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THE INFLUENCE OF NATIONAL JUDICIAL CONSENSUS ON CONVENTION LAW[1]

Arnfinn Bårdsen[2]
European Court of Human Rights, France
Email: Arnfinn.Bardsen@echr.coe.int

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Abstract. The European Court of Human Rights has for a long time deemed European consensus – or lack thereof – to be a relevant consideration in its interpretation and application of the European Convention on Human Rights. By examining the notion of European consensus and the different ways in which it operates under the Convention, this article highlights the influence consensus has had on the Court's case law under the Convention. The article also highlights some of the possible challenges and concerns with a consensus-based approach to the interpretation and application of the Convention.

Keywords: Consensus, National Practice, Convention Law.

Introduction

In 2025, we mark the 75th anniversary of the European Convention on Human Rights. It was intended to be an instrument of stability and European integration, born out of the conviction that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation. Lord Duncan McNair, the first president of the European Court of Human Rights, similarly saw the Convention as an expression of the founding states' common democratic tradition. Moreover, he maintained that further recognition of its rights and freedoms was a means for achieving greater unity among its members.

This remains the lodestar, as affirmed by the Member States in the Reykjavik Declaration from 2023, strikingly labelled 'United around our values'. Indeed, that declaration reaffirms the Member States' deep and abiding commitment to the European Convention on Human Rights and the European Court of Human Rights as the ultimate guarantors of human rights across our continent and to the benefit of more than 700 million people in the 46 Member States of the Council of Europe.

The Reykjavik Declaration reaffirms these Member States' shared responsibility to combat autocratic tendencies and the growing threats to human rights, democracy and the rule of law. These core values are, the declaration states, 'the bedrock of our continued freedom, peace, prosperity and security for Europe.'

[1] This article is based on a lecture I gave at the 11th Annual International Scientific-Practical Conference on Constitutional Law on the Lithuanian Day of Constitution 2024. I thank LL.M Andreas Tangstrøm for assisting me in revising the lecture into the form of an article.

[2] Dr Arnfinn Bårdsen is cand. jur. and Dr. jur. from the Faculty of Law, University of Bergen. Since 2019, he has served as a judge of the European Court of Human Rights, elected in respect of Norway. In 2022 and 2024, respectively, Dr Bårdsen was elected Section-President and Vice-President of the Court. Prior to taking office at the Court, Dr Bårdsen was an associate law professor at the University of Bergen, he served as a judge at the Gulating Court of Appeal, and from 2008 he was a Justice at the Supreme Court of Norway.

Accordingly, one should see the Convention itself as the ultimate and continued expression of a European consensus. One could perceive this consensus as a precondition for the legitimacy and authority of the European Court of Human Rights. I say this in reiterating that the Strasbourg Court's judgements and decisions serve not only to decide those cases brought before the Court but also, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, it often being described as a constitutional instrument of European public order.

In this respect, I emphasise the crucial role of a constructive dialogue between the Court and the domestic judiciary. This should include dialogue through judgements; dialogue through extrajudicial exchange; and dialogue aimed at listening, learning and looking forward, in the spirit of shared responsibility. Dialogue can not only make visible any emerging consensus but can also foster such consensus.

Two institutionalised means of dialogue between the Strasbourg Court and the domestic judiciary must be mentioned in particular.

Firstly, I note that the Constitutional Court of Lithuania is a prominent member of the Superior Court's Network, alongside 110 other domestic apex courts, including the Supreme Court and the Supreme Administrative Court of Lithuania. The Superior Courts Network was set up by the Strasbourg Court in 2015 as a tool for dialogue between the Court and national apex courts, an exchange that is considered central to the functioning of the Convention system. As I will explain later, the Superior Court Network also represents an important mechanism via which the Court can verify any emerging European consensus on a particular matter.

Secondly, we have the Court's advisory role, as established by Protocol 16 to the Convention, which entered into force in 2018. It is noticeable that Lithuania is one of very few Member States that has already made use of the opportunity that this Protocol provides to ask the Grand Chamber of the Strasbourg Court for an advisory opinion on the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto ('*On the assessment, under Article 3 of Protocol No. 1 of the Convention, of the proportionality of a general prohibition on standing for election after removal for office in impeachment proceedings*', 8 April 2022, requested by the Lithuanian Supreme Administrative Court).

1. 'Consensus' as a Convention Concept

Leaving aside consensus as stated in common political declarations such as that of the Reykjavik Declaration in 2023, consensus may find expression through a common practice or a clear tendency, in and among the Member States to the Council of Europe, and, thus, in the European legal space.

One particular variant is consensus expressed via European Union law setting out a particular standard within the Union. Additionally, the interplay between the European Convention on Human Rights as interpreted by the European Court of Human Rights on the one side, and the European Charter of Fundamental Rights as interpreted by the European Court of Justice on the other, has consensus as its starting point (and coherence as its goal). The accession of the EU to the Convention will reinforce this.

Establishing that there exists a European consensus or trend in Council of Europe Member States is one of the methodological principles flowing inherently from the nature and purpose of the Convention as an international human rights treaty that is to be interpreted in light of Article 31 of the Vienna Convention on the Law of Treaties. I note in this respect that a common practice is not only of interest as a matter of comparison but may also, depending on the circumstances, be seen as a joint normative expression.

It must also be made clear that European constitutional and supreme courts play a key role in the protection of democracy, of the rule of law and of fundamental rights, very often being the interlocutors between a domestic legal and political system on one hand and the European legal and political system

on the other. The Court is aware that its jurisprudence may inform constitutional interpretation at the domestic level. Furthermore, and equally importantly, it is clear that the jurisprudence of European apex courts, notably when considered from a comparative perspective, informs the Court in its interpretation and application of the Convention. Certainly, due to applicants' duty to exhaust domestic remedies before turning to the Court in Strasbourg, it is in principle the domestic courts, including the constitutional courts of the Member States, that are in the driver's seat. Climate-change litigation is a good example, see *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* [GC] (2024), *Duarte Agostinho and Others v. Portugal and 32 others* [GC] (2024), notably § 228.

In *Humpert and Others v. Germany* (2023), § 101, the Grand Chamber of the Court more generally reiterated that in defining the meaning of terms and notions in the text of the Convention, the Court can and must consider elements of international law, the interpretation of such elements by competent organs and the practice of European States reflecting their common values. Moreover, the Court held that any consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court.

Within the Convention system, European consensus systematically operates in two interrelated – but nevertheless distinct – ways, to which I now turn.

2. 'Consensus' as an Interpretative Tool

The existence of consensus is generally understood as being an important basis for the possible evolution of Convention standards through the Court's case law. For example, in the seminal case of *Tyrer v. the United Kingdom* (1972), the Court observed that it could not but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe. In this judgement, the inherent dynamism of the Convention found expression in the 'living instrument' doctrine.

This doctrine was forcefully confirmed and applied in the Grand Chamber judgement *Fedotova v. Russia* (2023), on the Member States' duty under Article 8 of the Convention (Private and Family Life) to have in place a system for the legal recognition of same-sex couples. The Court reiterated in that judgement that the Convention is a living instrument that must be interpreted in the light of present-day conditions and of the ideas prevailing in democratic States today (*Fedotova v. Russia,* § 167). The Court went on to make it clear that as the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any evolving convergence as to the standards to be achieved. By preferring an evolutive interpretation of the Convention, the Court ensures that its text moves in step with Europe's conscience, while admitting that any failure to maintain a dynamic and evolutive approach would risk rendering the Court a bar to reform or improvement.

Increasingly, the Court is also looking at sources of international law to achieve a similar aim. If we take the Grand Chamber judgement of *Grzęda v. Poland* (2022), which dealt with the premature termination of a judge's mandate as a member of the Council for the Judiciary, as an example, the international law section contains extensive references to international law and practice. Among the instruments referenced, one may find Council of Europe non-binding opinions and recommendations (from the Committee of Ministers, the Parliamentary Assembly and the Venice Commission), and European Union Law, including the case law of the Court of Justice of the European Union.

Another example is the huge number of cases raising questions under Articles 2 and 3 of the Convention, where the Court more generally has relied on a mix of *de facto* practices and international instruments to identify an incremental move towards an 'increasingly high standard being required in the area of protection of human rights' (*Selmouni v. France* [GC] (1999), § 101). Through this, it has inferred that the concepts of 'inhuman and degrading treatment and punishment have evolved considerably' over the years, for example with the effect that Contracting States now consider capital punishment to be an 'unacceptable form of punishment no longer permissible under Article 2', which now also amounts to

inhuman or degrading treatment under Article 3 (*Al-Saadoon and Mufdhi v. United Kingdom* (2010), § 119–120).

Similarly, the Court has found that a whole-life sentence without the possibility of parole with reference to substantial progress towards rehabilitation having been made would violate Article 3 of the Convention (*Vinter and Others v. the United Kingdom* [GC] (2013), § 119 and § 121). In support of this conclusion, reference has been made to clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved (*Vinter and Others v. the United Kingdom*, § 114).

3. 'Consensus' as a Regulator of the Court's Scrutiny

Beyond the impact of a European consensus on the interpretation of the Convention, such a consensus may also be said more broadly to assist the Court when determining the level of scrutiny with which a particular issue is to be examined.

Several of the provisions of the Convention lend themselves to an assessment of necessity or proportionality, see, for instance, Article 8 § 2 and Article 10 § 2. In its review of the application and implementation of these provisions at the national level, the Court has consistently accorded domestic authorities a margin of appreciation.

Following the entry into force of Protocol 15 to the Convention in 2021, the according of such a margin also finds support in the last Recital of the Preamble of the Convention. As the Preamble shows, the according of such a margin of appreciation must be understood in light of the general principle of subsidiarity and the inherent allocation of duties and competences under the Convention.

Pursuant to Article 1 of the Convention, the 'High Contracting Parties shall secure to everyone within their jurisdiction' the rights and freedoms of the Convention and its Protocols. In other words, the very starting point of the Convention is that the primary responsibility to ensure the application and effective implementation of the Convention lies with the States Parties and national authorities, including domestic courts at all levels.

Nonetheless, Article 19 of the Convention makes clear that the Court's role is to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. Even if the States should be the first to address human rights issues that arise within their territory, they have thus also accepted that their actions can be reviewed by the Strasbourg Court, which remains the ultimate arbiter of the scope and content of the Convention (*Namik Yüksel v. Türkiye* (2024), § 35).

This subsidiary nature of the Court's review – and the margin of appreciation that accordingly is to be accorded to the Member States when conducting said review – has been an integral part of the Convention machinery for the majority of its existence. Ever since the plenary judgement of the Court in *Sunday Times v. the United Kingdom* (no. 1) in 1979, it has, however, also been widely accepted that the margin of appreciation to be accorded will vary depending on the circumstances of the case. The margin will for example tend to be relatively narrow where the right at stake is crucial to an individual's effective enjoyment of intimate or key rights, or where a particularly important facet of an individual's existence or identity is at stake (*Paradiso and Campanelli v. Italy* [GC] (2017), § 182). Conversely, the margin will often be wider if the state is required to strike a balance between competing Convention rights.

When it comes to European consensus as a factor in the determination of the margin of appreciation, the rule of thumb is as follows. Where there is a large degree of European consensus, the State's margin of appreciation tends at the outset to be narrow. Conversely, where there is little or no consensus, that margin of appreciation tends, again as a starting point, to be wider (*Glor v. Switzerland* (2009), § 75).

In this regard, it is also worth noting that the notion of a European consensus relates not only to the relative importance of the interest at stake but also to the best means of protecting it (*Evans v. the United Kingdom* [GC] (2007), § 77).

The case of *S.A.S. v. France* [GC] (2014) may serve as a useful illustration of the Court's approach here. The case concerned a blanket ban in France on wearing clothing designed to conceal one's face, such as a full-face veil, in public places. The Court noted that while France at the time was one of only two European countries to adopt a blanket ban, there existed no consensus on the question of wearing a full-face veil in public in general, or on the use of a blanket ban in particular (*S.A.S. v. France,* § 156). These findings contributed to France being accorded a wide margin of appreciation and to the Court's conclusion that there had been no violation of the Convention in that case.

Another salient example is the Grand Chamber judgement in *Lautsi v. Italy* [GC] (2011) on the use of the crucifix in Italian schools. In concluding that it was for the Italian authorities, within their margin of appreciation, to decide whether to continue this tradition, the Court referred to the fact that there was no European consensus on the question of the presence of religious symbols in state schools (*Lautsi v. Italy*, § 70).

Whereas the *Lautsi* case could be seen as relating to differing traditions, *Paradiso and Campanelli v. Italy* illustrates how a lack of European consensus could also stem from Member States adopting different approaches when faced with new issues. The case concerned two applicants who had brought to Italy from abroad a child who had no biological tie with either parent and who had been conceived through an assisted reproduction technique – surrogacy – that was unlawful under Italian law. The Court noted that surrogacy arrangements raised sensitive ethical questions on which there existed no consensus among the Contracting States (*Paradiso and Campanelli v. Italy,* § 203). Italy was thus accorded a wide margin of appreciation, which the Court concluded that they had remained within in removing the child from the applicants' care.

4. Restraints and Counterbalancing Factors

The European Court of Human Rights has applied various terms when referring to the concept of European consensus. The Court has used, for example, the phrases 'international consensus among Contracting States of the Council of Europe' (*Lee v. the United Kingdom* [GC] (2001), § 95), 'common standard between Member States of the Council of Europe' (*T. v. the United Kingdom* [GC] (1999), § 72), 'common European standard' (*X, Y and Z v. the United Kingdom* [GC] (1997), § 44), 'general trend' (*Ünal Tekeli v. Turkey* (2004), § 62), and 'the ideas prevailing in democratic States today' (*Kress v. France* [GC] (2001), § 70). These variations in terminology have apparently not affected the meaning. However, there appears to be a slight preference for the term 'trend', given that 'consensus' may imply, from a linguistic perspective, something close to an identity in behaviour and opinions among all parties. When seen as a whole, the Court's case law on the matter clearly demonstrates that the mechanism is initiated at an earlier stage, depending on a wide range of variables.

Moreover, while the Court's recourse to European consensus introduces an element of objectivity and predictability and adds legitimacy to the living instrument doctrine, it also raises difficulties. Indeed, there are several restraints on the use of a consensus-based or comparative law approach to the interpretation and application of the Convention. Here, I will briefly mention three examples.

Firstly, we have the methodological challenges connected with any comparative approach to law research. These challenges relate both to the quality of the comparative material and to the use of it to discover a possible relevant pattern or tendency and in turn to apply it normatively. I should mention here that, since 2016, the Court's comparative research is typically carried out with the assistance of the apex courts of the Member States, within the framework of the Superior Courts Network. This would normally involve a survey of the law and practice of approximately 30 to 40 Member States. Involving the domestic apex court directly in this process not only provides greater quality but also adds legitimacy.

Secondly, one may ask how a consensus-based approach to the interpretation and application of the Convention goes along with the principle of subsidiarity, sovereignty and respect for domestic democratic processes. One may, in this respect, also question what the Court is really looking for when comparing national laws and practices. Is it seeking a consensus on ends, on means to achieving those ends, on the quality of law, or even on moral matters? Although Member States have a shared heritage of political traditions, ideals, freedom and the rule of law, the Grand Chamber judgements of *Lautsi v. Italy* (2011) and *S.A.S. v. France* (2014) may suggest that the Convention does not require States to have a uniform set of social values. Therefore, a simple search for a majoritarian view when interpreting comparative material runs the risk of losing sight of the target or of upsetting the delicate balances that are struck at a national level.

Thirdly, we have the delicate and more far-reaching question of the continued realism of the very idea of a European consensus. Despite the credo of the Reykjavik Declaration, it is currently no exaggeration to claim that the fundamental values of the Council of Europe, namely human rights, democracy and the rule of law, are increasingly being called into question in our society. Institutions, such as the Council of Europe and the European Court of Human Rights, that are grounded in the concept of collective guarantees of human rights and multilateralism, are also vulnerable to attack, as are domestic and international judges. The challenges to the European Court of Human Rights and the human rights framework in our time may be understood in the context of the political polarisation and the rise of authoritarianism that we are witnessing in society in general.

Conclusions

One may safely conclude that referring to the level of European consensus is today a well-established and rather frequently used tool by the European Court of Human Rights. It is a tool that enables the Court to anchor the evolving interpretation and application of the Convention in present-day conditions, as these conditions transpire through the prism of a broad pan-European comparative analysis. The method enhances the legitimacy of the Court's dynamic approach. Moreover, this not only enables the Court to keep the Convention adapted and alive but also provides direction, momentum and depth to that evolution.

As an extension of this, one may have to pose the following questions. What, then, if there emerges a European consensus that implies a 'watering down' of individual rights and freedoms in one or more areas? Could or should such a finding lead to the regression of the protection afforded by the Convention? Is the living instrument doctrine a one-way street allowing only for a progressive, expanded level of the protection of rights? Or is the duty to interpret and apply the Convention in the light of present-day conditions also a duty to step back, if need be? The fundamental question that begs to be addressed is whether the trajectory of the Convention system now, after 75 years, has reached the point where a reconsolidation may be called for, not as a contrast to the protection of fundamental rights, but as a precondition for maintaining effective liberal democracies that can also continue to be the guarantors of such protection in the future.

Herein lies a tremendous challenge. Let there be no doubt that the future of fundamental rights, such as those stemming from the European Convention on Human Rights, depends on independent national and international courts taking them seriously and rendering them effective in practice. To do so, courts must make wise, sustainable and principled choices, within the limits of the law and in accordance with the powers vested in the judiciary. Furthermore, the courts, be they national or international, must do this in a spirit of dialogue. Moreover, and equally important, we must do this in the spirit of a shared responsibility. A shared responsibility for the safeguarding of our common European legal order, a legal order founded on the effective and coherent protection of our democracies, of our fundamental rights and freedoms and on the rule of law.

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