Non-Legal Considerations in the Reasoning of the European Court of Human Rights

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Abstract

This article discusses the role of non-legal considerations in the judgments of the European Court of Human Rights. First, it considers what legal instruments are available to the Court in interpreting the Convention Rights and why such instruments came to being in the first place. Second, the article identifies what types of non-legal considerations are taken into account by the Court and what impact they have on the Court's decision-making process. The article argues that the Court pays considerable attention to such considerations and, in certain circumstances, it deploys available legal instruments, such as the margin of appreciation doctrine or fair balance test, to give those non-legal considerations a legal pretence. The article concludes that the importance of the non-legal factors in the decision-making process can be attributed to the vulnerable position of the European Court of Human Rights vis-à-vis the contracting states.

Keywords: ECHR, Convention, human rights, subsidiarity, pretence.

A Introduction

Over the decades of its operation, the European Court of Human Rights has developed a whole range of legal instruments that assist it in arriving at its judgments. Although none of these instruments is actually articulated in the Convention itself, their role could not be overestimated. In this respect, the European Court is perhaps no different than any national Constitutional Court as they all employ some form of legal instruments when dealing with Constitutional Rights. In the context of the European Convention on Human Rights, this long process of developing relevant instruments prompts at least two questions. First, why would the Court actually need these instruments, given that the Convention enumerates all relevant Rights? Second, considering the number of instruments developed by the Court, what drives the Court to employ a particular instrument in a particular case?

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This article intends to build on the existing literature concerning the evolving nature of the European Court of Human Rights. Although there is an abundance of scholarship analysing the subject of interpretation of Convention Rights, the idea of non-legal considerations, and its impact on the decision-making process of the Court, seems not to have been adequately address. This article intends to close that gap or, at least, contribute to its closure.

This article will attempt to provide answers to the two research questions by analysing the case law of the European Court of Human Rights. While answering the first question might be purely academic, the answer to the second question is likely to be of interest to any person practicing European Human Rights Law, as well as any person who believes that his or her rights under the Convention have been infringed, because it will render the outcome of the proceedings before the Court more predictable. After all, the instruments assisting the European Court of Human Rights in the interpretation of the Convention push the Court in various directions, often leading to opposing results. In these circumstances, it is of crucial importance to be able to understand the *rationale* behind the Court's use of its assisting instrument as this will have a significant impact on the final judgments.

In relation to the first question, the article will argue that the European Court of Human Rights has developed relevant legal instruments for the purposes of extracting substantial contents from the Rights enumerated in the Convention. After all, the European Convention on Human Rights is put in rather generic terms. Although some Rights enumerate their specific components, e.g. The Right to a Fair Trial under Article 6, those components themselves are not defined anywhere in the Convention. What is more, other rights, e.g. prohibition on torture and inhumane and degrading treatment under Article 3 and The Right to Private and Family Life under Article 8, leave no hint as to their actual scope. Consequently, literal interpretation of the European Convention on Human Rights would be impossible given its construction.

In relation to the second question, the article will argue that the European Court of Human Rights is guided by non-legal considerations when deciding what instrument of interpretation to employ. As a result, a purely legalistic approach to the Convention could not provide any definite answer as to the likely outcome of the proceedings. The analysis of the case law indicates that the Court uses legal instruments to achieve an outcome that it deems just and equitable, in any given situation, as well as realistic in terms of its enforceability.

B Living Instrument Doctrine

Unlike national Constitutions, the European Convention on Human Rights is an international treaty and therefore subject to interpretation in accordance with Article 31 of the Vienna Convention on the Law of the Treaties.[1] The Article prescribes three major manners of interpretation within one provision – literal, orig-

1 Vienna Convention on the Law of the Treaties, Article 31.

inalist and purposive. In its early days, the European Court of Human Rights in *Golder v. UK*[2] rejected pure literal interpretation and focused on the purposive part of Article 31.[3] This allowed the Court to recognize the right of a prisoner to consult a solicitor in order to institute libel proceedings against a prison officer under Article 6 of the Convention. Having rejected a literal interpretation, the Court considered interpretation based on the original intention of the drafters. If the Convention was given its original meaning, its scope would be limited to the problems that the actual drafters had in mind. Since the Convention was drafted in the late 1940s, with World War II still fresh in peoples' memory, the drafters were concerned primarily with issues of civil rights. This approach was rejected in the 1981 case of *Young, James and Webster v. UK*[4] where the Court,[5] faced with evidence that the drafters intentionally omitted the right not to join a trade union in the Convention,[6] simply disregarded such evidence and moved to consider what it deemed to be appropriate substance of Article 11.[7]

It seems that the originalist manner of interpretation was rejected as it would keep the scope of the Convention unaffected by the real-world developments and thereby unsuitable to deal with problems that such developments might create. As a result, the European Court of Human Rights has been faced with the task of determining the extent of the Rights contained in the Convention. Since the document itself does not provide any straightforward directions, the Court must have developed instruments that would assist it in reaching, what it deems, appropriate conclusions.

In these circumstances, the European Court of Human Rights did what other judicial bodies had done in relation to other international treaties – it developed the idea of the Convention as a living instrument.[8] The living instrument doctrine is based on the premise that the meaning of the rights enumerated in the Convention is not frozen at the time of drafting but instead evolves over time.[9] The living instrument doctrine is the primary mechanism allowing the Court to push for an increasingly wider application of the rights enumerated in the Convention. Although civil rights, which were of the primary concern to the drafters, still remain an important part of the jurisprudence of the Court,[10] the world has changed and straightforward cases arising out of civil rights no longer seem to constitute the majority of the workload of the Court. Instead, the scope of the

2 *Golder v. The United Kingdom* (App. No. 4451/70) 1975.
3 G. Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer', *The European Journal of International Law*, Vol. 21, No. 3, 2010, p. 516.
4 *Young, James and Webster v. The United Kingdom* (App. No. 7601/76 & 7806/77) 1981.
5 *Ibid*., at [52].
6 Report of 30 June 1950 of the Conference of Senior Officials, Collected Edn of the "*Travaux Preparatoires*" IV at 262.
7 Letsas, 2010, p. 519.
8 For the Court of Justice of the European Union, *see e.g.* L. Bojarski, D. Schindlauer & K. Wladasch, *The European Charter of Fundamental Rights as a Living Instrument: Manual*, Rome-Warsaw-Vienna, 2014, available at: <http://bim.lbg.ac.at/sites/files/bim/attachments/cfreu_manual_0.pdf>.
9 Letsas, 2010, p. 513.
10 *E.g. Salduz v. Turkey* (App. No. 36391/02) 2008.

European Journal of Law Reform 2017 (19) 3
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Convention has been extended to cover a whole range of issues, from social[11] to economic[12] and beyond.[13]

The European Court of Human Rights first mentioned the doctrine of living instrument in 1978 in the case of *Tyrer v. UK*[14] in relation to the corporal punishment of minors in the Isle of Man.[15] Since then, the Court has been constantly widening the scope of application of the Convention according to the changing social standards. As a result, the Court has interpreted the Convention Rights in a wider context of social changes, drawing inspiration from other international treaties the contracting states became part to. Such an interpretation has allowed the Court to read certain specific Rights into the broad language of the Convention, such as the right of access to a court of law,[16] as well as those which the drafters of the Convention could not have possibly known of, such as the right to participate in the European Union elections,[17] or intentionally refused to protect, such as the right not to be a part of a trade union[18] and others.[19]

C Positive Obligations

It could be claimed that the concept of positive obligations constitutes one of the core elements of the living instrument doctrine. Accordingly, the European Court of Human Rights has been using positive obligations to considerably extend the reach of the Convention. Positive obligations originate in the first paragraph of the Convention Rights, e.g. Article 8(1) or Article 10(1), and therefore their very existence does not depend on the margin of appreciation, which is only to be applied at a later stage.[20] The margin of appreciation in turn originates in the second paragraph of the Convention Rights, e.g. Article 8(2) or Article 10(2), and its impact on the Convention Rights is considered in the following. The case law of the European Court of Human Rights[21] indicates that positive obligations primarily focus on the prevention of human rights violations and on sanctions for violators only as supplementary steps.[22] In the view of the Court, state liability arises

11 *E.g. A, B and C v. Ireland* (App. No. 25579/05) 2010.
12 *E.g. Da ConceiçãoMateus v. Portugal* (App. No. 62235/12) 2013.
13 *E.g. Budayeva and Others v. Russia* (App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) 2008.
14 *Tyrer v. The United Kingdom* (App. No. 5856/72) 1978.
15 A. Føllesdal, B. Peters & G. Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, p. 109.
16 *Golder v. The United Kingdom*, 1975.
17 *Matthews v. The United Kingdom* (App. No. 24833/94) 1999.
18 *Young, James and Webster v. The United Kingdom*, 1981.
19 Føllesdal *et al.*, 2013, pp. 122-123.
20 D. Xenos, *The Positive Obligations of the State under the European Convention on Human Rights*, Routledge, Abingdon, 2012, p. 91.
21 *E.g. Ireland v. The United Kingdom* (App. No. 5310/71) 1978; *Osman v. The United Kingdom* (App. No. 23452/94) 1998; *LCB v. The United Kingdom* (App. No. 23413/94) 1998; *Mahmut Kaya v. Turkey* (App. No. 22535/93) 2000.
22 Xenos, 2012, pp. 98-99.

where the authorities had knowledge of risk factors but nevertheless failed to take appropriate steps to prevent damage from occurring or continuing.

It seems that the concept of positive obligations is perfectly suited for this purpose of extending Convention Rights as it is inherently open-ended in nature and therefore, in principle, it allows the Court to increase state obligations well beyond the text of the Convention itself.[23] Nevertheless, in the case of *Rees v. UK*,[24] the Court devised a fair balance test whereby balance must be struck between "the general interests of the community and the interests of the individual".[25] It appears that the concept of fair balance has been used by the European Court of Human Rights as a method of self-restraint.

Accordingly, the Court will be eager to impose positive obligations on a contracting state provided they only require a legal or administrative framework to be put in place and thereby do not incur considerable costs. For instance, in the case of *X and Y v. The Netherlands*,[26] the European Court of Human Rights ruled a mentally handicapped rape victim had her Article 8 Rights violated because there was no legal mechanism in place that would allow her to instate criminal proceedings against the perpetrator.[27] It was held that the state was under a positive obligation to put in place appropriate enforcement mechanism of criminal law as otherwise it failed to protect one citizen from another.[28] In other cases, the Court found violation of the Convention where the state failed to protect children from sexual abuse[29] or neglect[30] even though it had had information regarding the risk factors.[31] All these cases had at least one factor in common – the misdeed that constituted the cause of action before the Court could have been rectified without incurring considerable costs on the part of the state.

On the other hand, the Court seems to recognize that financial and administrative resources are some natural limitations in relation to positive obligations. Consequently, in its case law,[32] the European Court of Human Rights recognized that an imposition of a particular positive obligation cannot constitute a disproportionate or, in fact, impossible burden on the state.[33] Accordingly, in *Hatton v. UK*,[34] the economic well-being of the country prevailed over the nuisance caused by the Heathrow Airport, which *prima facie* interfered with the applicants' rights under Article 8 of the Convention.[35] Furthermore, in *Zehnalova and Zehnal v. The*

23 *Ibid*., p. 4.
24 *Rees v. The United Kingdom* (App. No. 9532/81) 1986 at [37].
25 Xenos, 2012, pp. 60.
26 *X and Y v. The Netherlands* (App. No. 8978/80) 1985.
27 Xenos, 2012, p. 23.
28 *Ibid*., pp. 23-24.
29 *E and Others v. The United Kingdom* (App. No. 33218/96) 2002.
30 *Z and Others v. The United Kingdom* (App. No. 29392/95) 2001.
31 Xenos, 2012, pp. 113.
32 *E.g. Edwards v. The United Kingdom* (App. No. 46477/99) 2002; *Bone v. France* (App. No. 69869/01) 2005.
33 Xenos, 2012, pp. 101.
34 *Hatton and Others v. The United Kingdom* (App. No. 36022/97) 2001.
35 Xenos, 2012, pp. 61.

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Czech Republic,[36] where the applicants complained about architectural barriers preventing disabled people from accessing public buildings, the Court held that their allegation as to the impact of barriers on their private life is too broad. However, it could be argued that it was the high costs of removing those architectural barriers across the country that persuaded the Court that any judgment to the contrary would remain a dead letter because the Czech Republic simply would not be able to rebuild all of its public space.

Nevertheless, the Court has been more willing to recognize violations of the Convention Rights, in spite of considerable costs factor, in the environmental cases. For instance, in *Fadeyeva v. Russia*[37] and *Ledyayeva v. Russia*,[38] the state authorities were held to have failed to protect the applicant's right under Article 8 of the Convention from an environmental nuisance caused by a large steel plant.[39] Similarly, in *Tasking v. Turkey*[40] and *Tatar v. Romania*,[41] the operation of gold mines was held to violate applicants' rights under Article 8.[42]

Consequently, it could be argued that the fair balance test applied by the European Court of Human Rights, although indicates that positive obligations are more willingly found in cases not involving high costs, it is not definitive. Accordingly, there are other, fact-oriented, factors, which the Court takes into account when deciding the case. By no means does this article imply that the mere cost-benefit calculation, under the fair balance test, is the ultimate factor determining the outcome of positive obligation cases, it is merely being argued that, in such cases, the Court takes into consideration other, non-legal factors, i.e., the cost that would be incurred by the state, should it ruled against it.

D Subsidiarity

The fair balance test is a part of the principle of subsidiarity, which means that "it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level."[43] According to the 2000 case of *Kudla v. Poland*,[44] as subsequently confirmed in *Cocchiarella v. Italy*[45] and *De Souza Ribeiro v. France*,[46] the principle of subsidiarity has its roots in Articles 1, 13 and 35(1) of the Convention.[47] Recently, the principle has gained even more importance as a

36 *Zehnalova and Zehnal v. The Czech Republic* (App. No. 38621/97) 2002.
37 *Fadeyeva v. Russia* (App. No. 55723/00) 2006.
38 *Ledyayeva and Others v. Russia* (App. No. 53157/99 & 53695/00) 2006.
39 Xenos, 2012, pp. 102-103.
40 *Taskin and Others v. Turkey* (App. No. 46117/99) 2004.
41 *Tatar v. Romania* (App. No. 67021/01) 2009.
42 Xenos, 2012, pp. 115.
43 *Varnava and Others v. Turkey* (App. No. 16064/90) 2009.
44 *Kudla v. Poland* (App. No. 30210/96) 2000.
45 *Cocchiarella v. Italy* (App. No. 64886/01) 2006.
46 *De Souza Ribeiro v. France* (App. No. 22689/07) 2012.
47 A. Mowbray, 'Subsidiarity and the European Convention on Human Rights', *Human Rights Law Review*, Vol. 15, 2015, pp. 313-341, at 319.

response to the criticism coming from the UK Judiciary[48] and with the drafting of Protocol 15 to the Convention.[49] Accordingly, the 2010 Interlaken Declaration and Action Plan[50] stressed that "the subsidiary nature of the supervisory mechanism established by the Convention and notably the fundamental role which national authorities [...] must play in guaranteeing the protecting human rights at the national level."[51] Similar conclusions were reached at the 2012 Brighton Conference[52] convened by the UK government.[53] Furthermore, in 2014, Judge Spano[54] of the European Court of Human Rights expressed the Court's commitment to the principle of subsidiarity and confirmed the intention to build on the legacy of the 2003 decision in *Hatton v. UK*[55] in relation to all qualified Rights under Articles 8-11 of the Convention.[56]

In all cases coming before the European Court of Human Rights, the Court has to recognize the profound diversity of the European Continent. This diversity creates a situation wherein European states differ from one another when it comes to acceptable and unacceptable behaviour. Some states are more conservative than others and some states adopt quicker to social changes. Accordingly, the Convention has been described as "the lowest common denominator among diverse member states."[57] Consequently, the living instrument doctrine, which allows the Court to expand the Convention Rights, has been counterbalanced by the principle of subsidiarity, which limits such an expansion. This principle of subsidiarity, limiting the expansion of Convention Rights, takes the form of the fair balance test, as applied to positive obligations, or as the doctrine of the margin of appreciation as applied to social changes among societies of the European states.[58]

The doctrine of margin of appreciation flowing from the principle of subsidiarity has been most effectively used by the Court to counterbalance the living instrument approach in cases where it has found no convincing European consensus in relation to a particular issue. European consensus could be defined as a prevailing agreement adopted by the majority of European states pertaining to a particular issue.[59] Accordingly, in cases involving public morals, such as the publication of a book with sexual advice for teenagers,[60] the displaying of obscene

48 L. Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 2009.
49 Mowbray, 2015, p. 318.
50 2010 Interlaken Declaration and Action Plan at 6.
51 Mowbray, 2015, p. 329.
52 Brighton Declaration at para. 3.
53 Mowbray, 2015, p. 318.
54 R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', *Human Rights Law Review*, Vol. 17, 2014, p. 487.
55 *Hatton and Others v. The United Kingdom* (App. No. 36022/97) 2003.
56 Mowbray, 2015, p. 318.
57 Føllesdal *et al*., 2015, p. 63.
58 H. Petzold, 'The Convention and the Principle of Subsidiarity', cited in Mowbray, 2015, p. 321.
59 K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights', *German Law Review*, Vol. 12, No. 10, 2011, p. 1733.
60 *Handyside v. The United Kingdom* (App. No. 5493/72) 1976.

European Journal of Law Reform 2017 (19) 3
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paintings,[61] screening of blasphemous video materials[62] or legal recognition of new sexual identity,[63] the Court has been reluctant to interfere with domestic legal arrangements of the states citing no settled consensus in the majority of European states.[64]

E European Consensus

Nevertheless, it is not clear what constitutes sufficient evidence of European consensus that would successfully overcome the incompatible values of one particular society. The concept of European consensus is neither included in the Convention itself, nor has it been sufficiently explained by the European Court of Human Rights.[65] Accordingly, in some cases such as *Marckx v. Belgium*,[66] relating to the concept of illegitimate children, the Court was satisfied that there was a European consensus on the basis of a couple of international convention, which had not been even ratified by the majority of European states; on the other hand, in cases such as *Rees v. UK*,[67] concerning the legal recognition of transsexuals, the Court required "Europeanly shared approach among Contracting States," which led it to find no violation of the Convention.[68]

Subsequently, the European Court of Human Rights reversed its previous stance on the issue of the legal reassignment of sex in the case of *Goodwin v. UK*[69] citing "the changing conditions within the respondent State and within Contracting States Europeanly."[70] However, it has been pointed out that in fact there had been no major changes in public opinion on the issue between 1986 and 1996 and all the Court did was loosen its own standard of European consensus to reach a different conclusion.[71]

In some cases the European Court of Human Rights has been willing to extract European consensus from such feeble evidence as recommendations of the Committee of Ministers and Parliamentary Assembly of the Council of Europe,[72] reports of the European Commission Against Racism,[73] the Oviedo Convention on Human Rights and Biomedicine,[74] the European Convention on State Immunity,[75] Conventions of the International Labour Organisation,[76]

61 *Muller and Others v. Switzerland* (App. No. 10737/84) 1988.
62 *Otto-Preminger-Institut v. Austria* (App. No. 13470/87) 1994.
63 *Rees v. The United Kingdom*, 1986.
64 Føllesdal *et al*., 2015, p. 114.
65 Dzehtsiarou, p. 1.
66 *Marckx v. Belgium* (App. No. 6833/74) 1979.
67 *Rees v. The United Kingdom*, 1986.
68 Føllesdal *et al*., 2015, p. 115.
69 *Goodwin v. The United Kingdom* (App. No. 17488/90) 1996.
70 Føllesdal *et al*., 2015, pp. 115-116.
71 *Ibid*., p. 116.
72 *Oneryildiz v. Turkey* (App. No. 48939/99) 2004.
73 *Bekos and Koutropoulos v. Greece* (App. No. 15250/02) 2005.
74 *Glass v. The United Kingdom* (App. No. 61827/00) 2004.
75 *Al-Adsani v. The United Kingdom* (App. No. 35763/97) 2001.
76 *Siliadin v. France* (App. No. 73316/01) 2005.

reports of the Venice Commission,[77] the European Social Charter,[78] the Aarhus Convention on Access to Information[79] and others.[80] Even though international conventions could serve as strong evidence of developments in the field of social acceptability of particular conduct, most of those instruments are non-binding or were not ratified by many European states at the relevant time.

Furthermore, in some cases where the European Court of Human Rights has not been able to find a European consensus based on any evidence, it simply ignored the issue and refused to grant the margin of appreciation in relation to the issue at hand. Accordingly, in the case of *Hirst v. UK*,[81] the Court held that a blanket ban of the voting rights of prisoners violated the Convention and ruled the apparent lack of any consensus in this area of law "cannot in itself be determinative of the issue."[82] What is more, on other occasions, the opposite approach could be observed. In the case of *A, B and C v. Ireland*,[83] the Court, having found a European consensus, held that "consensus cannot be a decisive factor."[84]

On the other hand, in other cases, the lack of any consensus was crucial in the Court's reasoning that led to the application of the doctrine of the margin of appreciation. Accordingly, in the case of *Schalk and Kopf v. Austria*,[85] the lack of any European consensus regarding the legal recognition of the same-sex partnerships, and in the *Lautsi v. Italy*,[86] regarding the displaying of crucifixes in public classrooms, prompted the Court to find no violation of the Convention.[87] Interestingly, in the former case, the lack of consensus allowed the Court to find no violation of the Convention despite the fact that the state had not adduced any evidence justifying different treatment of partners of the same and different sex, which, according to the dissenting judges,[88] should normally be a *sine qua non* requirement to even consider the matter of consensus.[89]

Finally, in other cases the European Court of Human Rights found no European consensus despite strong evidence to the contrary and used this finding to allow a wide margin of appreciation. Very recently, in the case of *SAS v. France*,[90] the European Court of Human Rights almost unanimously held that there was no consensus in European states as to whether the state could prohibit full face veils in public, even though none of the other European states had such a ban at the time. In these circumstances, it was perfectly open for the Court to find that the

77 *Russian Conservative Party of Entrepreneurs and Others v. Russia* (App. No. 55066 & 55638/00) 2007.
78 *Sorensen and Rasmussen v. Denmark* (App. No. 52562 & 52620/99) 2006.
79 *Taskin and Others v. Turkey* (App. No. 46117/99) 2004.
80 Føllesdal *et al.*, 2015, pp. 116-117.
81 *Hirst v. The United Kingdom* (App. No. 74025/01) 2005.
82 Føllesdal *et al.*, 2015, p. 120.
83 *A, B and C v. Ireland*, 2010.
84 *Ibid.*, p. 237.
85 *Schalk and Kopf v. Austria* (App. No. 30141/04) 2010.
86 *Lautsi and Others v. Italy* (App. No. 30814/06) 2011.
87 Føllesdal *et al.*, 2015, p. 120.
88 *Schalk and Kopf v. Austria*, 2010, Dissenting Opinion of Judges Spielmann, Jebens and Rozakis.
89 Føllesdal *et al.*, 2015, p. 121.
90 *S.A.S v. France* (App. No. 43835/11) 2014.

European Journal of Law Reform 2017 (19) 3
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lack of such a ban in other states was indicative of a European consensus that such a ban was socially unacceptable. However, the Court applied the criteria of the European consensus which led it to a completely opposite conclusion and those criteria seem *prima facie* incomprehensible in terms of a purely legal reasoning. The outcome of the case could only be properly understood by looking at non-legal considerations that might have affected the Court's judgment, such as the socio-religious tensions within French society at that time.

It appears that the European Court of Human Rights has been very inconsistent in its approach to European consensus. Some attempt to find a pattern in the Court's approach by suggesting that the Court might focus on an existing consensus or, alternatively, on an emerging trend.[91] However, it seems that even ascertaining an existing consensus is an extremely difficult and unpredictable task because it depends on what type of evidence the Court looks for – hard law, soft law, opinion polls, enforceability of law etc. Consequently, to accept that the Court is able to reliably recognize an emerging consensus appears far-fetched at best. In fact, the whole doctrine of the margin of appreciation has been criticized for its inherent inconsistency. The inconsistency seems to be most striking in cases revolving around the freedom of expression under Article 10 with national security[92] concerns on the one hand and public morality[93] on the other.[94] In such cases, the Court's "reasoning has always suffered from a use of ad hoc balancing under the margin of appreciation doctrine which lacks legal certainty and adherence to clear principles."[95]

F Social and Financial Considerations

It appears that in extending the Convention Rights, the European Court of Human Rights has always been balancing two contradictory concepts. On the one hand, it is the living instrument doctrine. One way to apply this doctrine is to recognize that *tempora mutantur, no se tmutamur in illis*. On the other hand, it is the principle of subsidiarity, as applied in the form of the margin of appreciation or through the fair balance test. In any event, the interplay of the two always opposite considerations renders the outcome of the proceedings before the European Court of Human Rights rather unpredictable.

The dichotomy is best illustrated by the comparison of the use of the concept of a European consensus as an indicator of whether the Court should be more active under the principle of living instrument or more passive under the doctrine of margin of appreciation. Accordingly, on certain occasions, the Court was willing to acknowledge a European consensus and therefore refused to grant any

91 Føllesdal *et al*., 2015, p. 88.
92 *The Sunday Times v. The United Kingdom* (No. 2) (Spycatcher case) (App. No. 13166/87) 1991.
93 *Wingrove v. The United Kingdom* (App. No. 17419/90) 1996.
94 Føllesdal *et al*., 2015, p. 79.
95 Lord Lester of Herne Hill, 'The European Court of Human Rights after 50 Years', *European Human Rights Law Review*, Vol. 4, 2009, pp. 461-478 at 474 cited in Føllesdal *et al*., 2015, p. 80.

margin of appreciation on very feeble evidence (e.g. *Marckx v. Belgium*[96]). On other occasions, the Court was unable to find a European consensus despite strong evidence to the contrary (e.g. *SAS v. France*[97]). Furthermore, sometimes the Court granted the margin of appreciation in the absence of a European consensus (e.g. *Lautsi v. Italy*[98]) whereas in other cases, in the same circumstances, it refused to grant the state any margin of appreciation (e.g. *Hirst v. UK*[99]). On other occasions, the Court used its margin of appreciation where there was a strong European consensus (e.g. *A, B and C v. Ireland*[100]).

The unpredictability is equally applicable to cases pertaining to positive obligations under the Convention. Although it is fair to say that the lower the cost of the implementation of the judgment, the more likely the Court is to find a violation (e.g. *X and Y v. The Netherlands*[101] and *E v. UK*[102]), the Court has not been consistent in its approach to high costs cases. Accordingly, on certain occasions it has found no breach of the Convention as the Rights of the petitioner were outweighed by the economic well-being of the country (e.g. *Hatton v. UK*[103] and *Zehnalova and Zehnal v. The Czech Republic*[104]) while on others a breach was pronounced (e.g. *Fadeyeva v. Russia*[105] and *Tatar v. Romania*[106]). This strongly indicates that although there is some cost-benefit calculation in the reasoning of the Court, such cases remain very fact-sensitive.

By analysing the case law of the European Court of Human Rights, it could be concluded that the Court pays due consideration to the social and financial factors. In doing so, the Court employs certain doctrines, concepts and principles that allow it to arrive at what it considers to be the right decision. Each of those instruments pushes the decision into a different direction. Although it is possible to identify what instrument indicates what direction, it is hardly possible to create a manual that would allow the reader to foresee which instrument would be used in what circumstances. Instead, those legal instruments are employed to validate non-legal considerations, such as social and financial factors, and it is those considerations that have the primary effect on the outcome of the Court proceedings.

G Political and Legal Reality

In addition to the social and financial considerations discussed above, it could be argued that the European Court of Human Rights also pays due regard to the

96 *Marckx v. Belgium*, 1979.
97 *S.A.S v. France*, 2014.
98 *Lautsi and Others v. Italy*, 2011.
99 *Hirst v. The United Kingdom*, 2005.
100 *A, B and C v. Ireland*, 2010.
101 *X and Y v. The Netherlands*, 1985.
102 *E and Others v. The United Kingdom*, 2002.
103 *Hatton and Others v. The United Kingdom*, 2001.
104 *Zehnalova and Zehnal v. The Czech Republic*, 2002.
105 *Fadeyeva v. Russia*, 2006.
106 *Tatar v. Romania*, 2009.

European Journal of Law Reform 2017 (19) 3
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political and legal reality of the contracting states. This proposition was confirmed by Judge Myjer in his interview in 2009[107] and is consistent with the Court's case law. Accordingly, in the case of *Young, James and Webster v. UK*[108] where three employees of the British Railways were sacked for their refusal to join a trade union in accordance with the so-called "closed shop" policy, the Court found a violation of Article 11 of the Convention. What is interesting in this case is that the claimants were dismissed in 1975 in the heydays of the Keynesian economic policy in the United Kingdom when trade unions were widely supported by both the Conservative and Labour governments and therefore enjoyed hitherto unprecedented powers as their role was deemed to be vital for the economic well-being of the country.

However, the judgment of the European Court of Human Rights did not come until after a radical change in the state economic policy. By 1982, the government implementing Keynesian economic principles had been replaced by the Thatcher Administration with its neoliberal agenda. One of the main objectives of the Thatcher Administration was to diminish the power of trade unions. Consequently, the case arose at a time when the UK government shielded trade unions but it was only being decided by the European Court of Human Rights once the government turned against the unions. It could be argued that the ruling might have been completely different had the UK government continued its commitment to the role of trade unions in the state's economic affairs. After all, the judgment severely undermined the power of trade unions and, despite arguing to the contrary before the Court, the Thatcher government must have accepted the ruling with a great deal of relief.

Another example of the Court's regard for the political and legal reality could be found in the case of *A v. UK*[109] where the European Court of Human Rights ruled that indefinite detention applicable only to foreign terrorist suspects violated the Convention. This case reached the European Court only after the UK House of Lords had upheld the applicants' claim.[110] The UK highest court ruled that the detention violated Article 5 and it could have been lawful only upon derogation from the Convention pursuant to Article 15. Although the UK government attempted to make such derogation, the House of Lords held it to be invalid because it was discriminatory in nature. Interestingly, the government argued before the European Court of Human Rights that the House of Lords had failed to grant an appropriate margin of appreciation to the government. The European Court acknowledged that states indeed should enjoy a wide margin of appreciation in cases related to terrorism threat; however, it held that

> "where the highest domestic court has examined the issues relating to the State's derogation and concluded that there was a public emergency threatening the life of the nation but that the measures taken in response were not

107 Dzehtsiarou, p. 6.
108 *Young, James and Webster v. The United Kingdom*, 1981.
109 *A v. The United Kingdom* (App. No. 3455/05) 2009.
110 *A and others v. Secretary of State for the Home Department* [2004] UKHL 56.

> strictly required by the exigencies of the situation, the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable."[111]

It seems that the European Court of Human Rights used the principle of subsidiarity to uphold the finding of the UK House of Lords. It is possible that the ruling would have been completely different had the highest domestic court deemed the case to fall within the margin of appreciation. After all, the threat of international terrorism is such a sensitive issue that the European Court of Human Rights has been, more often than not, willing to defer the decision to the state authorities.[112]

Another example of the Court's attention to the legal and political considerations was transparent in the case of *The Sunday Times v. UK*,[113] where the Court looked, *inter alia*, into the definition of "law" as required by the "prescribed by law" element of the Convention Rights. The Court considered whether the offence of contempt of court, which was found at British common law before the enactment of the Contempt of Court Act 1981, fulfilled the requirements of "law" for the purposes of the Convention. The Court laid down the requirements that a rule must fulfil in order to be considered "law" for the purposes of the Convention. Accordingly, it held that the rule must be adequately accessible and the consequences of particular action falling within its scope must be foreseeable, if necessary with independent advice. Having set out those requirements, the Court found that common law should in fact be deemed to be "law" under the Convention. It could be argued that, given the construction of the British legal system, it would be politically impossible for the Court to rule that common law does not qualify as "law" for the purposes of the Convention. However, considering the requirements, it could easily be claimed that common law is neither readily accessible nor foreseeable. In order to have access to the database of judicial decisions, which constitute the backbone of common law, one must subscribe to very expensive private services such as Lexis or Westlaw. Even then, extracting legal principles from an endless list of cases requires time and special skills. In terms of the foreseeability of consequences, not only a layperson cannot be reasonably expected to be able to foresee the consequences of an action in particular areas governed by common law, but also lawyers as well as lower courts often remain clueless as to the ultimate outcome of cases.

This is best illustrated by the law on marital rape, which used to fall outside the statute law before the enactment of the Criminal Justice and Public Order Act 1994 and as such was regulated by common law. In the 1991 case of *R v. R*[114] the UK House of Lords reversed previously settled rule that marital rape is exempted from the law on rape. Although there had been cases that might have been taken

111 *A v. The United Kingdom*, 2009 at para. 174.
112 *E.g. Sher and Others v. The United Kingdom* (App. No. 5201/11) 2015.
113 *The Sunday Times v. The United Kingdom* (App. No. 6538/74) 1979.
114 *R v. R* [1991] 3 WLR 767.

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to point towards that development,[115] in 1984 The Criminal Law Revision Committee still expressly rejected the concept of marital rape.[116] In fact, the marital rape exemption had been at least partially successfully relied upon as late as 1988[117] and 1990.[118] Consequently, to say that in these circumstances any person, whether a lawyer or layman, could have foreseen the development of the law on marital rape is far-fetched at best. It seems that British common law, by its very nature, has great difficulties fulfilling the requirements that the Court laid down. Nevertheless, given its role in the British legal system, it was not an option for the Court to hold that common law falls outside of the scope of the Convention. The idea that common law must be restructured or fall outside the scope of the Convention would have clearly unacceptable political implications.

Interestingly, upon reviewing the case of *R v. R*,[119] the European Court of Human Rights held in *SW v. UK*[120] that the 1991 judgment did not amount to an *ex post facto* law and therefore did not violate Article 7 of the Convention. The Court arrived at this conclusion on the grounds that the 1991 judgment constituted a foreseeable development of law. This case is yet another excellent example of the Court's political sensitivity. The marital rape exemption had clearly become a relic of old times by the year 1991 and with all the pressure emanating from the feminist community supported by the disapproval of society at large, the Court could not have possibly legitimized rape in any of its forms. However, from a strictly legal point of view, the 1991 decision could be described as *ex post factum* rule as it was the first decision directly contradicting a settled precedent and it had not been preceded by any official announcement of any changes in this area of law. In these circumstances, it could be argued that the relevance of the evolution of law under Article 7 of the Convention merely masked the non-legal considerations that prompted the Court to find no violation of the Convention in this sensitive case.

Finally, the Court's political awareness is probably best illustrated when it comes to the issue of whole life sentences as treatment contrary to Article 3 of the Convention. In the 2013 case of *Vinter v. UK*[121] the Court held that the UK law regarding the review of life imprisonment sentences amounted to a violation of the Convention because it offered no prospect of early release. In 2014, the UK Court of Appeal expressly rejected this finding in the case of *R v. McLoughlin*[122] on the basis that the law offered an early prospect of release by way of the Secretary of State's discretion exercisable on exceptional grounds. When the same issue was brought again before the European Court of Human Rights in 2015 as *Hutchinson*

115 *R v. Clarke* [1949] 2 All ER 448; *R v. O'Brien* [1974] 3 All ER 663; *R v. Steele* (1976) 65 Cr. App. R. 22; *R v. Roberts* [1986] Crim LR 188.

116 Cited in C. Wells, *Lacey, Wells and Quick Reconstructing Criminal Law*, Cambridge, Cambridge University Press, 2010.

117 *R v. Kowalski* (1988) 86 Cr. App. R. 339.

118 *R v. Sharples* [1990] Crim LR 198.

119 *R v. R* [1991].

120 *S.W. v. The United Kingdom* (App. No. 20166/92) 1995.

121 *Vinter and Others v. The United Kingdom* (App. No. 66069/09, 130/10 & 3896/10) 2013.

122 *R v. McLoughlin* [2014] EWCA Crim 188.

v. UK,[123] the Court held that there was no violation of Article 3 on the grounds that the Court of Appeal had clarified the law and it indeed allowed early release in some circumstances. Consequently, without altering the law on whole life sentences, the United Kingdom has been able to convince the European Court of Human Rights that the UK law was compatible with the Convention. It seems that either the European Court of Human Rights did not understand the law in 2013 and somehow managed to comprehend it in 2015 following the 2014 Court of Appeal judgment, or it simply refused to make yet another ruling against the United Kingdom fearing it would create the "Hirst Effect". The Hirst Effect refers of course to the judgment of the European Court of Human Rights regarding the prisoners' voting rights in the case of *Hirst v. UK*,[124] which was blatantly ignored by the UK government.

It is undeniable that the European Court of Human Rights pays high regard to the legal and political reality of the contracting states when deciding cases that come before it. Those considerations, along with the social and financial factors, are duly scrutinized by the Court and, according to its intuition, drive it towards a particular outcome of a case at hand. However, the Court masks this process under the disguise of an appropriate judicial mechanism.

H Conclusions

The European Court of Human Rights has developed a wide range of instruments to assist it in interpreting the Convention Rights as a response to a generic nature of Convention. Those doctrines include living instrument, subsidiarity, margin of appreciation, European consensus, positive obligations, fair balance and such. The use of such assistance in dealing with the Convention is not unique to the European Court but rather common to virtually all domestic Constitutional Courts as well.

It has been further observed that those instruments employed by the Court are inherently flexible and depending on their combination, they could lead to opposing outcomes of the proceedings. This article has argued that, very often, those doctrines merely mask the main guiding principle of the Court – the regard to non-legal considerations. When the Court *feels* that a particular ruling against a state would be a step too far, whether because of social, financial or political factors, it applies one of the instruments available to it to put a break on the activist attitude and refrains from any intervention. Nevertheless, there seems to be no blueprint for an actual decision. Instead, depending on the issue at hand, sometimes the European Court of Human Rights engages in standard-reflecting (*i.e.* issues a non-controversial decision) while at other times in standard-setting (*i.e.* extending the Convention Rights).[125]

123 *Hutchinson v. The United Kingdom* (App No. 57592/08) 2015.
124 *Hirst v. The United Kingdom*, 2005.
125 Dzehtsiarou, p. 6.

European Journal of Law Reform 2017 (19) 3
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The fact that the Court takes into account non-legal considerations should come as no surprise. Although some writers[126] have suggested that it is the "moral value" of human rights that should always be prioritized,[127] the Court, having no means to implement its rulings, ultimately depends on the goodwill of the contracting states. If the Court pushed too far in one direction, the contracting states could simply refuse to implement its judgments or pull out of the Convention altogether. So long as it is only a state to the dispute that refused to accept a judgment against it, the Committee of Ministers of the Council of Europe, responsible for the oversight of the implementation of the Court's judgments, could put pressure on that state to come to terms with the adverse ruling. However, should the Court became out of touch with the reality and engaged in issuing judgments that would not be accepted by the majority of the contracting states, it would lose its legitimacy and ultimately send the whole Convention to its doom. After all, the European Court of Human Rights is in no better position than that of the US Supreme Court after its decision in *Worcester v. Georgia*,[128] in response to which President Jackson reportedly said, "John Marshall has made his decision; now let him enforce it!" Judge Spielmann confirmed in his interview in 2010 that those concerns were constantly present in the minds of the Judges of the European Court of Human Rights.[129]

126 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford, Oxford University Press, 2007, p. 74.

127 Dzehtsiarou, p. 1743.

128 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

129 K. Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European consensus in the case law of the European Court of Human Rights', *Public Law*, 2011, p. 6.