## Articles

# European Consensus and the Evolutive Interpretation of the European Convention on Human Rights

*By Kanstantsin Dzehtsiarou*[*]

### A. Introduction

The European Convention of Human Rights (ECHR) should be an instrument of development and improvement rather than an "end game"[1] treaty which froze the state of affairs that existed 60 years ago. At the same time, evolutive interpretation should not be tantamount to arbitrary interpretation. This paper seeks to explain how the European Court of Human Rights ("ECtHR") strikes a balance between development and stability.

If proper balance is achieved, the case law of the ECtHR will attain two purposes at the same time: firstly, the practical and effective nature of rights provisions will be maintained, and secondly, acceptance and domestic implementation of judgments by the Contracting Parties to ECHR will be ensured. An evolutive interpretation of the ECHR is the tool that keeps the meaning of the rights both contemporary and effective. European consensus injects European context and predictability into the ECtHR's reasoning. This paper argues that European consensus provides a sufficient response to the legitimacy challenges made against evolutive interpretation.

This paper provides a brief overview of the ECtHR's application of evolutive interpretation and European consensus. The second section of the paper examines the challenges to the legitimacy of evolutive interpretation. The third section outlines the role of European consensus in the "legitimizing" of evolutive interpretation.

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[1] Jared Wessel, *Relational Contract Theory and Treaty interpretation: End-Game Treaties v. Dynamic Interpretation,* 60 ANNUAL SURVEY OF AMERICAN LAW 149, 149 (2004).

**B. Evolutive Interpretation and European Consensus in the Case Law of the ECtHR**

Evolutive interpretation and European consensus were simultaneously deployed by the ECtHR in a substantial number of cases. In some cases European consensus has been approached as a sign for evolution;[2] sometimes lack of consensus prevented the ECtHR from deployment of evolutive interpretation.[3] In this section, a short introduction to the concepts of evolutive interpretation and European consensus is made.

*I. Scope of Evolutive Interpretation*

Evolutive (or dynamic) interpretation is a tool of interpretation which provides the ECtHR with the necessary degree of flexibility to ensure the realization of rights guaranteed by the ECHR and the Protocols. If important social, technical changes have occurred than the precedent of previous case law should change accordingly.[4] The ECtHR has affirmed dynamic interpretation of the ECHR by stating that the European Convention is a "living instrument" and that it should be interpreted in the light of "present day conditions."[5]
The ECtHR deployed dynamic interpretation for the first time in *Tyrer v. the United Kingdom.* In this case the ECtHR dealt with the issue of whether the practice of corporal punishment in schools is in compliance with the ECHR. It stated that it must:

> [….] also recall that the Convention is a living instrument which...must be interpreted in the light of present-day conditions....[T]he Court cannot but be influenced by the developments and commonly accepted standards in... the Member States of the Council of Europe [….][6]

The ECtHR ultimately ruled that corporal punishment is degrading and does indeed violate the ECHR. After *Tyrer*, the ECtHR continued using evolutive doctrine in relation to a broad variety of Convention Rights: for example, the Article 3 prohibition of torture;[7] the Article 6

[2] Micallef v. Malta, 50 Eur. Ct. H. R 37 (2010), at para. 78.

[3] Vo v. France, 40 Eur. Ct. H. R. 12, at para. 82 (2005).

[4] Christine Goodwin v. the United Kingdom, 35 Eur. Ct. H. R. 18, at para. 74 (2002).

[5] Tyrer v. the United Kingdom, 26 Eur. Ct. H. R. (ser. A), at para. 183 (1978).

[6] *Id.* at para. 183.

[7] In relation to the death penalty: Soering v. the United Kingdom, Eur. Ct. H.R. (ser. A, No. 161), at para. 104 (1989), and the definition of torture: Selmouni v. France, 29 Eur. Ct. H. R. 403, at para. 101 (2009).

right to a fair trial;[8] the Article 5 right to liberty and security,[9] the Article 8 right to private life[10] and the Article 14 prohibition on discrimination.[11]

Dynamic interpretation has been generally welcomed by the ECHR's commentators, lawyers, and judges. Former President of the ECtHR, Luzius Wildhaber, writing extra-judicially, emphasized that evolutive interpretation is fundamental to the effectiveness of the ECHR system and the ECtHR's authority.[12] A dynamic reading of the ECHR ensures that its rights are made practical and effective.[13] Evolutive interpretation provides a necessary degree of flexibility to ECHR law in a rapidly changing environment.[14]

The ECtHR can hardly avoid using evolutive interpretation if it wishes to maintain the effectiveness of the ECHR. Contemporary Europe represents a different landscape in terms of human rights protection when compared with 60 years ago.[15] Application of the standards adopted during the early years of the ECHR would have resulted in turning it into an instrument of stagnation. Rozakis has argued that the rudimentary nature of ECHR provisions and the age of the instrument have acted as the main driving forces behind an evolutional interpretation.[16]

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[8] Free legal aid in civil cases: *see* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A), at para. 26 (1979. For certain procedural matters in the French Administrative Court, *see* Kress v. France, VI Eur. Ct. H.R., at para. 70 (2001); for pre-trial injunctions *see Micallef, supra,* note 2, at paras. 78-86.

[9] Stafford v. the United Kingdom*,* 35 Eur. Ct. H. R. 32, at para. 68 (2002).

[10] For the clarification of the terms "family life," *see* Marckx v. Belgium*,* 31 Eur. Ct. H.R. (ser. A, 1979), McMichael v. the United Kingdom, 307B. Eur. Ct. H.R. (ser. A, 1995); "private life," *see* Christine Goodwin v. the United Kingdom, *supra* note 4, Niemietz v. Germany*,* 251B Eur. Ct. H.R. (ser. A) at para. 29 (1995), Halford v. The United Kingdom*,* 32 Eur. Ct. H. R. at para. 43-46 (1997), reports of Judgments and Decisions, Judgment of 25 June 2007; and "home," *see* Société Colas Est and Others v. France, 39 EUR. Ct. H. R. 17 (2004). So-called "environmental" case law also found its way into ECtHR's jurisprudence by means of evolutive interpretation; *see* Hatton and Others v. the United Kingdom*,* 34 EUR. Ct. H. R. 1 (2002).

[11] For an analysis of equality between children born in wedlock and outside of marriage *see*, Marckx v. Belgium, *supra* note 10; heterosexuals and homosexuals *see* Dudgeon v. the United Kingdom, 45 Eur. Ct. H.R. (ser. A, 1981); gender equality, *see* Schuler-Zgraggen v. Switzerland, 263 Eur. Ct. H.R. (ser. A, 1993).

[12] Luzius Wildhaber, *European Court of Human Rights*, 40 CANADIAN YEARBOOK OF INTERNATIONAL LAW 310 (2002).

[13] GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 79 (2009).

[14] Marton Varju, *Transition as a concept of European human rights law*, EUROPEAN HUMAN RIGHTS LAW REVIEW (EHRLR) 170, 172 (2009).

[15] *See* Wildhaber, *supra* note 12, at 310.

[16] Christos Rozakis, *The European Judge as Comparativist,* 80 TULANE LAW REVIEW 257, 260-261 (2005).

*II. Scope of European Consensus*

The concept of European consensus in the case law of the ECtHR may be defined as a general agreement among the majority of Member States of the Council of Europe about certain rules and principles identified through comparative research of national and international law and practice.[17] European consensus is approached as a mediator between dynamic interpretation and the margin of appreciation.[18]

European consensus is a rebuttable presumption in favor of the solution adopted by the majority of the Contracting Parties.[19] For example, in *Unal Tekeli v. Turkey*, Turkey appeared to be the last state in Europe where it was illegal for a woman to remain with her maiden surname after she married.[20] The ECtHR held that this law violated Article 14 when taken in conjunction with Article 8 of the ECHR.

If the law of the respondent state diverts from European consensus it does not automatically mean that the state in question violates the ECHR. The following outcomes might occur. Firstly, the Member State's law may fall outside European consensus without reasonable justification, as in the above-mentioned *Unal Tekeli v. Turkey* case. In this case, the consequences are usually quite clear: The ECtHR normally holds a violation of an ECHR right. Secondly, the Member State may have a particularly strong justification for the law in question even if this law is different to common European trend. The list of reasons that can justify diversion from the solution provided by the European consensus is open for the ECtHR. One can suggest that in assessment of this justification, it takes into account the moral sensitivity of the matter at issue,[21] historical and political justification,[22] and other factors.

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[17] *See* Kanstantsin Dzehtsiarou, *Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights*, PUBLIC LAW 534, 541-548 (2011).

[18] Alexander Morawa, *The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom*, 3 GERMAN LAW JOURNAL (GLJ) (2002), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=172 (last accessed: 27 September 2011).

[19] EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 420 (2001).

[20] Ünal Tekeli v. Turkey, 42 Eur. Ct. H. R. 53, at para. 62 (2006).

[21] A, B. and C. v. Ireland, 2032 Eur. Ct. H.R., at para. 188 (2010).

[22] Republican Party of Russia v. Russia, 12976 Eur. Ct. H.R. 7, at para. 126 (2011), available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Republican%20|%20Party%20|%20of%20|%20Russia%20|%20v.&sessionid=79205413&skin=hudoc-en (last accessed: 28 September 2011) (last accessed: 27 September 2011).

The ECtHR applies European consensus extensively in relation to a broad variety of rights. It was deployed in the reasoning of the ECtHR in cases concerning right to life,[23] prohibition of torture,[24] right to liberty and security,[25] fair trial,[26] personal rights provided by articles 8-11,[27] property rights,[28] right to education[29] and voting rights.[30]

European consensus possesses legitimizing potential. It is persuasive because it is based on the decisions that are made by democratically elected bodies; and it can positively affect the clarity of the ECtHR's reasoning.[31]

### C. Legitimacy Challenges of European Consensus and Evolutive Interpretation

Commentators have identified key concerns regarding the legitimacy of evolutive interpretation. Firstly, case law built on evolutive interpretation can amount to the exercise of a legislative role and bypasses the sovereign consent of the Contracting Parties.[32] Secondly, a so-called "counter-majoritarian difficulty"[33] may arise in determining the correct time for an evolution. Thirdly, it has been argued that evolutive interpretation

[23] *Vo, supra* note 3, at para. 82.

[24] *Selmouni, supra* note 7, at paras. 96-100.

[25] *Stafford, supra* note 9, at paras. 68-69.

[26] *Micallef*, *supra* note 2, at para. 78.

[27] *Goodwin*, *supra* note 4, at paras. 85-86; *Tekeli*, *supra* note 20, at para. 61; Handyside v. the United Kingdom, Eur. Ct. H.R. (ser. A), at para. 48 (1976); Stoll v. Switzerland, 47 Eur. Ct. H. R. 59, at para. 155 (2007).

[28] Mazurek v. France, 42 Eur. Ct. H. R. 9, at para. 31 (2006).

[29] D.H. and others v. the Czech Republic, 47 Eur. Ct. H.R. 3, at para. 181 (2008).

[30] Hirst v. the United Kingdom, 42 Eur. Ct. H. R. 41, para. 81 (2006).

[31] European consensus links evolutive interpretation to external circumstances which can be verified.

[32] Legitimacy of evolutive interpretation was challenged in *Golder v. United Kingdom*. In this case the ECtHR interpreted ECHR dynamically and stated that right to access court is to be protected under Article 6 of ECHR. Judge Fitzmaurice in his separate opinion stated that the Contracting Parties cannot be expected to comply with an obligation which is not articulated or defined. *See* Golder v. the United Kingdom, 18 Eur. Ct. H.R. (ser. A, 1975). Separate opinion of Judge Fitzmaurice, at para. 30.

[33] The legitimacy of constitutional judicial review of legislation is often challenged from the point of view of the so-called "counter-majoritarian difficulty." *See* Luc B. Tremblya, *General legitimacy of judicial review and the Fundamental basis of constitutional law* 23 OXFORD JOURNAL OF LEGAL STUDIES 525, 525 (2003). This difficulty relates to the fact that, in systems with judicial review of legislation, non-elected judges are able to question a decision made by a democratically elected representative organ. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L. J. 1346 (2006). This difficulty is relevant in the case of international tribunals like the ECtHR.

contradicts principles such as consistency in case law, legal certainty, and predictability.[34] Hence, the process legitimacy of the ECtHR case law is arguably undermined by evolutive interpretation.[35] Fourthly, even those commentators who accept evolutive interpretation in principle have maintained that its application has been weakly supported by empirical data in the ECtHR's reasoning.[36]

At the same time, the legitimacy of European consensus is challenged on grounds that are diametrically opposed to the ones above. Firstly, it has been argued that human rights should not depend on what has been decided or legislated by the majority of the Contracting Parties. [37] Secondly, commentators pointed out that the ECtHR has to set universal standards and fulfill the role of external guardian, while European consensus prevents it from accomplishing this task.[38] Those commentators who question the legitimacy of European consensus usually welcome broader application of evolutive interpretation.[39]

In the case law the correlation between consensus and evolutive interpretation is usually explained by the ECtHR in the following terms:

> The existence of a consensus has long played a role in the development and evolution of Convention protections.... the Convention being considered a "living instrument" to be interpreted in the light of present-

[34] *See* Hans LM Gribnau, *Legitimacy of the Judiciary,* 6 ELECTRONIC JOURNAL OF COMPARATIVE LAW (2002).

[35] There is a group of theorists who define legitimacy as an attribute which a norm, decision, or institution possesses only if it was adopted or created in accordance with accepted procedure. Weber argued that readiness to conform to rules follows from the fact that it is 'formally correct and imposed by accepted procedures.' *Id. See also* MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 19 (1972); JOSEPH RAZ, THE AUTHORITY OF LAW (1979)). Kelsen, for instance, disregarded the norm content while discussing its validity; he stated "a legal norm is valid... because it is created in a certain way;" *See* HANS KELSEN, PURE THEORY OF LAW 198 (1989).

[36] Alastair Mowbray, *The Creativity of the European Court of Human Rights* 5 HUMAN RIGHTS LAW REVIEW (57, 61 (2005).

[37] George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 279, 304 (2004).

[38] Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards* 31 JOURNAL OF INTERNATIONAL LAW AND POLITICS 843, 852 (1999).

[39] Letsas argues that dynamic interpretation "surprise[s] Contracting States in that they often have to introduce legislative measures in order to comply with their Convention obligations. These measures may be quite extensive, involving, among other things, financial costs that will affect the community as a whole." This inconvenience, according to Letsas, is outweighed by the moral value of human rights. *See* Letsas, *supra* note 13, at 74.

> day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention.[40]

Starting from *Tyrer v. the United Kingdom*, the ECtHR deployed consensus as an evidence for evolutive interpretation.[41]

Lack of consensus may prevent the ECtHR from dynamic reading of the ECHR. In *Sheffield and Horsham v. the United Kingdom*, the ECtHR considered whether the failure to change the birth certificates after gender reassignment surgery violates Article 8 of the ECHR. The ECtHR stated that it cannot depart from previous case law because for it, this continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.[42] In *Christine Goodwin v. the United Kingdom*, the ECtHR dealt with similar facts and overturned the decision in *Sheffield and Horsham* by stating that there is a "continuing international trend" in transsexuals' rights recognition.[43]

One can argue that the fact that European consensus was deployed to support evolutive interpretation proves that European consensus is not a sign of stability in the case law but rather an instrument which justifies changes. The European consensus argument does not contradict evolution but rather restricts it. If European consensus is deployed consistently, the ECtHR is not in a position to employ evolutive interpretation arbitrarily.

Some commentators approach European consensus and evolutive interpretation as almost mutually exclusive: the ECtHR can either defer to the solutions adopted at the national level or deploy evolutive interpretation. This clash between European consensus and evolutive interpretation is further illustrated through the opinions of Lord Hoffmann and Judge Zupančič.

Lord Hoffmann is known for his anti-ECtHR rhetoric.[44] He argues that evolutive interpretation as it is approached by the ECtHR is illegitimate. He points out that:

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[40] *A., B. and C. v. Ireland*, *supra* note 21, at para. 234.

[41] *Tyrer,* supra note 5, at para. 183.

[42] Sheffield and Horsham v. the United Kingdom, V Eur. Ct. H.R. at para. 58 (1998).

[43] *Goodwin*, *supra* note 4, at para. 85.

[44] Lord Hoffmann recently has authored a foreword to a report that advocated denunciation of the ECHR by the United Kingdom. Lord Leonard Hoffmann, BRINGING RIGHTS BACK HOME: MAKING HUMAN RIGHTS COMPATIBLE WITH PARLIAMENTARY DEMOCRACY IN THE UK 7, 8 (Michael Pinto-Duschinsky ed., 2011).

> The proposition that the Convention is a "living instrument" is the banner under which the Strasbourg Court has assumed power to legislate what they consider to be required by "European public order". I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times. It cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge[45] saying of a decision of the German Constitutional Court:
>
> "I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press … It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded."
>
> [...] What legislative power the judicial representative of Slovenia can wield from his chambers in Strasbourg. Out with this pernicious American influence. What do their courts or Founding Fathers know of human rights? It is we in Strasbourg who decree the European public order. Let the balance be struck differently, I say, and all the courts of Europe must jump to attention.[46]

Lord Hoffmann questions the competence of the ECtHR to use evolutive interpretation the way that it does. This opinion can be put on one extreme of the spectrum of opinions related to legitimacy of European consensus and evolutive interpretation. Lord Hoffmann argues that the ECtHR should not arbitrary decide when it can deploy evolutive interpretation.

On the other extreme of the spectrum, one can place a view articulated by Judge Zupančič, the Slovenian judge mentioned in the quoted opinion of Lord Hoffmann. Judge Zupančič questions the role of national laws of the Contracting Parties in the interpretation of the ECHR. Judge Zupančič maintains that an ECtHR judge should not be bound by rules which are accepted in the majority of the States.[47] For that reason, it seems that European

[45] Von Hannover v. Germany, 43 Eur. Ct. H. R. 7 (2006). Concurring opinion of Judge Zupančič.

[46] Lord Leonard Hoffmann, *The Universality of Human Rights*, 125 LAW QUARTERLY REVIEW 416, 428-429 (2009).

[47] Interview with Bostjan Zupančič, Judge of the ECtHR, in Strasbourg (30 April 2010).

consensus is less relevant to the judicial reasoning. Judge Zupančič fundamentally questioned the role of European consensus as a compelling argument. He explains:

> Consensus…. is always a question of the Court being a democratic institution which decides by the majority of the judges according to what is accepted and what is not. The difference between a court and a democratic parliament is not that you decide by virtue of simple majority but you decide by criteria which are independent of the preferences of the majority. When you vote the majority wins and the minority loses over a particular issue. Let me put it this way: imagine that we have a medical council dealing with a particular medical issue - cancer. We have surgeons, dermatologists, and other medical specialists – consilium. They debate over the issue. They may not arrive to consensus. Somebody may disagree whether there is cancer or there is no cancer. The issue is not whether we have consensus or not – the issue is whether there is cancer or not. The issue here in the Court is very similar. The issue is not who is in the majority or what the majority's view is. We start from the assumption that what we are dealing with is something objective with pertains to the sense of justice: logic, cognitive analysis rather than simply a prevailing view of the judges or even more prevailing view of the states they come from.[48]

Both of these views are potentially problematic. Lord Hoffmann as well as some other commentators[49] point out that the founders of the ECHR did not envisage dynamic interpretation.[50] This view did not remain unchallenged. Nicol, for instance, points out that

> [I]t is clear from the *travaux préparatoires* that a significant proportion of the Consultative Assembly wanted the ECHR to go far wider than merely

[48] *Id.*

[49] Elizabeth Wicks, *The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry,* PL 438, 447 (2000).

[50] Lord Hoffmann argued that ECHR should not be used against "old democracies." He pointed out, "When we joined, indeed, took the lead in the negotiation of the European Convention, it was not because we thought it would affect our own law, but because we thought it right to set an example for others and to help to ensure that all the Member States respected those basic human rights which were not culturally determined but reflected our common humanity." *See* Lord Leonard Hoffmann, *Human Rights and the House of Lords,* 62 MODERN LAW REVIEW 159 (1999).

> preserving post-war democracy. For many negotiators, it would not only fortify the structure but widen the bases of fundamental freedoms.[51]

The legal basis for evolutive interpretation is enshrined in the ECHR itself and within general international law. Gerards argues that an evolutive approach means that the provisions of the ECHR should be interpreted according to the object and purpose of the ECHR as defined in the Preamble.[52] The Preamble declares that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of human rights and fundamental freedoms. The living instrument doctrine enhances effectiveness of human rights,[53] and in this way ensures their further realization.

Judge Zupančič has compared judicial reasoning with medical consilium. This view is questionable as the purpose of judging is not establishing scientifically proven truth. Posner, for example argues that a judge "does not have the luxury of the pure thinker, who can defer coming to a conclusion until the evidence gels".[54] Pure logical thinking in law can bring one to mechanical jurisprudence or jurisprudence as science.[55] The idea of mechanical jurisprudence was predominantly rejected by judges and commentators.[56] The judges do not establish scientifically proven truth in their judgments, therefore, the comparison with medical consilium seems slightly farfetched.[57]

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[51] Danny Nicol, *Original Intent and the European Convention on Human Rights' Spring*, PL 152, 156 (2005).

[52] Janneke Gerards, *Judicial Deliberations in the ECtHR*, *in* THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND (Nick Huls, Maurice Adams & Jacco Bomhoff eds., 2009).

[53] *See* Letsas, *supra* note 13, at 79.

[54] RICHARD A POSNER, THE PROBLEMS OF JURISPRUDENCE 72 (1990).

[55] In the beginning of the 20th century American lawyer Roscoe Pound defined mechanical jurisprudence and criticized it. He pointed out that "the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however, honest, and however much disguised under the name of justice or equality or natural law." *See* Roscoe Pound, *Mechanical Jurisprudence,* 8 COLUMBIA LAW REVIEW 605 (1908). *See also* POSNER, *supra* note 53, at 39-42.

[56] BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE 27-43 (2010).

[57] It should be note that there were a few attempts to compare law and science in legal scholarship. Kelsen, for instance argued that there are similarities between law and science. However, he also pointed out emphasized an important difference. He argued "The rule of law and the law of nature differ not so much by the elements they connect as by the manner of their connection. [T]he principle according to which natural science describes its object is causality; the principle according to which the science of law describes its object is normativity." *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 50 (1945).

If the ECtHR follows the approach proposed by Judge Zupančič, it can face a "counter-majoritarian difficulty" as articulated by Lord Hoffmann.[58] European consensus can remedy this concern; at the same time, the ECtHR is entitled to disregard consensus if justification is provided.[59]

The approaches of Judge Zupančič and Lord Hoffmann are not the only ones but they seem to represent two alternatives in decision-making process of the international tribunal. These two views assess the impact of domestic law on international adjudication differently. By saying this, it is not suggested that there are just two alternatives – either the ECtHR establishes its subordination to consent and laws of the Contracting Parties or exercise unrestricted and flexible interpretation. There are a few moderate views of the role of European consensus and evolutive interpretation. Lack of consensus in the newly litigated areas can advocate broader margin of appreciation.[60] European consensus is often considered as a variable which leads the ECtHR to either widen or narrow down the width of the margin of appreciation.[61] European consensus is a rebuttable presumption[62] and therefore, the ECtHR does not always follow the solution the consensus argument seems to suggest.[63] There is no linear dependency between European consensus and evolutive interpretation. The opinions of Lord Hoffmann and Judge Zupančič seem to represent more radical views on the role of consensus and evolutive interpretation in the decision-making process.

This paper seeks to reconstruct a middle ground between European consensus and evolutive interpretation. It is argued in the following part of the paper that European consensus and evolutive interpretation can rectify each other's legitimacy deficit.

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[58] Namely "[i]t cannot be right that the balance we in this country strike between freedom of the press and privacy should be decided by a Slovenian judge." *See* Hoffmann, *supra* note 45, at 428.

[59] Kanstantsin Dzehtsiarou, *Comparative Law in the Reasoning of the European Court of Human Rights*, 10 UCD LAW REVIEW 109, 137-139 (2010).

[60] Lautsi and Others v. Italy, Eur. Ct. H.R., at para. 70 (2011) available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=lautsi&sessionid=79286733&skin=hudoc-en (last accessed: 27 September 2011).

[61] Kathleen A. Kavanaugh, *Policing the Margins: Rights Protection and the European Court of Human Rights*, EHRLR 422, 423 (2006). Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, HUMAN RIGHTS QUARTERLY 474, 479, (1982). Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine*, 7 GERMAN LAW JOURNAL 611, 617 (2006), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=736 (last accessed: 27 September 2011).

[62] *See* Brems, *supra* note 19, at 420.

[63] *See A., B. and C. v. Ireland*, *supra* note 21.

**D. Process Legitimacy of Evolutive Interpretation**

If the ECtHR is satisfied that evolutive interpretation should be deployed, a previous judgment or judgments may be overruled. It also means that this change will affect the process legitimacy of the ECtHR. Process legitimacy of judicial rulings is guarded by the principles of consistency, legal certainty, and predictability of the case law.[64] On a number of occasions, the ECtHR has reiterated its adherence to these principles. The ECtHR pointed out that while previous case law is not binding on it (the ECtHR), it should not depart from a precedent without good reasons.[65] The reasons for a departure by the ECtHR from preceding case law are rooted in phenomena such as: developments in law,[66] societal changes,[67] technical progress,[68] etc. French argues that these developments should be of such significance that they should affect the interpretation of a pre-existing text.[69]

The judges in the common law jurisdictions are used to balance consistency with progress through the doctrine of precedents.[70] The ECtHR can be more flexible in approaching its case law, as this is not legally binding for it. The ECtHR however, established a rule for national courts in relation to overruling their previous judgments. In *S.W. v. the United Kingdom*, the ECtHR approved evolutive interpretation of domestic British courts in relation to marital rape. It stated:

> [T]here was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.[71]

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[64] *See* Gribnau, *supra* note 33.

[65] Mamatkulov and Askarov v. Turkey, 41 EUR. Ct. H. R. 25, at para. 121 (2005); Vilho Eskelinen and Others v. Finland, 45 Eur. Ct. H. R. 43, at para. 56 (2007).

[66] *Micallef*, *supra* note 2.

[67] Cossey v. the United Kingdom, 184 Eur. Ct. H.R. (ser. A), at para. 35 (1990)

[68] S.H. and others v. Austria, 52 Eur. Ct. H. R. 6, at para. 69 (2011); *Goodwin, supra* note 4, at para. 81.

[69] Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules,* 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 281, 285 (2006).

[70] For more comprehensive discussion of the doctrine of precedents adopted by the ECtHR *see* Alastair Mowbray, *An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law,* 9 HRLR 179 (2009).

[71] S.W. v. the United Kingdom, 335B Eur. Ct. H.R. (ser. A), at para. 43 (1995).

It seems illogical if the ECtHR would apply a similar set of requirements for evolutive interpretation of its own case law.

Interpretation of the European Convention requires fluidity, flexibility, and a present-day approach.[72] However, if evolutive interpretation is completely unpredictable it undermines process legitimacy. To make rights effective, the ECtHR has to change its stance which inevitably reduces predictability of outcomes. The ECtHR stated:

> It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[73]

Evolutive interpretation seemingly contributes to a lack of predictability in the ECtHR's judgments causing the Contracting Parties become unsure of the scope and meaning of their obligations under the ECHR. Koch and Vedsted-Hansen have argued that

> Some legal observers see this dynamic method of interpretation as producing legal uncertainty, because it makes it difficult if not impossible to foresee the state of the law within the near future. It cannot be ignored that interpreting such provisions as those laid down in international human rights treaties may imply a certain risk of lacking foreseeability. This is to some extent an inherent consequence of the established principles of treaty interpretation which generally differ quite much from the tradition of interpretation in domestic legal systems […][74]

The Contracting Parties may invest certain financial and organizational resources into complying with rules interpreted in a certain way at a given time. These rules can then change subsequently as a consequence of dynamic interpretation. To counter this, Letsas argues that the ECtHR cannot enter into a cost-benefit calculation in deciding their approach to interpretation; the problems created by a lack of predictability must be

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[72] Małgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties (Part II)*, *in* HAGUE YEARBOOK OF INTERNATIONAL LAW 29 (Johan G. Lammers ed., 2009); Varju, *supra* note 14, at 172.

[73] Scoppola v. Italy (no. 2), 51 Eur. Ct. H. R. 12, at para. 104 (2010).

[74] Ida Elisabeth Koch & Jens Vedsted-Hansen, *International Human Rights and National Legislatures - Conflict or Balance?* 75 NORDIC JOURNAL OF INTERNATIONAL LAW 3, 11 (2006).

trumped by the moral value of human rights.[75] Letsas correctly focuses on the moral value of human rights; however, it cannot be the only justification for an otherwise seemingly arbitrary decision to deploy evolutive interpretation. European consensus provides evidence proving that the change is in line with contemporary understanding of human rights. Moreover, European consensus can be considered as implicit consent of the Contracting Parties to a particular interpretation of the meaning of ECHR rights.

Consent is an important legitimizing factor in international law. The consent of democratically elected national institutions acts as a shield against accusations of farfetched intervention on the part of international tribunals in internal affairs. At the same time, Letsas rightly points out that "[t]he purpose of human rights treaties, unlike that of many other international treaties, is to protect the autonomy of individuals against the majoritarian will of their state, rather than give effect to that will."[76] This argument does not mean that the issue of the States' consent should not be taken into account by the ECtHR.

Fitzmaurice argues that dynamic interpretation, especially at the early stages of its development, "must have been an unacceptable (if not shocking) violation of the sacred principles of international law..."[77] as consent and sovereignty are the core elements of classical international law. While the ECtHR may depart from these elements of classical international law, its judgments should be accepted and executed by the Contracting Parties, otherwise the status of this jurisprudence is purely symbolic. In this process the Contracting Party's consent gains crucial importance. The ECtHR faces a dilemma: its judgments should be independent enough to guarantee effective human rights provision and the judgments should also reflect the common position of the Contracting Parties to be accepted by the respondent state and the other Contracting Parties generally. This objective is complicated in cases if evolutive interpretation is deployed. Since evolutive interpretation improves effectiveness of human rights protection at the expense of predictability case law.

In the interest of the legitimacy of judgments of the ECtHR, it has to provide evidence that dynamic interpretation is necessary. European consensus is a reference to national consent implicitly expressed in national legislation. The ECtHR often assesses the state of European consensus in relation to the issue if evolutive interpretation is at stake.[78] In this case evidential burden is on its side, to demonstrate that evolution is necessary. European

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[75] Letsas, *supra* note 13, at 74.

[76] *Id.*

[77] Małgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties (Part I)*, *in* HAGUE YEARBOOK OF INTERNATIONAL LAW 151 (Johan G. Lammers ed., 2008).

[78] *See Goodwin, supra* note 4, at para. 84-85; *Micallef*, *supra* note 2, at para. 78.

consensus favoring the approach that is contrary to the one accepted by the ECtHR is a presumption favoring dynamic interpretation. European consensus is the evidence that can support the finding of the ECtHR in favor of evolution.

Properly identified European consensus can mitigate the adverse effects of evolutive interpretation on the legitimacy of certain judgments. Koch and Vedsted-Hansen argue that:

> [T]he dynamic or evolutive interpretation of human rights treaties is in no way unrelated to sources of law which are under the current influence by democratically legitimized bodies such as domestic legislatures. The interpretative method of in particular the ECtHR can be described as dually comparative in the sense that it seeks to anchor the evolutive interpretation in legal norms existing outside the Convention itself. As a primary source of reference, the Court usually examines whether a common standard or even consensus has evolved among the European States parties to the Convention. In addition, the possible position to the matter in question in other international treaties or even in relevant soft law will frequently be taken into account.[79]

The ECtHR often faces the challenge of balancing procedural legitimacy against effectiveness of rights. While European consensus mitigates the "surprise effect" from the application of evolutive interpretation since interpretation of the ECHR is linked to external and verifiable circumstances, namely laws of the Contracting Parties. Gerards argues that consensus provides an acceptable middle road between the legitimacy of the judgment and principle of effectiveness of human rights.[80]

Mowbray points out that the ECtHR deploys evolutive interpretation but sometimes without providing adequate justification for its use of the living instrument doctrine.[81] Mowbray also maintains that the ECtHR has not overstepped its legitimate interpretative role by being involved in dynamic interpretation. However, the lack of clear determining factors creates a fear that dynamic interpretation is simply a cover for subjective "ad-hockery."[82] These inherent challenges should be taken seriously. The rejection of

[79] *See* Koch & Vedsted-Hansen, *supra* note 73, at 12.

[80] *See* Gerards, *supra* note 51.

[81] *See* Mowbray, *supra* note 35, at 61.

[82] *Id.* at 69-71.

previously accepted rules without compelling justification can be followed by robust critique similar to that made by Lord Hoffmann.[83]

Evolutive interpretation faces serious legitimacy challenges. If evolutive interpretation utilizes the approach of European consensus, greater overall credibility is accomplished because European consensus has at its heart a strong emphasis on commonality between states thereby reflecting the traditional approach of international law. European consensus is the mechanism used to assess post-drafting consent, which avoids burdensome international negotiations over new Protocols. European consensus provides the ECtHR with the evidence that the Contracting Parties have accepted a particular rule in their own law and practice.

**E. Conclusion**

Evolutive interpretation is necessary to keep European human rights effective and up-to-date. Deployment of evolutive interpretation means that the case law of the ECtHR may be changed. These changes, no matter how necessary they are, undermine the process legitimacy of the judgments. European consensus mitigates the "surprise effect" of evolutive interpretation. Consensus in Europe cannot form overnight and therefore one can foresee the changes in the case law. European consensus, while limiting the ECtHR's ability to change, is not absolute and can be disregarded by it if there are reasons for doing so.

[83] *See* Hoffmann, *supra* note 45, at 428-429.