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When to Use European Consensus: Assessing the Differential Treatment of Minority Groups by the European Court of Human Rights

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Introduction

European consensus (EuC) is an interpretative tool employed by the European Court of Human Rights (henceforth 'the Court') and constitutes a fundamental aspect of its decision-making process. At a time when the legitimacy of the Court as the ultimate arbiter of human rights protection in Europe is under challenge by many contracting parties to the European Convention on Human Rights ('ECHR' or 'the Convention'),¹ consensus-based interpretation provides a useful means to legitimise the Court's judgments and ensure their enforcement.²

The justifications for the use of EuC and its contribution to the Court's case law have been discussed extensively in the literature.³ The Court examines primarily individual applications⁴ from the 47 Member states of the Council of Europe (CoE) and, as part of this mandate, is often called upon to resolve a variety of controversial and sensitive moral issues that range from the decriminalisation of homosexuality,⁵ to the rights of prisoners,⁶ in vitro fertilisation⁷ and assisted suicide.⁸ The Court has recognised that the Convention is a 'living instrument' that should be interpreted "in light of present day conditions"⁹ and has extended the protection provided under the ECHR to new areas that go beyond what the original drafters of the Convention envisioned. The Court also operates under the principle of subsidiarity which determines its role as secondary to the institutions within the national legal orders of the Contracting Parties that have the

¹ See for instance Steering Committee for Human Rights, 'CDDH report on the longer-term future of the system of the European Convention on Human Rights' CDDH(2015)R84 available at http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH%282015%29R84_Addendum%20I_EN-Final.pdf

² On the relationship between consensus and legitimacy see Fiona de Londras and Kanstantsin Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 523-49.

³ See indicatively Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015); George Letsas, *A theory of interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007); 621 L. R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', (1993) 26 *Cornell International Law Journal* 133-65; Christos Rozakis, 'The European Judge as Comparatist' (2005) 80 *Tulane Law Review* 257-80.

⁴ Articles 33 and 34 ECHR allow applications to the Court from contracting parties to the Convention (Inter-State cases) and individuals.

⁵ *Dudgeon v United Kingdom* (App. No. 7525/76, 22 October 1981).

⁶ *Hirst v United Kingdom* (n2) (App. No. 74025/01, 6 October 2005).

⁷ *Evans v United Kingdom* (App. No. 6339/05, 10 April 2007).

⁸ *Pretty v United Kingdom* (App. No. 2346/02, 29 April 2002).

⁹ *Tyrer v United Kingdom* (App. No. 5856/72, 25 April 1978).

primary responsibility of implementing and interpreting the Convention, while also providing remedies for its violation.¹⁰ Therefore, it is hardly surprising that before taking a stance on sensitive moral issues, or before evolving the meaning of the ECHR, the Court takes into account developments in the CoE member states¹¹ to determine whether there is an emerging European approach that supports a specific, ‘novel’ interpretation of the Convention. This ensures the legitimacy of the Court’s judgments¹² and is an added safeguard to guarantee that any novel interpretation of the Convention is not dictated by the Court to the contracting parties in a manner that does not consider the existence (or lack) of an EuC on the matter.

In spite of its many advantages, the Court’s use of EuC has proven controversial in legal scholarship. Academic commentary has challenged the normative foundations of consensus,¹³ while also noting discrepancies in its application that undermine its value as an interpretative tool.¹⁴ A specific objection against EuC, known in the literature as the “anti-majoritarian argument”,¹⁵ is the focal point of this chapter. This objection to EuC suggests that, if the purpose of human rights protection is to provide a counter-majoritarian barrier to ‘the tyranny of the majority’, appeals to European majority opinion through a EuC analysis seem counterintuitive, if not outright problematic, when determining the rights of unpopular social groups and minorities.¹⁶

This objection to the use of EuC is all the more relevant in discrimination cases under Article 14 ECHR, where the applicants argue that they face unjustifiable obstacles to the enjoyment of a right due to their membership to specific group.¹⁷ This raises a key question as to the appropriate contribution of EuC in this context. What role should the minority status of the applicant play when assessing the weight that will be placed on EuC?

In response to this question, the chapter demonstrates that the minority status of an applicant has indeed provided the Court with the justification to assign lesser persuasive

¹⁰ Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs White and Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 6th edn, 2014) p. 85.

¹¹ EuC is only one type of consensus the Court relies on. Other types are “international consensus identified through international treaties; internal consensus in the respondent Contracting Party; expert consensus” Kanstantsin Dzehtsiarou, ‘Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights’ [2011] *Public Law* 534-53, at 548.

¹² *Ibid.*

¹³ See for instance, ‘Consensus: Concordance, or Hegemony of the Majority?’ in *Dialogues between Judges* (2008) available at http://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf. This point will be developed further in the following section.

¹⁴ As Murray argues in his critique of EuC, “the consensus doctrine degenerates into an interpretive tool of such indeterminacy as to permit the court to exercise a freewheeling discretion in the interpretation of Convention rights”. See John L Murray, ‘The Influence of the European Convention on Fundamental Rights on Community Law’ (2011) 33 *Fordham International Law Journal* 1388-422, at 1416.

¹⁵ J.L. Murray, ‘Consensus: Concordance, or Hegemony of Majority’ in *Dialogues between Judges*; J.A. Brauch, ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’, (2004) 11 *Columbia Journal of European Law* 113-50, at 146.

¹⁶ These criticisms will be presented in more detail below.

¹⁷ The Convention provides that discrimination is prohibited on the grounds of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” in Article 14 ECHR.

value to the existence or non-existence of EuC.¹⁸ However, it argues that this has been applied inconsistently across the Court's case-law. The chapter will conclude that, if the Court accepts some value in limiting the role EuC plays in cases involving minorities, this must be applied uniformly across the Court's jurisprudence. Alternatively, where the Court wishes to depart from this approach in a specific case, it must provide convincing analysis in its reasoning as to why this is necessary.

The chapter does not intend to provide a thorough overview of the Court's case law on minorities. Instead, in order to better illustrate this disparity in the application of EuC amongst various minority groups, the chapter will rely on two case studies involving groups the Court has recognised as minorities.¹⁹ The case studies represent two radically different approaches in the use of EuC. Firstly, the chapter will examine how EuC was used in cases involving access of Roma children to education. These cases represent textbook examples of the Court relying on the minority status of the applicants to narrow the margin of appreciation of the respondent state and to bypass the solution to the problem that EuC would have dictated if it was applied to the facts of the case. This approach will be juxtaposed to same-sex marriage cases, where the weight placed on EuC was not affected by the fact that the applicants were members of a "sexual minority",²⁰ and the final outcome was determined almost exclusively based on the status of EuC on the matter.

The chapter will be structured as follows. Part 1 examines the normative objections to the use of consensus in cases relating to minorities and identifies that the Court in such cases applies the EuC tool with greater flexibility. In light of this, Part 2 will assess whether this approach to EuC has been applied uniformly across different minorities. This section will examine the weight the Court placed on EuC firstly, when examining discrimination against Roma children and secondly, in its same-sex marriage case-law. The focus will be placed on how the minority status of the applicants affected the application of EuC and the margin of appreciation. Based on the conclusions reached in part 2, Part 3 will argue that, if the Court is willing to rely on the minority status of the applicant to avoid giving primacy to the EuC method of interpretation, it must do so consistently. This section will also suggest that more clarity must be provided as to the relationship between EuC and minorities in discrimination cases. Finally, this part will address potential objections to the arguments advanced in the chapter.

1. Protection Versus Pragmatism: Normative Objections to the Application of Consensus in Cases Involving Minorities

The issues surrounding the effective human rights protection of minorities are inherently controversial. Debates surrounding the appropriate role of judges in this context and

¹⁸ This will be developed in detail below. For a thorough examination of how the Court lessens the persuasive value of EuC in minority cases, see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* at 117-129.

¹⁹ This point will be developed in the analysis below.

²⁰ *X and others v Austria* (App. No. 19010/07, 19 February 2013) at [151].

their contribution to providing definitive answers on the scope of minority rights have featured heavily in constitutional law scholarship. Two conflicting schools of thought have emerged on this issue. The first promotes the view that the judiciary should act to correct injustices perpetrated by majorities against “discrete and insular”²¹ minorities that may lack the capacity to participate equally in the democratic process.²² Under this analysis, the executive and legislative branches are viewed with suspicion as far as minority rights are concerned, as they are perceived to embody majoritarian preferences.²³ On the opposite end of the spectrum, there is ample literature questioning the democratic legitimacy of the judiciary to challenge democratically enacted legislation in a well-functioning democracy on the basis that it may violate rights.²⁴ Jeremy Waldron for instance, famously dismisses the ‘tyranny of the majority’ argument, stressing that it is a term usually employed to denote one’s disagreement with the majority on the appropriate scope of rights.²⁵ Such issues according to Waldron, are better resolved through the democratic process, rather than by means of judicial review.²⁶

While these differing attitudes on the role of the judiciary with regards to minorities refer to domestic courts reviewing domestic legislation on the basis of a constitution, similar debates arise at the European Court of Human Rights when the Court is called upon to determine the protection that will be afforded to minorities under the ECHR. If we are to accept²⁷ that the judiciary, and more specifically an international court, is equipped to provide us with definitive solutions to these dilemmas, this in turn requires us to address the appropriate tools the international judge should employ to fulfil this mandate. In order to determine the preferred methods of interpretation the Court should follow, one must take into account the need for the Court to provide protection that is “practical and effective, not theoretical and illusory”,²⁸ but inevitably, weight must also be given to more pragmatic considerations. Even the most progressive interpretation of the Convention

²¹ The term was employed by Justice Stone in the landmark US Supreme Court judgment of *United States v. Carolene Products Co.* 304 U.S. 144, 152 n4 (1938).

²² See for instance Aharon Barak, ‘Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 16-162; Ronald Dworkin, *Freedom’s Law: A moral reading of the American Constitution* (Harvard: Harvard University Press, 1996); Stephen Macedo, ‘Against Majoritarianism: Democratic Values and Institutional Design’ (2010) 90 *Boston University Law Review* 1029-42; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) Chapter 6, Will Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995).

²³ “[The] protection of human rights—the rights of every individual and every minority group—cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion” see Aharon Barak, ‘Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) at 21.

²⁴ Jeremy Waldron, ‘The core of the case against judicial review’ (2006) 115 *Yale Law Journal* 1346-406. Murray Hunt, Hayley Hooper, Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (London: Hart Publishing, 2015).

²⁵ Jeremy Waldron, ‘The core of the case against judicial review’ (2006) at 1405.

²⁶ *Ibid.*

²⁷ This is by no means universally accepted. See for instance Richard Bellamy, ‘The Democratic Qualities of Courts: a Critical Analysis of Three Arguments’, (2013) 49 *Representation* 333-46 but also Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the *Hirst Case*’, in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2013) pp. 243-71.

²⁸ *Demir and Bakara v Turkey* (App. No. 34503/97, 12 November 2008) at [66].

can have little effect if the contracting parties do not recognise it as legitimate and are not willing to comply with it. EuC thus serves as an optimal “legitimising tool”²⁹ especially in cases where the Court expands the scope of protection traditionally afforded under a Convention right.

This approach, however, raises serious objections from those who subscribe to the view that human rights serve as a counter-majoritarian bulwark to the tyranny of the majority.³⁰ Scholars have argued that there is an inherent contradiction in resolving complex issues of legal interpretation of a document protecting human rights through a quantitative exercise, which merely requires the judge to calculate the number of COE member states that agree or disagree with a specific rights claim advanced by a minority.³¹ Under such an approach, the degree to which Convention protection applies to minorities becomes conditional on the extent of majoritarian bias or acceptance the minority in question enjoys in Europe. If EuC is applied in this rudimentary manner, a minority would essentially be deprived of effective recourse to human rights protection, since the institution assigned with the task of protecting the minority’s rights, when reaching its decision, will rely on (or, at the very least, take into account) the same majoritarian bias the group is seeking protection from. Particularly for groups that have been subjected to unfavourable treatment and have historically withstood injustice and discrimination, EuC seems to be a counterproductive tool to determine their rights.

Proponents of EuC argue that a closer inspection of the minority case law of the Court demonstrates that these concerns are unjustified.³² EuC is nothing more than an indication in favour of one interpretation of the Convention. The Court is cognisant of the limitations of the tool and can “disregard”³³ EuC where there is good reason to do so. Dzehtsiarou contends, that the fact that minority rights are at stake in a given case, provides the Court with a convincing justification to use the tool with greater flexibility

²⁹ Dzehtsiarou, ‘Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights’ at 534.

³⁰ The unsuitability of EuC to effectively protect the rights of minorities and unpopular social groups has been discussed extensively in the literature. Benvenisti laments how “minority values, hardly reflected in national policies, are the main losers” of the consensus approach and accuses the Court of using this device to eschew responsibility from its decisions. Thus, for Benvenisti, the Court “falls short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities” see Eyal Benvenisti, “Margin of appreciation, consensus, and universal standards” (1999) 31 *New York University Journal of International Law and Politics* 843-54 at 851. For Fenwick, “reliance on finding a European consensus in socially sensitive contexts can merely lead to acceptance of detrimental treatment of groups traditionally vulnerable to discrimination” see Helen Fenwick, ‘Same sex unions at the Strasbourg Court in a divided Europe: driving forward reform or protecting the Court’s authority via consensus analysis’ [2016] *European Human Rights Law Review* 249-72, 250. See also Holning S. Lau, ‘Rewriting Schalk and Kopf: shifting the locus of deference’ in Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge: Cambridge University Press, 2012) p.248; George Letsas, ‘Two concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705-32 and George Letsas, ‘The Truth in Autonomous Concepts: How to interpret the ECHR’ (2004) 15 *European Journal of International Law* 279-305.

³¹ Underlying this debate is the discussion surrounding positivism, natural law and the theoretical foundations of human rights. See indicatively, John Manique, ‘Development, Human Rights and Law (1992) 14 *Human Rights Quarterly* 383-408.

³² Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* at 119.

³³ *Ibid* at 124.

and to lessen the weight it places on it.³⁴ When examining the practice of the Court in judgments relating to minorities, Dzehtsiarou argues that the Court either does not apply EuC “automatically”³⁵ or applies it at the “level of principles, without requiring the existence of consensus at the level of rules”.³⁶ Dzehtsiarou concludes that in practice, this more creative use of EuC, has expanded protection for minorities rather than diminished it.³⁷ This is attributed to the fact that, in such cases, the Court employs the full flexibility associated with the tool, rather than applying it in an automatic and rudimentary manner to the issue under examination.³⁸

Such an approach, if consistently adopted by the Court, can be viewed as a means to bridge the gap between the two competing accounts on the appropriate role of EuC in minority cases. By retaining the flexibility to lessen the persuasive value of EuC, the Court can ensure that it does not produce judgments that are solely informed by the status of European majority opinion on the minority. This flexibility of EuC, however, may allow it to still play an ancillary role. For instance, the Court can focus on consensus derived through international legal materials to reinforce the minority status of the applicants and to narrow the margin of appreciation with regards to the impugned measure. This ensures that EuC is used as a nuanced interpretative tool rather than a blunt instrument, whereby the Court simply counts states that agree or disagree with a specific rights claim advanced by a minority. If EuC serves merely as one of many factors that provide guidance as to the scope of a Convention right, then the Court can argue that the status of the applicants as members of a minority requires the Court to examine the impugned measure in a manner that does not rely solely on what EuC dictates.

However, even though scholars have identified³⁹ a more flexible approach to the application of EuC where minority rights are involved, the Court in its reasoning in these cases,⁴⁰ has not *explicitly* stated that it is applying EuC with greater flexibility due to the minority nature of the case. The Court has also not exhaustively identified the groups whose minority status justifies a departure from the EuC method of interpretation. This is not to say that the Court has remained entirely silent on the matter. It has developed some guidance as to the circumstances which will allow it to subject an impugned

³⁴ Additionally, Dzehtsiarou argues that EuC “can be linked to customary norms or to general principles of law” in *European Consensus and the Legitimacy of the European Court of Human Rights* at 6. This suggests that rather than being associated with majoritarianism, consensus is a “method allowing the Court to identify and recognize with its case law the emergence of (regional) custom” Tzevelekos and Dzehtsiarou, ‘International Custom Making and the ECtHR’s European Consensus Method of Interpretation’ (2016) 16 *European Yearbook of Human Rights* 313-44. This hypothesis, is difficult to prove as the Court has not provided an authoritative definition of consensus. However, even if it is incorrect to associate consensus with majoritarianism in the sense that it represents the will of states or the will of social majorities within them, it contains a quantitative dimension in the sense that the court is “counting states” in its effort to determine the outcome of the case.

³⁵ Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* at 129.

³⁶ *Ibid* at 124.

³⁷ *Ibid* at 120.

³⁸ *Ibid* at 125.

³⁹ *Ibid* at 120.

⁴⁰ For the ECtHR case law on minorities see Steven Wheatley, *Minorities under the ECHR and the construction of a 'democratic society'* [2007] *Public Law* 770-92, Lourdes Peroni, ‘Minorities before the European Court of Human Rights’ in Jane Boulden and Will Kymlicka (eds.), *International Approaches to Governing Ethnic Diversity* (Oxford: Oxford University Press, 2015).

measure against a minority to more intense scrutiny. Firstly, in its Article 14 case law, the Court has suggested that differential treatment against specific groups solely due to a characteristic they possess constitutes a ‘suspect’ ground of discrimination. Suspect grounds include “race and ethnic origin, sexual orientation, and [...], nationality”.⁴¹ For such suspect grounds, the Court requires particularly weighty and objective reasons to be adduced by the respondent state to justify any differential treatment. Furthermore, (and more specifically), in cases relating to discrimination due to sexual orientation, the Court has highlighted the need to protect individuals from majoritarian disfavour by noting that “treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority”⁴² is unacceptable under the Convention. Thus, by defining certain grounds of discrimination as suspect, and explicitly sheltering certain groups from majoritarian bias, the Court suggests that respondent states in cases involving such rights claims will be afforded a narrower margin of appreciation.

How has this been applied in practice in relation to EuC? The subsequent part will demonstrate that the Court’s use of EuC in such cases is inconsistent. While in some judgments, the Court takes full advantage of the flexibility associated with EuC to strengthen Convention protection for minorities and narrow the margin of appreciation, in other cases, EuC is the sole factor the Court examines in its reasoning and serves as an impediment to progress on minority rights.

2. Is the Flexibility Associated with Consensus Applied Selectively?

In light of the flexibility of the EuC tool discussed in the section above, this section will assess whether the Court takes full advantage of the “space for manoeuvre”⁴³ the tool is associated with. In order to illustrate the disparity in the use of EuC, the chapter focuses on two minorities where the Court has followed fundamentally different approaches. The Court has relied on consensus stemming from international legal materials to recognise the minority status of Roma people and to narrow the margin of appreciation in Article 14 cases involving Roma rights. Crucially, in these judgments, the Court did not apply EuC to the key human rights issue it was attempting to resolve. In same-sex marriage judgments, even though the Court has identified LGBTI individuals as a sexual minority, EuC on same-sex marriage is the sole determining factor the Court relies on to examine whether a positive obligation to provide for same-sex marriage can be included in the Convention. Both of these case-studies will be examined in turn.

⁴¹ European Network of Legal Experts in the Non-Discrimination Field, Report written by Olivier de Schutter, *The Prohibition of Discrimination under European Human Rights Law* (European Communities Report, 2011) Chapter 1 ‘The European Convention on Human Rights’ p 16-17.

⁴² *Smith and Grady v. the United Kingdom* (App. Nos. 33985/96 and 33986/96, 27 September 1999) at [121]; *L. and V. v Austria* (App. Nos. 39392/98 39829/98, 9 January 2003) at [52]; *Identoba and others v Georgia* (App. No. 73235/12, 12 May 2015).

⁴³ Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 125.

2.1 Discrimination against Roma and European Consensus

The Court has been particularly vigilant in promoting the rights of Roma people by recognising the existence of “a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life”.⁴⁴ In a series of cases relating to a common issue across Europe, the disproportionate placement of Roma children in special schools, either on the ground that they have learning disabilities,⁴⁵ or due the fact that they do not have an adequate command of the language,⁴⁶ the Court used consensus creatively to reach its conclusions.

In the leading case on this matter, *D.H. and others v Czech Republic*,⁴⁷ 18 Roma applicants argued that the excessive amount of Roma children found to have learning disabilities after taking specialised tests and being subsequently placed in special schools, resulted in the uneasy co-existence of “two separately organised educational systems, namely special schools for the Roma and “ordinary” primary schools for the majority of the population”.⁴⁸

At first instance, in the Chamber judgment⁴⁹ of the case, the Court followed a deferential approach noting that the planning of a curriculum in the sphere of education “may legitimately vary according to the country”.⁵⁰ This supported the idea that a wide margin of appreciation applied to the case.⁵¹ The Court noted that “states cannot be prohibited from setting up different types of school for children with difficulties or implementing special educational programmes to respond to special needs”.⁵² The Court concluded that the impugned policy of the state could not be viewed as discriminatory under Article 14 and Article 2 of Protocol 1, and no violation was found.

After the applicants successfully referred the case to the Grand Chamber (GC), the respondent government, seeking to replicate the Court’s approach in the Chamber judgment, relied heavily on EuC when presenting its arguments to the Court. In determining the scope of state obligations under Article 2 Protocol 1, the Czech government argued that:

⁴⁴ *Coster v the United Kingdom* (App. No. 24876/94, 18 January 2001) at [110].

⁴⁵ *D.H. and others v the Czech Republic* (App. Nos. 57325/00, 13 November 2007).

⁴⁶ See *Orsus and others v Croatia* (App. No. 15766/03, 16 March 2010). For further commentary, see indicatively, Iryna Ulasiuk, “To Segregate or not to Segregate? Educational Rights of the Roma Children in the Case Law of the European Court of Human Rights” (2014) *EUI Working Paper RSCAS 2014/29*, Danisi Carmelo, “How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its non-discrimination jurisprudence” (2011) 9 *International Journal of Constitutional Law* 793-807.

⁴⁷ *D.H. and others v the Czech Republic* (App. Nos. 57325/00, 13 November 2007).

⁴⁸ See legal summary of the case available at [http://hudoc.echr.coe.int/eng#{"itemid":\["002-2439"\]}](http://hudoc.echr.coe.int/eng#{).

⁴⁹ *D.H. and others v the Czech Republic* (App. Nos. 57325/00, 07 February 2006).

⁵⁰ *Ibid* at [47].

⁵¹ *Ibid*.

⁵² *Ibid*.

No European standard or consensus currently existed regarding the criteria to be used to determine whether children should be placed in special schools or how children with special learning needs should be educated.⁵³

The respondent government argued that in line with the Court's use of EuC, this lack of consensus should allow for a wide margin of appreciation.

The GC was not convinced by the government's arguments and took an altogether different approach, distancing itself from the Chamber judgment. Instead of focusing on the lack of common ground between CoE member states in relation to special schools as the Chamber had done, the GC noted the "emerging *international* consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle".⁵⁴ In defining what this international consensus consisted of, the Court referenced its previous judgment in *Chapman v the United Kingdom*,⁵⁵ where it relied on soft law instruments from the COE and beyond⁵⁶ to confirm its recognition of the special status of Roma people as a minority. This shift from EuC on educational systems to international consensus on the status of Roma people as a group worthy of "special protection"⁵⁷ was not a significant departure for the Court, as it has often gone beyond searching for a "common regional perspective",⁵⁸ namely 'counting' CoE states that agree or disagree with a specific human rights proposition, to take into consideration norms of public international law as evidenced through international treaties, soft law instruments or UN Documents.⁵⁹ This led the Court to argue that "as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority".⁶⁰ After finding that there was indirect discrimination in this instance, the Court concluded that the "burden of proof must therefore shift to the Government, which must show that the

⁵³ Ibid at [155].

⁵⁴ Ibid at [181]. See also "the Court stated that there was international consensus on the issue that minority rights should be properly protected and it placed less emphasis on the fact that there was no European consensus among laws and practices of the Contracting Parties to the ECHR" Dzehtsiarou, *European Consensus and the Legitimacy of the ECtHR* at 125.

⁵⁵ (App. No 27238/95, 18 January 2001).

⁵⁶ The materials the Court relied on in *Chapman* were The Council of Europe Framework Convention for the Protection of National Minorities (1995), Recommendation 1203 (1993) of the Parliamentary Assembly on Gypsies in Europe, and, going beyond the COE sphere, an EU Resolution on the situation of Gypsies in the Community, and reports of the Office of Democratic Institutions and Human Rights and the High Commissioner on National Minorities of the OSCE. See paragraph [93] cross referencing to paragraphs [55]-[59]. In *Sampani and others v Greece* at [76], the Court also mentions that "as evidenced by the activities of numerous European and *international* bodies [...], this protection [to Roma children] also extends to the field of education" (original text in French, translated by the author). The Court identifies this consensus as international, rather than EuC throughout its subsequent case law relating to Roma people. See indicatively *Orsus* [148], *Sampanis and others v Greece* [73], *Sampani and others v Greece* [76].

⁵⁷ *D.H. and others* at [182].

⁵⁸ Adamantia Rachovitsa, 'Fragmentation of international law revisited: insights, good practices, and lessons to be learned from the case law of the European Court of Human Rights' (2015) 28 *Leiden Journal of International Law* 863, 869.

⁵⁹ On this see indicatively Vassilis P. Tzevelekos, 'The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?' (2010) *Michigan Journal of International Law* 621-90; Laurence Helfer, 'Consensus, Coherence and the European Convention on Human Rights', (1993) at 133.

⁶⁰ *D.H. and others* at [182].

difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin”.⁶¹ Not being able to produce such convincing evidence, the Czech Republic was found in violation of Articles 14 in conjunction with Article 2 of Protocol 1.

This historical injustice the Roma people have withstood also features heavily in the Court’s subsequent case law. In the cases of *Sampanis and others v Greece*,⁶² *Oršuš and others v. Croatia*,⁶³ *Sampani and others v. Greece*⁶⁴ and *Horvath and Kiss v. Hungary*,⁶⁵ the Court forwent a detailed EuC-based analysis that would have required it to thoroughly engage with the practices across Europe in relation to education of children of Roma origin, and relied on the minority status of the applicants to narrow the margin of appreciation.

In *Horvath and Kiss* for instance, the Court noted that “the misplacement of Roma children in special schools has a long history across Europe.”⁶⁶ Reference was made to EuC when examining the notion of ‘respect’ states must afford when discharging their obligations under Article 2 Protocol 1. The Court noted:

[T]he requirements of the notion of “respect” [...] vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.⁶⁷

This wide margin of appreciation, however, is immediately mitigated in the subsequent paragraph of the judgment. Instead of further developing its EuC analysis, the Court ties the obligations owed to the applicants, to the historical injustices Roma people have suffered. As the Court stresses:

In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems.⁶⁸

In its subsequent analysis,⁶⁹ the Court does not mention the wide margin or EuC, focusing instead of the blatant overrepresentation of Roma children in special schools and the historical disadvantages they have suffered in their access to education. Thus, and

⁶¹ Ibid at [195].

⁶² (App. No. 32526/05, 5 June 2008) at [69].

⁶³ (App. No. 15766/03, 16 March 2010) at [148].

⁶⁴ (App. No. 59608/09, 11 December 2012).

⁶⁵ *Horvath and Kiss v. Hungary* (App. No. 11146/11, 29 January 2013).

⁶⁶ Ibid at [115].

⁶⁷ Ibid at [103].

⁶⁸ Ibid at [104] emphasis added.

⁶⁹ Ibid at [109-129].

conversely to same-sex marriage judgments which will be considered in the next section of this chapter, the wide margin of appreciation on the placement of children with learning difficulties in special schools dictated by EuC analysis, ‘surrenders’ to the special status of Roma people as a vulnerable group with a history of stigmatisation.⁷⁰

Thus, three important points emerge from this analysis. Firstly, in this set of judgments, the Court moves away from EuC and the wide margin of appreciation in relation to the impugned measure of the respondent state. Secondly, it derives the legitimacy to do this from the status of the applicants as members of a minority group, and relies on international consensus to determine this status. The wide margin of appreciation dictated by the absence of EuC yields when confronted with the internationally accepted situation of stigmatisation of Roma people and allows the Court to exercise intense scrutiny of the impugned measure by requiring additional steps from the respondent state and by narrowing the margin of appreciation. Thirdly, these additional steps mean that, in the *stricto sensu* proportionality stage of the analysis, the state is expected to produce particularly cogent reasons to justify its differential treatment of the applicants in line with the case law on Article 14 ECHR. Dzehtsiarou relies on these cases to suggest that “the fact that the case is related to minority rights offers the Court some space for manoeuvre” in its application of EuC.⁷¹ The Court seems to fully take advantage of this flexibility in these judgments.

As the following part will demonstrate, exactly the opposite points can be made in relation to the Court’s same-sex marriage case-law.

2.2 The Use of European Consensus in Same-sex Marriage Cases

The Court has had to contend with applicants who sought to challenge, among other issues, the lack of provision for same-sex marriage in their respondent states. The challenges were brought under Article 14 ECHR on the prohibition of discrimination in conjunction with Articles 8 and 12. The chapter will examine the response of the Court, and will address the following questions. Firstly, what was the weight placed on EuC? Secondly, did the status of the applicants as members of a “sexual minority”⁷² have any effect on narrowing the wide margin of appreciation dictated by the absence of EuC? Thirdly, and turning to the Article 14 ECHR component of the judgments, how did EuC interact with the duty to provide weighty reasons for differential treatment of the applicants?

2.2.1 What was the weight placed on the EuC argument?

⁷⁰ The fact that a violation was found even though the Czech Republic was ahead of many other European member states was commented on in the dissenting judgment of judge Zupancic who pointed out that “[a]s the majority explicitly, and implicitly elsewhere in the judgment, [...] the Czech Republic is the only Contracting State which has in fact tackled the special-educational troubles of Roma children. It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words, this “violation” would never have happened had the respondent State approached the problem with benign neglect”.

⁷¹ Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, at 125.

⁷² The court confirmed that LGBT individuals constitute a sexual minority most recently in *Bayev and others v Russia* (App. No. 67667/09 44092/12 56717/12, 20 June 2017) at [66-67].

In *Schalk and Kopf*, the applicants sought permission from the Austrian authorities to marry. After the authorities refused, they challenged the refusal relying on Articles 8, 12 and 14 ECHR. The Court initially relied on textual interpretation to determine whether the scope of Article 12 ECHR could include same-sex marriage. An obvious obstacle was the reference in Article 12 to “men and women”⁷³ as opposed to “everyone” or “no one” that is found in other ECHR Articles. This pointed towards the fact that when the Convention was drafted, there was no intention of including same-sex couples in the ambit of Article 12.⁷⁴ Ultimately, by making reference to Article 9 of the Charter of Fundamental Rights of the European Union which abandoned reference to “men and women”, the Court took an important step and declared that the Court “no longer consider[s] that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint”.⁷⁵

When it came to determining, however, whether this generated a positive obligation to allow same-sex marriages, the Court relied exclusively on EuC. Since only 6 out of 47 member-states allowed for same-sex marriage at the time, the lack of consensus did not allow the Court to proceed further. Thus, it found no violation of Article 12. Similar conclusions were reached when the Court examined the argument under Articles 14 and 8 ECHR. The Court noted that “there is not yet a majority of States providing for legal recognition of same-sex couples”⁷⁶ and therefore, did not proceed to the proportionality stage of its inquiry.

In *Hämäläinen v. Finland*, the Court confirmed the approach it had taken with regards to Article 12 in *Schalk and Kopf*. The applicant had undergone gender re-assignment surgery. She complained that she could not have her identification documents changed to reflect her gender without transforming her marriage to her partner to a civil partnership, as same-sex marriage was not recognised in Finland. The third party interveners in the case, attempted to steer the Court away from regional consensus and towards broader international developments on same-sex marriage.⁷⁷ They argued that “human rights treaties should, as far as possible, be interpreted in harmony in order to give rise to a single set of compatible obligations”.⁷⁸ They further noted how in most instances worldwide, whenever there were similar judicial challenges, “the adjudicating bodies concluded that the States had not put forward reasonable, convincing, objective or weighty arguments to justify discrimination against individuals on grounds of their sexual orientation”.⁷⁹ After the Court noted the lack of EuC on the matter, it argued that

⁷³ *Shalk and Kopf* at [54-55].

⁷⁴ *Ibid.* Johnson challenges this interpretation of the Convention, saying that the use of “men and women of a marriageable age” was added to ensure the equality of the spouses and to promote the right of women to enter marriages by their own free will. See Paul Johnson, ‘The Choice of Wording must be Regarded as Deliberate: Same-sex Marriage and Article 12 of the European Convention on Human Rights’ (2015) 40 *European Law Review* 207-24.

⁷⁵ *Shalk and Kopf* at [61]. See also Loveday Hodson, ‘A Marriage by Any Other Name? *Schalk and Kopf v Austria*’ (2011) 11 *Human Rights Law Review* 170-79.

⁷⁶ *Shalk and Kopf* at [105].

⁷⁷ *Hämäläinen* at [54].

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

the applicable margin of appreciation would be wide.⁸⁰ It subsequently focused its analysis on the fact that the applicant and her wife would not lose any significant rights if their marriage was converted into a civil partnership.⁸¹ The lack of EuC on the matter was once again central to this outcome.

Finally, in *Oliari and others v Italy*, the applicants challenged both the fact that they were barred from entering a civil union, and that they were unable to marry. While the Court recognised the existence of a positive duty on states to provide some form of legal recognition to same-sex couples, its stance on Article 12 did not alter. The third-party interveners had provided the Court with detailed information on the progress of same-sex marriage outside Europe in the period between the *Schalk and Kopf* judgment and the present case. They urged the judges to follow the approach in *Goodwin v UK*⁸² where the Court had relied on a “continuing international trend”⁸³ rather than EuC analysis to determine that post-operative transsexuals had a right to marry under Article 12. The applicants stressed that, after the Court’s recent acceptance in *Schalk and Kopf* of the applicability of Article 12 to same-sex couples, a refusal to allow same-sex couples to marry “only continued to marginalise and stigmatise a minority group in favour of a majority with discriminatory tendencies”.⁸⁴ This did not seem to convince the Court in relation to the Article 12 component of the case. In a few short paragraphs, the Court reiterated its commitment to EuC,⁸⁵ and (in an arguably regressive step after *Schalk and Kopf*) found the Article 12 and 14 ECHR aspect of the case inadmissible as manifestly ill-founded.

2.2.2 Did the minority status of the applicants affect the margin of appreciation?

The Court has accepted that LGBT individuals constitute a “sexual minority”⁸⁶ and that “sexual orientation is a concept covered by Article 14”.⁸⁷ In relation to differential treatment of LGBTQ individuals, the Court has also clarified that the State’s margin of appreciation is narrow⁸⁸ while emphasising that “differences based solely on considerations of sexual orientation are unacceptable under the Convention”.⁸⁹ At the same time, the Court identifies a wide margin where there is “no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues”.⁹⁰

Therefore, cases such as the ones relating to same-sex marriage, illustrate the complicated exercise the Court has to perform in determining the appropriate margin of appreciation, when it is faced with contradictory standards as to the appropriate

⁸⁰ Ibid at [74-75].

⁸¹ Ibid at 84.

⁸² *Goodwin v United Kingdom* (App. No. 28957/95, 11 July 2002).

⁸³ Ibid at [84-85].

⁸⁴ *Oliari* at [190].

⁸⁵ *Oliari* at [192].

⁸⁶ *Bayev* at [66-67].

⁸⁷ *Vallianatos and others v Greece* (App. No. 29381/09 and 32684/09, 7 November 2013) at [77].

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ *Oliari* at [162].

intensity of review.⁹¹ The differential treatment of same-sex couples due to their sexual orientation points to a narrow margin, while the moral and ethical issues raised by same-sex marriage suggest a wide margin of appreciation. In previous cases, where the Court had to examine a claim representing a similar conflict, namely in applications relating to second-parent adoption among same-sex couples, the Court categorically was in favour of narrowing the margin.⁹² The approach is different in same-sex marriage cases. Without much by way of explanation, the Court seems to suggest that, in examining same-sex marriage, the wide margin on ethical and moral issues dictated by EuC, overrides the narrow margin that is to be applied when there is difference in treatment due to sexual orientation.

In the *Oliari* case especially, the claimants employed arguments that sought to emphasise the minority aspects of the case and the historic injustices suffered by LGBTQ people by making references to the case law that has shone a light on the special and discriminatory circumstances faced by the LGBTQ community in general.⁹³ They asserted that this stigmatisation of the LGBTQ community, when viewed in conjunction with the Court's long-held assertion that states would have a very narrow margin of appreciation when treating individuals differently solely due to their sexual orientation, should allow the Court to find violations of Articles 12 and 14 ECHR.⁹⁴ These arguments, however, did not alter the Court's approach.

This refusal of the Court to effectively engage with the status of LGBTQ individuals as a sexual minority is surprising. The Court has relied on this status specifically to shield LGBTQ individuals from unfavourable majoritarian preferences in a variety of other cases relating to discrimination. For instance, in the recent case of *Bayev v Russia*⁹⁵ where the applicants challenged the compatibility with the Convention of laws barring the 'promotion' of homosexuality or non-traditional sexual relations among minors, the Court clarified that:

it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority.⁹⁶

The Court in this case was attempting to counter the Russian government's argument that the 'homosexual propaganda' law enjoyed widespread support across Russia. This

⁹¹ On contradictory intensity of review determining standards see Janneke H. Gerards, 'Intensity of Judicial Review in Equal Treatment cases' (2004) 51 *Netherlands International Law Review* 135-83, at 154.

⁹² "The Court observes that the breadth of the State's margin of appreciation under Article 8 of the Convention depends on a number of factors. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...] However, the Court reaffirms that when it comes to issues of discrimination on the grounds of sex or sexual orientation to be examined under Article 14, the State's margin of appreciation is narrow". *X and others v Austria* at [148].

⁹³ Reference was made to *X and Others v. Austria* (App. No. 19010/07, 19 February 2013) and *X v. Turkey* (App. No. 24626/09, 9 October 2012).

⁹⁴ *Oliari* at [190].

⁹⁵ *Bayev and others v Russia* (App. No. 67667/09 44092/12 56717/12, 20 June 2017).

⁹⁶ *Ibid* at [70].

majoritarian preference in Russia had no bearing, according to the Strasbourg judges, on the exercise of the right under examination. Therefore, the Court in *Bayev* was referring to internal consensus rather than EuC.⁹⁷ But its point on the appropriate stance the Court should take when the rights of LGBTQ individuals are at stake highlights the dangers of any interpretative tool that involves taking majoritarian preferences into account when determining the scope of minorities' Convention rights. An attempt at such an analysis does not feature in the Article 12 ECHR cases discussed above. Thus, the Court misses an opportunity to rely on the nature of LGBTQ individuals as a sexual minority to justify departing from (or supplementing its) EuC analysis.

2.2.3 Consensus and the Duty to Give Weighty Justifications for Differential Treatment under Article 14 ECHR.

As discussed in the introduction, especially “suspect”⁹⁸ grounds of discrimination such as discrimination based on sexual orientation,⁹⁹ require the state to produce particularly weighty reasons for differential treatment of a specific group. The Court has required¹⁰⁰ respondent states to produce such reasons as far as exclusion of same-sex couples from civil partnerships is concerned but, due to the lack of EuC, does not proceed to that stage of inquiry when examining same-sex marriage even though this engages both Articles 8 and 12 ECHR.

The dissenting judges in *Schalk and Kopf*, pointed out this issue in relation to Articles 14 and 8 ECHR, while also distancing themselves from the majority's reliance on EuC. Since the Court had followed through with the formula it relies on in discrimination cases having identified a “relevantly similar situation”¹⁰¹ and noting that “differences based on sexual orientation require particularly serious reasons by way of justification”,¹⁰² the dissenting judges disagreed with the majority opinion for not following through with the next step of the Article 14 analysis, namely the duty to give reasons. As they noted:

the existence or non-existence of common ground between the laws of the Contracting States” [...] is irrelevant as such considerations are only a subordinate basis for the application of the concept of the margin of appreciation. Indeed, it is only in the event that the national authorities offer grounds for justification that the Court can be satisfied, taking into account the presence or the absence of a common approach, that they are better placed than it is to deal effectively with the matter.¹⁰³

With this in mind, and returning to the three main questions posed in the beginning of this section, namely the significance of EuC to the outcome of the case, the weight placed on the minority status of the applicants when examining the same-sex marriage case-law, and the relationship between consensus and the duty to give reasons, the following

⁹⁷ In the judgment, EuC was favourable to the applicants and taken into account by the Court.

⁹⁸ See Ilias Tripsiotis, ‘Discrimination and Civil Partnerships: Taking ‘Legal’ out of Legal Recognition’ (2014) 14 *Human Rights Law Review* 343, 347.

⁹⁹ *Ibid.*

¹⁰⁰ See *Vallianatos and others* at [80-92].

¹⁰¹ *Schalk and Kopf* at [99].

¹⁰² *Ibid* at [97].

¹⁰³ *Schalk and Kopf* Dissenting opinion of judges Rozakis, Spielmann and Jebens.

conclusions can be reached. Firstly, the Court when examining the existence of a positive obligation to provide same-sex marriage ties its analysis solely to EuC and does not engage with international documents, international trends or other methods of interpretation to complement its EuC analysis.¹⁰⁴ Secondly, the fact that the Court is examining the rights of a sexual minority does not convince the judges to shield the applicants from an unfavourable EuC and to seek alternative methods of interpretation or to employ EuC with greater flexibility. Thus, the narrow margin the Court grants when examining differences in treatment based on sexual orientation, surrenders to the wide margin dictated by the absence of EuC. Finally, the reliance on what the EuC analysis dictates, bars the judges from proceeding to the proportionality stage to require the respondent states to provide reasons for the differential treatment the applicants experience in the Article 14 ECHR component of the case.

With this in mind, the following part will address this discrepancy in the case law in the relation to how the minority status of the applicant affects the application of EuC.

3. When to Apply Consensus in Minority Cases

The chapter in its examination of these two case studies has aimed to identify and contrast two conflicting approaches that lead to an inconsistency in the application of EuC to minorities. This section will argue for a more coherent and uniform approach and present the options the Court could follow when applying EuC to minorities. Additionally, it will address a potential objection to the arguments advanced in the chapter.

3.1 Consensus, Minorities, and the Role of the Court

Judgments such as the ones discussed in the chapter illustrate the tightrope exercise the Court has to perform when defining the scope of contested rights of minority groups, especially where it is asked to provide solutions to sensitive moral and ethical dilemmas that divide European societies. Any outcome in such cases is bound to generate criticism, either on the basis that the Court was activist and arbitrarily increased the obligations of contracting parties to the Convention, or conversely, on the ground that it did not provide adequate protection to effectively address the plight of the applicants. The chapter argues, that the use of EuC in the cases presented sends mixed messages as to the capacity of the Court to advance human rights protection for minorities and to reverse discriminatory practices against them across Europe.

The approach to EuC which the Court employs in its same-sex marriage case law, suggests that any progress on minority rights should first take place at the domestic level. This is in line with the Court's subsidiary nature and demonstrates self-awareness as to the limits of international human rights supervision. In this scenario, EuC serves as a tool to track progress across Europe. By tying progress on same-sex marriage to EuC, the Court is implicitly suggesting that once a majority of states in the CoE recognise same-sex

¹⁰⁴ The dissenting judges in *Hämäläinen*, attempted such an interpretation by making reference to the Yogyakarta Principles (see International Commission of Jurists, Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007, (available at http://www.yogyakartaprinciples.org/principles_en.htm) along with "recent judgments of the Constitutional Courts of Austria, Germany and Italy". See joint dissenting opinion of judges Sajo, Keller and Lemmens at [16].

marriage, it will begin to reconsider its approach and potentially find the exclusion of same-sex couples from the right to marry discriminatory. This matter, however, is one for the contracting parties to decide, at least until that point in time when sufficient EuC¹⁰⁵ is reached in favour of same-sex marriage. Until this occurs, the Court will refrain from interpreting the Convention in a manner that will expand the obligations of the contracting parties. The application of EuC is largely unaffected by the minority status of the applicants, even though the Court has accepted in its case law that they belong to a group that requires protection from majoritarian bias.

Under this understanding of consensus, any progress on minority rights in the Court's case law is inextricably linked to majoritarian consent as expressed through EuC. This approach is one where the Court views itself as "an institution that merely implements legal norms and not as an institution that pushes its own political agenda".¹⁰⁶ In a hypothetical scenario where such majoritarian consent to a minority right is subsequently withdrawn,¹⁰⁷ then the justification for the expansion of the right disappears. It would then be up to the Court to determine whether Convention protection will concomitantly regress, or whether the 'new' standard will remain embedded into the ECHR regardless of whether the majority of states continue to support it.¹⁰⁸

The alternative approach is one where the Court signals that it will assign lesser persuasive value to EuC, or at least engage with it creatively by taking advantage of the flexibility of the tool where minority rights are involved. This is the approach to EuC the Court demonstrated in the Roma cases discussed in the chapter. A multitude of international legal materials were employed to identify international consensus on the status of Roma as a minority in need of special Convention protection. This was a necessary step which provided the Court with the justification to reverse widespread discriminatory practices against Roma children across Europe. The Court in its assessment of the applicants' claim did not compare how each contracting party arranges access to educational institutions for Roma pupils, in spite of being prompted to do so by the respondent government, nor did it examine the educational practices for students with special learning requirements across Europe.

This approach does not discard consensus-based interpretation altogether. The outcome in these judgments relies partly on consensus derived from international legal materials.

¹⁰⁵ In *Schalk and Kopf* the Court explained that "there is not yet a majority of States providing for legal recognition of same-sex couples" at [105]. This implies that when 24 or 25 states legalise same-sex marriage, EuC will be in favour of the applicants. In spite of what its name implies, EuC is not meant to be understood as a consensus of all the 47 member states on a specific matter. A mere majority or a 'trend' suffices for the Court to ascertain that consensus exists. On this see Helen Fenwick, 'Same sex unions at the Strasbourg Court in a divided Europe' at 252.

¹⁰⁶ Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* at 6.

¹⁰⁷ Concerns have been expressed as to the progress being made in LGBTI rights across Europe, see Nils Muižnieks, 'The long march against homophobia and transphobia' (Council of Europe, The Commissioner's Human Rights Comments) available at <http://www.coe.int/en/web/commissioner/-/the-long-march-against-homophobia-and-transphobia?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fthematic-work%2FLGBTI>

¹⁰⁸ *Scoppola v Italy (n3)* (App. No. 126/05, 22 May 2012) and *Hutchinson v. the United Kingdom* (App. No. 57592/08, 17 January 2017) are recent examples where the Court is arguably regressing with regards to the protection it offers.

The role of consensus, however, in addressing the issue the applicants raised is complemented by rigorous and in-depth examination of the justifications the state advances to explain the difference in treatment. The outcome of the case is thus not tied to EuC on the impugned measure. The Court reaches its conclusion on the basis that the reasons the respondent state relied on to explain the differential treatment of the applicants did not withstand judicial scrutiny. International consensus merely served to reinforce the status of the applicants as a minority. This in turn serves as the justification for the Court to narrow what would have otherwise been a wide margin of appreciation.

This highlights a significant drawback of the approach in same-sex marriage cases where the minority status of the applicants is wholly irrelevant to the application of EuC. The lack of consensus on the existence of a positive obligation on same-sex marriage does not allow the Court to proceed to the next stage of its inquiry under Article 14 ECHR. As the Court does not identify the existence of such a positive obligation, it does not examine the respondent state's purported justifications for this differential treatment. Article 14 cases require the respondent state to produce weighty reasons to justify any differential treatment the applicants are subjected to with regards to the enjoyment of a right. The Court's analysis in its same-sex marriage judgments reflects that there has been little progress on this matter in European societies, but by not proceeding to the proportionality stage, the Court cannot address *why* such a consensus exists. It does not evaluate whether practices of excluding same-sex couples from the right to marry reflect "bias on behalf of a heterosexual majority"¹⁰⁹ against a group that has historically withstood discrimination, nor does it examine the validity of reasons states have provided to exclude same-sex couples from marriage. By not reaching the *stricto sensu* proportionality stage of its analysis to detect and assess the underlying reasons behind the exclusion, the Court seems satisfied that excluding same-sex couples from marriage is a lawful practice from the viewpoint of the Convention, on the basis that the contracting parties inform the Court that a right to same-sex marriage does not exist. This deprives the applicants of the opportunity to contest before the Court the reasons put forward to exclude them from the enjoyment of the right.

This approach may not be objectionable if one views the Court as an institution that should only passively implement the legal norms that contracting parties to the Convention generate for it. It is vital, however, for the Court to build a more coherent approach in relation to minority cases, rather than to oscillate between a passive and a seemingly more activist stance where minority rights are involved. If the Court accepts the need to narrow the margin where suspect grounds of discrimination are involved, a clearer test has to be developed to identify the appropriate relationship between EuC and minority protection.

3.2 Addressing Potential Objections

Dzehtsiarou argues that the discrepancy on the weight the Court places on EuC in Roma cases compared to same-sex marriage cases is justifiable. As he contends, in the Roma judgments, the lack of a common approach allowed the Court to seek "a clearer

¹⁰⁹ *Smith and Grady v. the United Kingdom* at [121]

guideline”,¹¹⁰ namely to go beyond EuC to examine international consensus as evidenced through other international legal materials. Conversely, in same sex-marriage cases, a clear consensus *against* same sex-marriage exists in Europe. This limits the available avenues for the Court. Thus, “the addition of a new right to the Convention, [the right of same-sex couples to marry] could hardly be justified at that point in time”.¹¹¹ Therefore, according to this analysis, *lack of consensus* should be distinguished from *existing consensus* against a specific interpretation of the Convention when determining the weight the Court should place on the overall EuC argument. According to this approach, existing EuC against a specific interpretation adds weight to the persuasive value of EuC.

A different approach is defended in this chapter. Firstly, if we are to accept (as Dzehtsiarou seems to accept)¹¹² that the fact that the Court is examining a case relating to minority rights provides the Court with the justification to use EuC with greater flexibility, it should be irrelevant whether the Court diagnoses an existence or lack of EuC on the impugned measure. When examining the scope of minority rights under the prism of EuC, there is greater likelihood a consensus will exist *against* the minority. For instance, as discussed in the analysis above, in *Horvath and Kiss* the Court noted that “the misplacement of Roma children in special schools has a long history across Europe”.¹¹³ It did not, however, interpret this continuous discriminatory treatment as a form of EuC against the participation of Roma children in the mainstream education school system. This point was used instead, to further justify the need to narrow the margin of appreciation of the respondent state. Similarly, historically, European states have exposed same-sex couples to various forms of differential treatment. This, in itself, should have little significance to the Article 14 ECHR argument, unless cogent justifications are presented as to why any exclusion from the enjoyment of a right satisfies the test of proportionality.

Secondly, it is true that EuC analysis is crucial where a ‘new right’ is added to the Convention. EuC “anchors”¹¹⁴ the Court when expanding state obligations under the Convention, by ensuring that this expansion is not conducted in an arbitrary manner. The Court, however, has already accepted that same-sex marriage falls within the ambit of Articles 8 and 12.¹¹⁵ Therefore, it is merely determining whether an existing right, the right to marry (whose ambit per the Court cannot “in all circumstances be limited to marriage between two persons of the opposite sex”),¹¹⁶ can justifiably generate a positive obligation on contracting parties. While a pronouncement that states have a Convention-based duty to provide recognition to same-sex marriage would certainly constitute a novel interpretation of the Convention, the Court is applying evolutive interpretation to *extend* an existing right to a recognised minority that has traditionally been excluded

¹¹⁰ Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* at 127.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Horvath and Kiss v. Hungary* at [115].

¹¹⁴ Robert Wintemute, ‘Consensus is the right approach for the European court of human rights’ (Guardian.com, 12 August 2010) available at <https://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus>.

¹¹⁵ *Schalk and Kopf* at [61].

¹¹⁶ *Ibid.*

from it and withstood various forms of discrimination. It is questionable whether this justifies the application of EuC in such a rudimentary manner.

There are also ample examples in the case-law of the Court demonstrating that in cases, where the scope of LGBTQ rights was under challenge, EuC against the applicant's claim did not bar the Court from proceeding to the proportionality stage of its analysis and examining the cogency of the reasons submitted by the state to justify differential treatment. For instance, *E.B. v France*¹¹⁷ and *X and others v Austria*,¹¹⁸ are examples of cases involving discrimination against LGBT individuals (namely their inability to adopt children), which required evolutive interpretation of the Convention,¹¹⁹ and where there was clear EuC against the applicants' claim.¹²⁰ In both cases, however, the Court did not rely exclusively on this EuC to determine the outcome of the case. It fully engaged with and thoroughly examined the justifications presented by the respondent states and found them lacking.¹²¹

In light of these observations, the chapter will provide a summary of the main points by way of a conclusion.

Conclusion

The chapter set out to examine the impact of the applicant's minority status to the use of the EuC method of interpretation. In doing so, the chapter identified inconsistencies in the Court's application of EuC between different minorities. Whereas the Court took advantage of the full potential of the flexibility associated with EuC to resolve conflicts as to the appropriate scope of Roma rights and their equal access to education, it exhibited a much more deferential approach in same-sex marriage cases. In the latter set of judgments, the minority status of the applicants seems to have no bearing on the manner in which EuC was applied. The chapter argues that the relationship between EuC and the minority status of the applicant must be better defined and more consistently applied across judgments that relate to minority rights. This will assist in further clarifying the role the Court reserves for itself in relation to minority protection across Europe and the fight against discrimination. Finally, if the Court accepts some value in limiting the role of EuC in minority cases, the nature of EuC (namely whether there is an existing consensus, or conversely, no consensus in relation to a specific rights claim) should not alter the Court's approach in applying this method of interpretation.

¹¹⁷ (App. No. 43546/02, 22/01/2008).

¹¹⁸ (App. No. 19010/07, 19/02/2013).

¹¹⁹ See *E.B. v France* at [46] and *X and other v Austria* at [139].

¹²⁰ In *E.B. v France* the respondent government noted that "only nine out of forty-six member States of the Council of Europe" had moved towards adoption by same-sex couples and many countries did not make adoption available to single persons at all [65]. In *X and others v Austria* rather than relying on a sample of all European states, consensus was construed very narrowly by including only states that allowed second parent adoption. The sample was considered too narrow for consensus to be a determining factor in the outcome of the case [149].

¹²¹ Even in judgments involving adoption by LGBT individuals where the Court did not find a violation of the consensus, the structured test of Article 14 was followed where this was applicable. See for instance *Gas and Dubois v. France* (App. No. 25951/07, 15 March 2012); *Fretté v. France* (App. No. 36515/97, 26 February 2002).

