of the ECHR	*Christine Goodwin v. the United Kingdom* [GC], App. No. 28957/95 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60596 | *I. v. the United Kingdom* [GC], App. No. 25680/94 (July 11, 2002), https://hudoc.echr.coe.int/fre?i=001-60595	EU law (para. 58 | para. 41)	37 Member States (paras. 55-57 | paras. 38-40), study conducted by a third party	"unmistakable trend in the Member States [. . .] towards giving full legal recognition to gender re-assignment" (para. 55 | para. 38); "continuing international trend" (paras. 84-85 | paras. 64-65); "widespread acceptance of the marriage of transsexuals" (para. 103, but see para. 57 [54% of Contracting States] | para. 83, but see para. 40)	interpretation of Art. 8 of the ECHR (paras. 75, 90 & 93 | paras. 55, 70 & 73) and of Art. 12 of the ECHR (paras. 98-101 | paras. 78-81)	"no significant factors of public interest to weight against the interest of this individual applicant" (para. 93 | para. 73); "no justification for barring the transsexual from enjoying the right to marry under any circumstances" (para. 103 | para. 83)	rather strong with respect to Art. 8 of the ECHR (paras. 84-85 | paras. 64-65), but also invocation of "human dignity" (paras. 90-91 | paras. 70-71); weak with respect to Art. 12 of the ECHR (para. 103 | para. 83); double change in the case law	right to obtain legal recognition of "gender reassignment"(para. 93 | para. 73) and to marry a person of the "sex" opposite to the reassigned gender (paras. 101 & 103 | paras. 81 & 83)

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Art. 9 of the ECHR	*Bayatyan v. Armenia* [GC], App. No. 23459/03 (July 7, 2011), https://hudoc.echr.coe.int/fre?i=001-105611	CoE, EU and UN material; other international texts and practices (paras. 50-70)	all Member States (paras. 46-49)	"a virtually general consensus on the question in Europe and beyond" (para. 108; see also para. 123)	interpretation of Art. 9 of the ECHR (paras. 108-110)	disproportionate interference with the freedom to manifest one's religion (see especially paras. 122-123 & 128)	strong (paras. 101-108 & 122-124); change in the case law	"opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief" within the meaning of Article 9 (para. 110)
Art. 10 of the ECHR	*Magyar Helsinki Bizottság v. Hungary* [GC], App. No. 18030/11 (Nov. 8, 2016), https://hudoc.echr.coe.int/fre?i=001-167828	UN, CoE and EU material; other international texts and case law (paras. 35-63)	31 Member States (para. 64).	"broad consensus" within the Member States (para. 139; see, however, the dissenting opinion of Judge Spano joined by Judge Kjølbro, at V); "A high degree of consensus has also emerged at the international level" (para. 140); "a definite trend towards a European standards" (para. 145); "common ground" (para. 153)	interpretation of Art. 10 of the ECHR (paras. 151 & 155-156)	no reference to consensus or trend in the analysis of the interference's justification (see paras. 181-200)	strong (paras. 138-153); "clarification" (para. 154) of the case law	a right of access to information held by a public authority or the obligation to impart such information to the individual "may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force [...] and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression" (para. 156)

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Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
—	*Macatė v. Lithuania* [GC], App. No. 61435/19 (Jan. 23, 2023), https://hudoc.echr.coe.int/fre?i=001-222072	CoE, EU and UN material (paras. 105-122)	33 Member States (paras. 123-129) ; USA and Canada (paras. 130-132)	"a significant number" of Member States (*i.e.* 16; paras. 126 & 212)	Interpretation of Art. 10 § 2 of the ECHR (paras. 214-216)	n/a	medium (paras. 211-213) due to previous case law on the applicable principles and other considerations, such as the fight against stigmatization (paras. 204-210 & 214-215)	"where restrictions on children's access to information about same-sex relationships are based solely on considerations of sexual orientation [. . .] they do not pursue any aims that can be accepted as legitimate" (para. 216)
—	*Hurbain v. Belgium* [GC], App. No. 57292/16 (July 4, 2023), https://hudoc.echr.coe.int/fre?i=001-225814	UN, CoE and EU material (paras. 59-87)	33 Member States (paras. 88-132)	"emergence over the past decade of a consensus regarding the importance of press archives" (para. 183 mentioning EU and CoE material)	resolution of the conflict between Art. 10 and 8 of the ECHR (paras. 185, 205 & 210)	reference to international and comparative law material in the analysis on the importance of press archives (para. 183) and in the definition of criteria to weigh up the rights at stake (paras. 205-210)	medium (see para. 183: "The Court also notes . . . "; para. 205: " . . . also, to some extent, to the practice . . . "; para. 210) due to previous case law on the applicable principles and other considerations (paras. 180-182, 189, 203-204 & 209-210)	"the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributes to the preservation of memory, especially if [. . .] the lawfulness of the article has never been called into question" (para. 185); establishment of criteria for balancing the various rights at stake (para. 205).

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Article ECHR or Protocols	Case	International material	States' laws and Practices	Consensus or Trend	Right's Scope and Interpretation	Proportionality	Impact of Consensus or Trend	Right's Shaping Through Consensus or Trend
Art. 11 of the ECHR	*Demir and Baykara v. Turkey* [GC], App. No. 34503/97 (Nov. 12, 2008), https://hudoc.echr.coe.int/fre?i=001-89555	UN, CoE and EU material (paras. 37-51)	number unspecified, at least "a vast majority" of European States" (para. 52)	"majority of the relevant international instruments and in the practice of European States" (para. 98; see also paras. 122 & 165); "vast majority" of European States (para. 151)	interpretation of Art. 11 of the ECHR (paras. 107 & 153-154)	reference to international and comparative law material in the analysis of the interference's justification (paras. 122-125 & 165-166)	strong (paras. 60-86, 98-106, 122-125, 147-154 & 165-166); "reconsideration" of the case law (para. 153)	"'members of the administration of the State' cannot be excluded from the scope of Article 11 of the Convention" (para. 107); "the right to bargain collectively with the employer has, in principle, become one of the essential elements [. . .] of Article 11 of the Convention" (para. 154)
Art. 14 in conjunction with Art. 8 of the ECHR	*Konstantin Markin v. Russia* [GC], App. No. 30078/06 (March 22, 2012), https://hudoc.echr.coe.int/fre?i=001-109868	UN, CoE and EU material (paras. 49-70)	33 Member States (paras. 71-75)	"significant number of the Member States" (para. 140)	interpretation of Art. 14 of the ECHR (paras. 143 & 148)	reference to international and comparative law material in the analysis of the justification of the aims pursued (paras. 147-148)	medium (rather strong in paras. 140 & 147-148) due to the reference to the aim of avoiding perpetuating gender stereotypes and disadvantaging women's careers and men's family life (paras. 141 & 143)	"the exclusion of servicemen from the entitlement to parental leave, while servicewomen are entitled to such leave, cannot be said to be reasonably or objectively justified" (para. 151)
—	*Vallianatos and Others v. Greece* [GC], App. Nos. 29381/09 & 32684/09 (Nov. 7, 2013), https://hudoc.echr.coe.int/fre?i=001-128294	CoE and EU material (paras. 27-34)	23 Member States (paras. 25-26)	emerging trend (para. 91)	no significant new development on the interpretation of Art. 14 and 8 of the ECHR	reference to international and comparative law material in the analysis of the justification of the aims pursued (paras. 91-92)	medium (focus on the interpretation of Greek law [paras. 86-90]; trend analysis [paras. 91-92], certainly final but still "additional" [see para. 91 *in initio*] consideration of the Court)	No "convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of [the] Law" introducing "civil unions" in Greece (para. 92)

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—	*Biao v. Denmark* [GC], App. No. 38590/10 (May 24, 2016), https://hudoc.echr.coe.int/fre?i=001-163115	CoE, EU and UN material (paras. 47-60)	29 Member States (para. 61)	"a certain trend towards a European standard" (para. 132); "no States which, like Denmark, distinguish between different groups of their own nationals when it comes to the determination of the conditions for granting family reunification" (para. 133)	no significant new development on the interpretation of Art. 14 and 8 of the ECHR	reference to international and comparative law material in the analysis of the justification of the aims pursued (paras. 131-137)	strong (paras. 131-138)	no "compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule" (para. 138) that creates a difference in treatment, notably with respect to family reunion, between persons who have held Danish citizenship for at least 28 years and other Danish nationals
Art. 1 of Prot. No. 1	*Kozacıoğlu v. Turkey* [GC], App. No. 2334/03 (Feb. 19, 2009), https://hudoc.echr.coe.int/fre?i=001-91413	CoE material (paras. 31-33)	17 Member States (para. 34)	"a number of [. . .] Member States" (para. 71)	no significant new development on the interpretation of Art. 1 of Prot. No. 1	reference to comparative law material in the analysis of the justification of the aims pursued (para. 71)	medium (para. 71: "Moreover, the Court, like the Chamber, observes . . .") due to the previous reference to fairness (para. 70)	"it is appropriate, in the event of expropriation of a listed building, to take account, to a reasonable degree, of the property's specific features in determining the compensation due to the owner" (para. 72)
Art. 3 of Prot. No. 1	*Yumak and Sadak v. Turkey* [GC], App. No. 10226/03 (July 8, 2008), https://hudoc.echr.coe.int/fre?i=001-87363	CoE material (paras. 51-60)	Member States with proportional systems (paras. 61-64)	"Member States' common practices" (para. 132)	no significant new development on the interpretation of Art. 3 of Prot. No. 1	reference to international and comparative law material in the analysis of proportionality (paras. 128-132)	Strong with respect to excessiveness of a 10% electoral threshold (paras. 128-132 & 147)	"in general a 10% electoral threshold appears excessive," subject to the specific political context of the elections at stake (para. 147)

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—	*Tănase v. Moldova* [GC], App. No. 7/08 (Apr. 27, 2010), https://hudoc.echr.coe.int/fre?i=001-98428	CoE material (paras. 83-86)	apparently all Member States (paras. 87-93)	"consensus" (para. 172)	no significant new development on the interpretation of Art. 3 of Prot. No. 1	reference to international and comparative law material in the analysis of proportionality (paras. 171-173, 176-177)	medium (rather strong in paras. 171-173 & 176-177) due to the reference to "effective democracy" (para. 178) and the specific political context (see paras. 31-44 & 178)	"where multiple nationalities are permitted, the holding of more than one nationality should not be a ground for ineligibility to sit as an MP, even where the population is ethnically diverse and the number of MPs with multiple nationalities may be high," except "where special historical or political considerations exist which render a more restrictive practice necessary" (para. 172)
—	*Paksas v. Lithuania* [GC], App. No. 34932/04 (Jan. 6, 2011), https://hudoc.echr.coe.int/fre?i=001-102617	Guidelines on elections adopted by the Venice Commission (para. 59)	Member States with a "republican system" (25 are mentioned; paras. 60-62)	Lithuania's position (permanent and irreversible disqualification from standing for election to Parliament, following impeachment proceedings) qualified as "an exception in Europe" (para. 106)	no significant new development on the interpretation of Art. 3 of Prot. No. 1	reference to comparative law material in the analysis of proportionality (see paras. 106 & 112)	medium (para. 106: "The Court notes, firstly, that . . . ") due to previous case law and reference to the specific circumstances of the case (paras. 107-111)	"in assessing the proportionality of such a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question." (para. 109)

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