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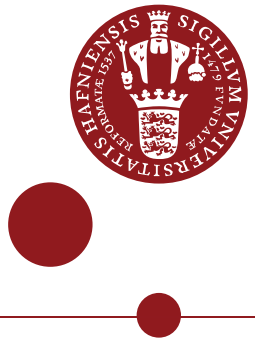

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Towards a General Typology of Consensus Analysis: From Entrenching Divergence to Constituting Convergence

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Consensus analysis is a method of interpretation and an argumentative practice employed by some of the highest courts in multilevel legal systems, ranging from national federations to systems with origins in international law. In its most basic and most prevalent form, consensus analysis is used by courts when they interpret a legal norm of a higher-level legal order based on how this norm had been interpreted and implemented in lower-level legal orders – the constituent states. Though there is abundant literature on the applications of consensus analysis within specific jurisdictions, few, if any at all, have attempted to transcend the dependence of their analyses on a specific systemic context and to examine consensus analysis as a practice in the abstract. This chapter aims to begin to fill this gap. It analyses consensus analysis as used by the United States Supreme Court, the Court of Justice of the European Union, and the European Court of Human Rights to inductively devise a general typology of consensus analysis as used across different courts and institutional contexts. Establishing this typology is instrumental to our understanding that consensus may serve either as a converging or diverging mechanism for resolving conflicts in multilevel legal orders. Which of the two functions it serves will depend on what type of consensus is used by a specific court in an individual case.

KEYWORDS: consensus analysis, European consensus, national consensus, European Court of Human Rights, United States Supreme Court, legal divergence, legal convergence

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Towards a General Typology of Consensus Analysis: From Entrenching Divergence to Constituting Convergence

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Abstract:

Consensus analysis is a method of interpretation and an argumentative practice employed by some of the highest courts in multilevel legal systems, ranging from national federations to systems with origins in international law. In its most basic and most prevalent form, consensus analysis is used by courts when they interpret a legal norm of a higher-level legal order based on how this norm had been interpreted and implemented in lower-level legal orders – the constituent states. Though there is abundant literature on the applications of consensus analysis within specific jurisdictions, few, if any at all, have attempted to transcend the dependence of their analyses on a specific systemic context and to examine consensus analysis as a practice in the abstract. This chapter aims to begin to fill this gap. It analyses consensus analysis as used by the United States Supreme Court, the Court of Justice of the European Union, and the European Court of Human Rights to inductively devise a general typology of consensus analysis as used across different courts and institutional contexts. Establishing this typology is instrumental to our understanding that consensus may serve either as a converging or diverging mechanism for resolving conflicts in multilevel legal orders. Which of the two functions it serves will depend on what type of consensus is used by a specific court in an individual case.

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1 Introduction

On September 2nd 1974, Ehrlich Anthony Coker escaped a Georgia penitentiary where he had been serving a sentence for murder, rape, kidnapping, and aggravated assault. Soon after his escape, Coker broke into the house of the Carver family; he robbed Mr Carver at knifepoint, stealing his money and the keys to the family car, tied him up in the bathroom, and proceeded to rape and abduct Mrs Carver. Soon after, Mr Carver had managed to break free and inform the authorities; they promptly tracked

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down the stolen car with Coker behind the wheel, finding Mrs Carver still alive. Coker was prosecuted and sentenced to death for non-homicidal rape. His conviction was upheld by the Supreme Court of Georgia and Coker brought his case to the United States Supreme Court (SCOTUS). In a 7-2 ruling, SCOTUS overturned Coker's death penalty, deciding that capital punishment for non-homicidal rape violates the Cruel and Unusual Punishment Clause of the Eighth Amendment. In reaching this conclusion, the majority leaned heavily on what the states themselves thought of the matter. It wrote that

'[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.'[2]

In doing so, the Court used what is known in US constitutional law as the national consensus doctrine, whereas SCOTUS would interpret a norm of the federal constitution—the Eighth Amendment—based on how the states understand and had implemented that provision in their state law. Other highest courts in multilevel legal systems use similar interpretative methods, too. The European Court of Human Rights (ECtHR) regularly employs the European consensus doctrine in interpreting the European Convention on Human Rights (ECHR) when it gauges the views of states parties to the ECHR to interpret its provisions. Similarly, the Court of Justice of the European Union (CJEU) gives meaning to EU human rights norms by examining if a right forms part of 'constitutional traditions common to the Member States'. Across different institutional and structural contexts, consensus analysis, much like the one SCOTUS performed in *Roper*, influences the outcomes of cases regarding 'delicate moral and ethical questions', to borrow the wording of the ECtHR. Be it abortion, artificial insemination, voting rights of prisoners, LGBT and Roma rights, or the death penalty, courts across different multilevel legal systems have decided on these issues through consensus analysis.

Consensus analysis is also important for systemic and structural reasons. Employing it in their decision-making, not only can courts change, affect, and literally end human lives, but they can also influence how multilevel legal systems accommodate the diverse views of their constituent states. Through consensus, courts can either entrench the pre-existing divergences between the constituent units, or constitute a converging force themselves. Going back to *Coker*, SCOTUS decided that because the majority of states were against capital punishment for non-homicidal rape, the federal constitution should be interpreted in line with that consensus. This decision bared the minority of outlier states from continuing to deliver capital sentences and brought them in line with the majority through a federal constitutional mandate. Consensus analysis, as the driving argumentative force behind that decision, thus constituted a convergence as it forced states to follow a single (federal) standard and did not allow states to diverge from it. Conversely, if SCOTUS were to find that there was no consensus against capital punishment for non-homicidal rape amongst the states and, as a

[2] *Coker v Georgia*, 433 U.S. 584 (1977) at 596.

result, the federal constitution did not enjoin states from using it, this would entrench the pre-existing divergences between the states. It would confirm that federal (constitutional) law does not impose a unified view on the states but instead permits them to come to divergent solutions to the problem at hand.[3]

And yet, despite the fact that courts have influenced the lives of hundreds of millions of people in very personal and intimate ways through consensus analysis, and despite the fact that it has an important role in how courts accommodate diversity in multilevel legal systems, there has not yet been a comprehensive study of consensus analysis as a method in the abstract, devoid of a specific systemic context. There is abundant literature on the applications of consensus analysis within a specific jurisdiction, as well as some attempts at a comparative treatment of courts' approaches.[4] In addition, many system-specific typologies of consensus have been developed.[5] But few, if any at all, have attempted to transcend the dependence of their analyses on a specific systemic context and to examine consensus analysis in the abstract. This chapter aims to begin to fill this gap.

It makes this contribution by setting up the groundwork for future more in-depth inquiries of consensus outside a specific systemic context through building a general typology of consensus

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[3] For such situation regarding the death penalty in general, and the effect it had on the reasoning of SCOTUS regarding the constitutionality of the death penalty, see *Gregg v Georgia*, 428 U.S. 153 (1976), at 179-184.

[4] See, for instance, Panos Kapotas and Vassilis P Tzevelekos, 'How (Difficult Is It) to Build Consensus on (European) Consensus' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019), particularly Part III (Chapters 15-18); Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011); Conor O'Mahony and Kanstantsin Dzehtsiarou, 'Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the US Supreme Court' (2013) 44 Columbia Human Rights Law Review 309; Christopher McCrudden, 'Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared' (2013) 15 Cambridge Yearbook of European Legal Studies 383.

[5] For extensive typological treatments of European consensus as used by the ECtHR, see Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 39–55; Jens T Theilen, *European Consensus between Strategy and Principle: The Uses of Vertically Comparative Legal Reasoning in Regional Human Rights Adjudication* (Nomos Verlagsgesellschaft 2021) 23–31; Lawrence Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26 Cornell International Law Journal 133, 139. For a fairly comprehensive typology of approaches to consensus by SCOTUS, see Ian P Farrell, 'Strict Scrutiny Under the Eighth Amendment' (2013) 40 Florida State University Law Review 853, 858–883; Robert J Smith, Bidish J Sarma and Sophie Cull, 'The Way the Court Gauges Consensus (and How to Do It Better)' (2014) 35 Cardozo Law Review 2397, 2402–2418.

analysis. It constructs this typology inductively, by generalising common traits of consensus from the consensus-related case law of various courts, as well as the legal commentary on those courts. Building such a general typology of consensus analysis is important because, for one, it opens up consensus to a more comparative rather than institutionally self-contained criticism and analysis. It also allows for a better and more encompassing contextualisation of consensus. It shifts the focus away from the systemic and institutional specificities towards the method in the abstract and its underlying methodologies, normativities, and peculiarities. In line with this, such a shift can also inform our understanding of how consensus analysis affects the processes of convergence and divergence between states across multilevel systems, as well as enable us to appreciate how courts can use consensus to accommodate diversity in complex legal systems more generally.

The chapter identifies four typological dimensions that define consensus analysis in the abstract and sketches out throughout the chapter how understanding this typology can shed light on our understanding of the accommodation of converging and diverging forces in multilevel systems. Section 2 discusses bases of consensus as the first typological variable. Section 3 discusses levels of generality of consensus. Section 4 focuses on temporality of consensus, while Section 5 delves into automaticity of consensus. Section 6 concludes.

2 Bases of Consensus

The bases of consensus are the central element of consensus analysis. They concern the fundamental question of what consensus is, and on the basis of what factors it is established. It tells us what evidence courts use when they make consensus-related arguments and what they reference when they examine if a consensus exists on a given issue. This typological dimension has been named differently by different courts and commentators in different institutional contexts. For instance, literature discussing European consensus of the ECtHR has settled on the terms ‘sources of consensus’ and ‘elements of consensus’. SCOTUS and its commentators, on the other hand, have consistently been using ‘objective indicia’ of consensus to reference this typological dimension. In the CJEU context, no consistent terminology is established. This chapter uses the term ‘bases of consensus’ to unite all these naming conventions under a single umbrella term. If it uses the specific terms ‘sources of consensus’, ‘elements of consensus’, or ‘indicia of consensus,’ it uses them interchangeably.

Across different multilevel systems and institutional contexts, courts have used a wide range of sources to discern the (non)existence of consensus. It is precisely on the basis of indicia of consensus that we can distinguish between the *core* meaning and the *peripheral* meanings of the consensus analysis method as a whole.[6]

[6] For the introduction of the idea of a ‘core’ meaning of consensus, see Kapotas and Tzevelekos (n 4) 7.

Under the core meaning of consensus, courts establish consensus on the basis of legislation of the constituent units on the disputed issue, or the practices prevalent in the constituent units. In the context of the CoE, for instance, the former would refer to the ECtHR gauging consensus by examining how an issue is regulated by the laws of states parties to the ECHR; or in the domestic US constitutional context, it would refer to SCOTUS using state laws on the disputed issue as the basis for establishing the existence of consensus. Examples of different courts using consensus analysis in this way are abound.[7] Consider, for instance, the decision of the CJEU in *D and Sweden* v. *Council*, in which the Court leaned heavily on the different meanings of 'registered partnership' and 'marriage' in the domestic laws of the EU Member States in ruling that the term 'married official' in EU Staff Regulations does not cover individuals in registered partnerships.[8] Discerning consensus on the basis of practices of constituent units would entail a similar exercise, with the exception that a court—SCOTUS, for instance—would not examine state laws but state practices or policies.[9] It would not examine whether state penal laws permit the imposition of the death penalty as a matter of law, but it would examine if state attorneys are pushing for the death penalty to be imposed, if juries actually sentence individuals to death, and if those sentences are actually being executed. In other words, the court would not examine penal laws, but penal policies and practices of constituent states.

Courts have been quite innovative in adding layers to this core understanding of consensus and developing further peripheral meanings of it. An impressively lengthy list of bases of consensus that have been referenced by courts can be assembled. Various national and international courts have thus discerned consensus on the basis of international treaties,[10] decisions of international tribunals,[11]

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[7] For the many examples in the jurisprudence of the EctHR, see Dzehtsiarou (n 5) 40–45; Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court of Human Rights' (2013) 33 Human Rights Law Journal 248, 253; Helfer (n 5) 139 and the case law contained therein. For the examples in the jurisprudence of SCOTUS, see Jaka Kukavica, 'National Consensus and the Eighth Amendment: Is There Something to Be Learned from the United States Supreme Court?' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019) 370–385 and the case law contained therein.

[8] Joined cases C-122/99 P and C-125/99 P *D and Sweden v Council* [2001] ECLI:EU:C:2001:304 paras 34-39.

[9] See, for instance, *Gregg v Georgia*, 428 U.S. 153 (1976) at 179-82; *Woodson v North Carolina*, 428 U.S. 280 (1976) at 289-95; *Coker v Georgia*, 433 U.S. 584 (1977) at 593-6; *Enmund v Florida*, 458 U.S. 782 (1982) at 789-97; *Thompson v Oklahoma*, 487 U.S. 815 (1988) at 823-31.

[10] See Dzehtsiarou (n 5) 45–49; Wildhaber, Hjartarson and Donnelly (n 7) 253–254; Helfer (n 5) 139 and the case law contained therein.

[11] See Dzehtsiarou (n 5) 49; Wildhaber, Hjartarson and Donnelly (n 7) 254–255 and the case law contained therein.

regional law,[12] international or regional soft law,[13] internal soft law,[14] foreign legal orders,[15] trends in the laws of constituent units,[16] international trends,[17] the margin by which laws of constituent units are passed by legislatures,[18] judges' perception of social consensus,[19] scientific developments and the views of experts,[20] statements of religious authorities,[21] and polling data.[22] This typology of bases of consensus is also demonstrated in Table 9.1 below.

[12] This corresponds to sources that are neither internal to a system, nor international in nature, but are nonetheless closely connected to a system in question. In the context of the CoE and the ECHR, EU law would fall within the meaning of regional law. And vice versa, within the EU context, the ECHR would qualify as regional law. In the context of the USA, NAFTA, for instance, could qualify as regional law. See Dzehtsiarou (n 5) 49 and the case law contained therein.

[13] See, for instance, *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003), para 36, in which the ECtHR refered to a resolution of the European Parliament.

[14] This corresponds to soft law instruments that are internal to a particular system. For instance, within the context of the CoE and the ECHR, this would mean CoE regulations and recommendations. However, a reference to a CoE regulation or recommendation made by SCOTUS would better be characterised as international soft law. See Dzehtsiarou (n 5) 48; Wildhaber, Hjartarson and Donnelly (n 7) 256; Helfer (n 5) 139 and the case law contained therein.

[15] Wildhaber, Hjartarson and Donnelly (n 7) 255–256, n 79–80 and the case law contained therein. As Wildhaber et al. explain, the ECtHR has mostly looked for inspiration to extra-European liberal and democratic common law jurisdictions, such as the USA, Canada, South Africa, Australia, and Israel; For equivalent references made by SCOTUS, see Youngjae Lee, 'International Consensus as Persuasive Authority in the Eighth Amendment' (2007) 156 University of Pennsylvania Law Review 63.

[16] *Babar Ahmad and Others v the United Kingdom* App nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09 (ECtHR, 10 April 2012) para 242; *Atkins v Virginia*, 536 U.S. 304 (2002) at 315.

[17] *Christine Goodwin v the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 85.

[18] *Atkins v Virginia*, 536 U.S. 304 (2002) 316.

[19] *Winterwerp v the Netherlands* App no 6301/73 (ECtHR, 24 October 1979), para 37.

[20] *Atkins v Virginia*, 536 U.S. 304 (2002) 316; *Sutherland v the United Kingdom* App No 25186/94 (ECtHR, 1 July 1997); *B. v France* App no 13343/87 (ECtHR, 25 March 1992), para 48.

[21] *Atkins v Virginia*, 536 U.S. 304 (2002) 316.

[22] ibid 317.

Bases of consensus	
Core meaning	Laws of constituent units
	Practices of constituent units
Peripheral meanings	International treaties
	Decisions of international tribunals
	Regional law
	International soft law
	Regional soft law
	Internal soft law
	Foreign legal orders
	Trends in laws of constituent units
	International trends
	Margin by which legislation of constituent units is passed
	Judges' perception of social consensus
	Scientific developments and the views of experts
	Statements of religious authorities
	Polling data

Table 9.1. Bases of consensus used by domestic and international courts across institutional contexts

Some authors, in developing their system-specific, most often ECHR-specific typologies, have attempted to group some of the above bases together to form discrete categories of consensus. Helfer, for instance, has identified legal consensus, expert consensus, and European public consensus as the three overarching categories of consensus used by the ECtHR.[23] Dzehtsiarou, on the other hand, has identified four 'types' of consensus from the various bases used by the ECtHR: consensus based on comparative analysis of laws and practices of states parties to the ECHR; consensus based on international treaties; expert consensus; and internal consensus within a single state.[24] While engaging in such a categorising and clustering exercise may have been useful for their analytical purposes, the purpose of this chapter is precisely the opposite; it is to deconstruct consensus analysis as a method into its smallest constituent elements and abstracting them from the various institutional contexts in which they are used.

[23] Helfer (n 5) 139.

[24] Dzehtsiarou (n 5) 38–39.

Before proceeding, however, the nature of this volume calls for a brief excursus concerning Dzehtsiarou's 'internal consensus within the respondent state' and the reasons for its omission from this typology. By internal consensus, Dzehtsiarou refers not to consensus *amongst* states that comprise a multilevel system, but rather to consensus *within* a single state; this internal consensus is established based on declarations of the respective national parliament, perceived internal consensus, and the results of potential national referenda.[25] It is highly reminiscent of the national identity clause of Article 4(2) TEU in EU law.[26] Through referring to any member state's individual national identity, the national identity clause, much like 'internal consensus within the respondent state', generally serves as a shield for individual member states against encroachments of EU law. It provides a legal justification for a member state to depart from the common standards that have been agreed on and made their way into EU law.[27] Conversely, consensus analysis is an intrinsically communitarian legal standard and gives courts a justificatory device through which they can ensure a measure of unity between the legal orders of constituent units. Whereas identity clauses and internal consensus promote diversity by granting constituent states the right to depart from common positions, consensus analysis permits courts to promote unity by prohibiting such departures from the common positions of constituent units. One is a unifying standard in accordance with which those states that are out of line with the general consensus are more likely to be found in breach of their constitutional or international obligations, while the other can be used by the same outlier state to justify its unorthodox position. Due to the inherently different nature of 'internal consensus' to consensus analysis, the former should therefore not be included in the general typology of the latter.

Having established this, we can now proceed to a more detailed discussion of both bases that constitute the core meaning of consensus: (i) laws and (ii) practices of constituent units.

2.1 Laws of Constituent Units

At first sight, 'laws of constituent units' as basis of consensus may seem self-explanatory; the existence of consensus is based on a comparative analysis of domestic laws of constituent units, be it constitutional provisions, statutes, or other sources of law within the relevant states.[28] However, there

[25] ibid 49–55.

[26] See chapters by Jakob Gašperin Wischhoff and Marjan Kos in this volume.

[27] See, for instance, Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 Common Market Law Review 1417. For more on the national identity clause of Article 4(2) TEU, see Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015). For similar uses of 'internal consensus' by the ECtHR, see *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010).

[28] Note that this includes cases in which courts engage in consensus analysis that is unsubstantiated and opaquely reasoned; that is cases in which the comparative legal analysis underlying consensus analysis is not explicit in the

is more than meets the eye, and references to domestic laws raise a number of important (methodological) questions. More specifically, such references raise three additional typological considerations that need to be considered to fully understand laws of constituent units as a basis for consensus: (i) how many states suffice for a court to find the existence of consensus; (ii) which states should be counted by the court and, finally, (iii) which states are actually counted by the court?

Examining these questions, as well as the conceptual problems that they raise, is more than just a theoretical or a mere taxonomical exercise; it is important because different answers to these questions can result, and often do, in different outcomes in concrete cases before courts. How precisely courts conduct consensus analysis thus has an important effect on how consensus accommodates diversity amongst the states that comprise a multilevel system. By varying the way they employ the method—for instance by changing how many states are needed in favour of a particular solution for consensus to exist—courts can make consensus either a device that leans more towards entrenching divergences, or a device that by imposing a uniform standard on the basis of consensus constitutes a convergence.

2.1.1 How Many States Are Required?

This typological concern refers to the question of when the threshold of 'consensus' is reached. What is the required majority of constituent units—states—in favour of a particular solution for a court to recognise the existence of consensus? Is it a simple majority? Perhaps a qualified majority? Something in between? Unanimity of all states, except for the respondent state, in cases in which there is one?[29] Thus far, to the best of my knowledge, no empirical research has been conducted in any of the legal systems in which highest courts use consensus analysis with the aim of determining how many states those courts require to find consensus to exist, though some things are clear. Not only across different courts, but also within the jurisprudence of a single court, there are significantly divergent approaches from case to case as to the majority required.[30] Moreover, particularly in the context of the ECtHR, there is a strong agreement amongst commentators that using the expression 'consensus' to denote consensus analysis is fundamentally inappropriate because it implies unanimity amongst the states, which is almost never required by the Court.[31] Furthermore, in this same context, some authors argue that the ECtHR has been unclear as to the percentage of states whose views must

judgment. See, for instance, *Tyrer v the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), para 31; Case 136/79 *National Panasonic (UK) Limited v Commission* [1980] ECLI:EU:C:1980:169, para 18.

[29] For a criticism of the state-counting approach while disregarding the percentage of the population that lives in an individual state, see Roderick M Jr Hills, 'Counting States' (2009) 32 Harvard Journal of Law & Public Policy 17, 21.

[30] Senden (n 4) 395.

[31] Wildhaber, Hjartarson and Donnelly (n 7) 257; Dzehtsiarou (n 5) 12.

converge for the Court to be satisfied that consensus had been reached[32] and that determining the percentage in the abstract would have been impossible.[33]

But regardless of these system-specific intricacies, it is important, for our purposes, to simply acknowledge that the majority of states required for consensus to gain normative value is a crucial typological consideration in studying consensus analysis across specific institutional contexts. It is particularly important in the study of consensus as a mechanism through which diversity is accommodated as the different majorities required fundamentally alter consensus' nature in that respect. Generally put, the smaller the required majority, the more convergence constituting consensus analysis will be; an agreement between fewer states will be necessary for a court to impose a unified standard on all constituent units. Conversely, the more qualified the required majority, the more divergence entrenching consensus becomes; an agreement between a larger number of states is needed for consensus to be recognised and a uniform standard to be imposed by a court.

2.1.2 Which States Count?

From a conceptual perspective, the question of which states should count in consensus analysis is even more fundamental and primary than the question of the required majority. The latter tells us the numerator, while the former tells us the denominator; it tells us what the sample of constituent units amongst which we are seeking for consensus is. Much similar to the question of the required majority, different answers to this question can result in different outcomes of cases, which, in turn, can change the nature of consensus as a mechanism of accommodation.

There has been a lot of discussion, particularly in the USA, regarding which states should count in assessing consensus; there, the discussion has been whether all states or just those for which a particular issue arises should be counted?[34] Eighth Amendment jurisprudence of SCOTUS is demonstrative of this issue. In *Roper* v. *Simmons*, SCOTUS had to decide whether sentencing underaged offenders to death was barred by the Eighth Amendment. The methodological dilemma faced by SCOTUS in surveying the state of national consensus was whether to take into account only the positions of US states that permit the death penalty, thereby substantially narrowing down the sample, or whether laws of all US states should be taken into account. The core of the disagreement on this issue between the majority and the dissenters in *Roper* may be summed up through this passage by Justice Scalia: 'That 12 States favour *no* executions says something about the consensus against

[32] Helfer (n 5) 140.

[33] Wildhaber, Hjartarson and Donnelly (n 7) 258–259.

[34] For more, see Tonja Jacobi, 'The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus' (2006) 84 North Carolina Law Review 1089, 1125–1131.

the death penalty, but nothing—absolutely nothing—about consensus that offenders under 18 deserve special immunity from such a penalty.'[35]

Scalia's argument is that it is not possible to infer from a categorical position against the death penalty of the 12 states what their position is on the special nature of culpability of minors. Put differently, Justices disagreed whether *argumentum a fortiori* can be applied when assessing consensus. In one of the few papers that have dealt with this issue, Dzehtsiarou and O'Mahony advocated for what they called an 'inclusive approach', according to which positions of all states should be considered when analysing the existence of consensus.[36] Only exceptionally, according to them, 'if the evidence indicated that the absence of relevant laws in an individual state was a result of that state genuinely not having considered the issue at hand, rather than a conscious decision to not regulate the issue,'[37] we could adopt the *a fortiori* exclusive approach.

However, the distinction between an inclusive approach, where all constituent units are counted in conducting consensus analysis, and the Scalian exclusive approach, under which only states 'for which the issue arises' should be considered, creates a false dichotomy. There is a third approach that can be discerned from the jurisprudence of consensus-employing courts.[38] I shall simply refer to it as the 'specific approach'.

What the 'specific approach' entails can be best demonstrated with the ECtHR case of *Lekić* v. *Slovenia*.[39] At the heart of the dispute in *Lekić* were the provisions of the Financial Operations of Companies Act 1999 (FOCA) passed by the Slovenian legislature.[40] On the basis of FOCA, Slovenia struck a significant number of companies off the registry and 'introduced a "non-rebuttable" presumption that the members of a struck-off company were deemed to have undertaken joint and several liability for any outstanding debts of the company.'[41] Members could exonerate themselves from any liability only by proving that their role in the company was a passive one. After one of the members of one of the affected companies failed to do so, he brought his case to Strasbourg, arguing that Slovenia had violated his right to peaceful enjoyment of his possessions from Article 1 of Protocol 1 of the ECHR. In rejecting his claim, the ECtHR explained that FOCA was introduced in a particular context in which 'thousands of companies, which had been created under the legislation of the former Socialist Federal Republic of Yugoslavia, existed only on paper and, moreover, had large

[35] See *Roper*, 611 (Scalia. J., dissenting).

[36] O'Mahony and Dzehtsiarou (n 4).

[37] ibid 346.

[38] To paraphrase the famous philosopher Slavoj Žizek: 'There is a third pill!'

[39] *Lekić v Slovenia* App no 36480/07 (ECtHR, 11 December 2018).

[40] *Zakon o finančnem poslovanju podje*tij (ZFPPod), Official Gazette RS, nos. 54/99, 110/99, 93/02 – odl. US, 117/06 – ZDDPO-2, 31/07, 33/07 – ZSReg-B, 58/07 – odl. US in 126/07 – ZFPPIPP.

[41] *Lekić v Slovenia* App no 36480/07 (ECtHR, 11 December 2018), para 27.

debts, but no assets.'[42] The ECtHR also explained that 'the FOCA was introduced in response to a serious and widespread problem in post-socialist Slovenia extending to no less than 6,500 companies and undermining some of the basic conditions which the companies had to satisfy in a free-market economy.'[43]

As the Court made it clear, the situation that gave rise to the case was highly specific to the post-Yugoslav context in which newly independent countries were making a transition from a centrally planned economy to a free-market system. It was within this specific context that the ECtHR decided that the admittedly wide-sweeping measures of FOCA were justified under the ECHR. Therefore, it could be argued that in conducting consensus analysis in *Lekić*, only laws of those CoE member states that have undergone a transition from a communist to a capitalist economic system should be relevant to the analysis. In fact, when conducting the comparative survey, the Court examined laws of all ex-Yugoslav states and the majority of the states that were surveyed were indeed ex-communist states.[44]

To put the lesson of *Lekić* into the abstract, the third 'specific approach' comprises of cases that originated from a very distinct factual substratum that only applies to a limited part of the constituent units and does not lend itself to the applicability of *argumentum a fortiori*. When discussing laws of which constituent units should count in establishing consensus, the first way in which the dichotomy between inclusive and exclusive approaches is false is that it overlooks these *Lekić*-like special cases. Therefore, there are not just two, but three approaches to defining what states are relevant in ascertaining consensus: the inclusive approach (all states count), the *a fortiori* exclusive approach (rejecting *a fortiori* inferences, only states that adopted a specific position on the specific issue count), and the special approach (only states that share a specific factual context count).

2.1.3 Which States are Actually Counted?

But even identifying the three approaches does not yield the full picture; there is a second way in which the hitherto established dichotomy between the inclusive and the *a fortiori* exclusive approach is false. This is because the preceding discussion was only concerned with domestic laws of what constituent units are *relevant* for discerning consensus. However, it said nothing about domestic laws of which states are *actually considered* by courts in deciding any given case. Therefore, within each of the approaches—the inclusive, the exclusive, and the specific—there are three sampling options a court could follow when deciding which states' laws to *actually* examine. First, a court can examine domestic laws of all of the relevant constituent units. Second, it can examine the laws of a statistically representative sample of the relevant constituent units. Finally, it can analyse a statistically unrepresentative sample of the relevant constituent units. Therefore, in discussing which states count

[42] ibid, para 114.

[43] ibid, para 116.

[44] ibid, para 56.

in establishing consensus, there are not only two approaches, as is commonly discussed in literature. Instead, there are nine distinct approaches: three in defining which states are *relevant* for the consensus inquiry, and three options under each of the approaches as to how many states' laws are *actually* surveyed by courts. This is presented in Table 9.2 below.

How to count states?	
Which states count?	*Which states are actually counted?*
Inclusive approach	All states
	Statistically representative sample
	Statistically unrepresentative sample
Exclusive approach	All states
	Statistically representative sample
	Statistically unrepresentative sample
Specific approach	All states
	Statistically representative sample
	Statistically unrepresentative sample

Table 9.2. Different approaches to counting legislative positions of states as bases of consensus

As noted above, the decision which of these nine approaches to follow is not mere theoretical fetishism. Each of the approaches changes consensus analysis as a method dramatically, and it changes how cases are decided. Going back to SCOTUS and its decision in *Roper*, Scalia's insistence on following the exclusive approach, and the majority's insistence on adopting the inclusive approach, was not only a matter of constitutional doctrine but also a matter a practical consequence. Were Scalia's theory to carry the day, the Court would not have been able to find consensus against sentencing minors to death;[45] it would therefore be more likely to find capital punishment of minors constitutional and thereby further entrench the existing divergences in sentencing policy amongst states. Conversely, as the majority's inclusive approach prevailed, SCOTUS was able to find a consensus against the death penalty for minors and found such punishment unconstitutional. In so doing, consensus acted as a converging force through which the Court was able to impose a uniform standard on capital punishment across all 50 states.

2.2 Practices of Constituent Units as a Separate Source

Legal commentary on consensus analysis, especially in Europe, has taken 'laws and practices of constituent units' as a unitary singular basis of consensus, even though they are not one and the same.

[45] See *Roper*, 609-611 (Scalia. J., dissenting).

This approach overly simplifies how consensus works, and it blurs the lines between the different bases of consensus that are better examined separately. It is an unavoidable fact that the law can be applied, practised, and administered in various different ways, especially when discretion is built into it by design.[46] Indeed, the evergreen distinction between 'law in books' and 'law in action' is predicated on this fact.

The distinction between, and the importance of separately examining consensus on the basis of legislation and practices shines through most explicitly in the USA, where most consensus-related case law concerns the constitutionality of certain types of punishment, historically most often the death penalty. In this context, the distinction between the two bases is the distinction between criminal law and sentencing policy. SCOTUS not only looks at whether states permit, in their criminal legislation, the death penalty (consensus on the basis of laws of constituent units), but also if the states still execute the death penalty and if the juries still sentence people to death (consensus on the basis of practices of constituent units). For instance, in *Gregg* v. *Georgia*, the Court rejected the idea that the death penalty was unconstitutional *per se*.[47] When examining national consensus, SCOTUS demonstrated that '[t]he legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes […]'.[48] The Court then separately analysed the sentencing practices, stating that 'the actions of juries in many States […] are fully compatible with the legislative judgments […] as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974, at least 254 persons had been sentenced to death […] and, by the end of March, 1976, more than 460 persons were subject to death.'[49] In the same way, SCOTUS has treated state laws and state practices separately in every national consensus case after *Gregg*.[50]

Making the distinction between consensus on the basis of laws and on the basis of practices is important because the two raise different normative considerations and methodological issues. As pertaining to consensus on the basis of laws of constituent states, some of these have been raised in the preceding paragraphs. All of them apply equally to counting states on the basis of practices as well. However, there are some methodological questions that are unique to them, for instance what inferences and conclusions, if any, can be drawn from state practices. This can again be illustrated with relation to jury decisions and sentencing policy in the USA. Does the rarity of a sentencing practice mean that there is a consensus that it should not be used, or that it should be used, well, rarely? In *Stanford* v. *Kentucky*, Justice Scalia wrote that rarity:

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[46] Frederick Schauer, 'The Convergence of Rules and Standards' (2003) 2003 New Zealand Law Review 303, 304–311.

[47] *Gregg v Georgia*, 428 U.S. 153 (1976).

[48] ibid, 179-80.

[49] ibid, 182.

[50] See, for instance, *Woodson v North Carolina*, 428 U.S. 280 (1976) at 289-95; *Coker v Georgia*, 433 U.S. 584 (1977) at 593-6; *Enmund v Florida*, 458 U.S. 782 (1982) at 789-97; *Thompson v Oklahoma*, 487 U.S. 815 (1988) at 823-31.

'does not establish […] that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries. To the contrary, it is […] overwhelmingly probable, that the very considerations which induce petitioners and their supporters to believe that death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed.'[51]

From a more practical standpoint, maintaining the typological distinction between legislation and practices of constituent units as bases of consensus is useful because a court may refer only to one; or only to the other; or to both bases in a single decision. They can lead to contradicting conclusions, or they can work in unison. Such different dynamics can obviously affect how consensus analysis is conducted, and what conclusions courts draw from it, therefore affecting whether consensus acts as converging or diverging mechanism of accommodation of diversity.
Acknowledging the differences between the two bases of consensus also allows for a more detailed and precise discussion of normative and dogmatic dimensions and effects of consensus analysis across different institutional contexts.

3 Level of Generality of Consensus

Moving from the question of what types of evidence courts seek when making arguments from consensus—that is what are the bases of consensus—we move to the question of what precisely is the object of consensus. Consensus on what does a court examine? What is the question a court asks to define to scope of its comparative inquiry? Generally, two approaches to these questions have been recognised depending on the level of abstraction at which courts assess consensus: consensus at the level of legal rules, and consensus at the level of legal principles.[52]

Whenever a court is searching for a consensus at the level of legal rules, the level of abstraction is low, consensus is sought on a relatively specific issue and, generally, it will be more difficult to find as compared to a consensus at a higher level of abstraction.[53] *M.C.* v. *Bulgaria*,[54] a case decided by the ECtHR, is quintessentially a case where a court was examining the existence of consensus at an extremely low level of abstraction, i.e. at the level of a legal rule. The Court assessed whether physical resistance of a victim was a constitutive part of the definition of rape in domestic criminal statutes of CoE states when it decided that the incrimination contained in the Bulgarian criminal code was not

[51] *Stanford v Kentucky*, 492 US 361 (1989) at 374.

[52] See, for instance, Jens T Theilen, 'Levels of Generality in the Comparative Reasoning of the European Court of Human Rights and the European Court of Justice: Towards Judicial Reflective Equilibrium' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019) 402–403.

[53] Dzehtsiarou (n 5) 15–16.

[54] *M.C. v Bulgaria* App no 39272/98 (ECtHR, 4 December 2003).

in line with how other ECHR state parties defined rape in their criminal law at the time.[55] Obviously, examining whether a specific element of a crime is included in the definition of an offence in national criminal codes is perhaps as close to seeking a consensus on the level of legal rules as one could imagine.

Conversely, consensus at the level of legal principles means that the level of abstraction is high, courts are searching for consensus on relatively broad and loosely defined questions; because of this, consensus at the level of principles is generally easier to find. The jurisprudence of the Court of Justice of the EU is emblematic of this approach: rather than looking for convergence on legal rules, the CJEU would typically examine whether an issue forms part of the hopelessly opaque standard of 'constitutional traditions common to the Member States'.[56] Similarly, the ECtHR has also taken a similar approach in some of its cases. In *D.H. and Others* v. *the Czech Republic*,[57] for instance, the Court found that there exists a consensus on an abstract level that the Roma 'require special protection' which 'also extends to the sphere of education,'[58] without going into details as to what that consensus might be more specifically.

Regardless of this analytically helpful dichotomy between consensus at the level of legal rules and principles, however, we should acknowledge that different levels of abstractness are not discrete categories. Instead, they exist on a spectrum. As a result, most cases may not fit neatly into one of the two categories but might lie somewhere in between. Take a hypothetical example of the recognition of same-sex marriage. On a spectrum from legal rules to principles on this issue, a consensus-seeking court may compare, for instance, (i) what specific procedures are prescribed by states for same-sex couples to obtain a marriage certificate; (ii) what specific rights are afforded to them; (iii) whether or not states permit marriages by same sex couples; (iv) whether or not states offer a legal recognition of a same-sex relationship in any way, be it through marriage, civil unions, or a registration of a partnership; (v) whether or not states enumerate sexual orientation as a suspect category in their definition of the prohibition of discrimination; (vi) whether or not states extend the scope of the prohibition of discrimination to all family law issues; or (vii) whether or not the states' domestic laws include the right to equal treatment and the prohibition of discrimination.

Finally, much like with the typological dimensions discussed above, an understanding of levels of generality as typological category is important for understanding how consensus can be used by courts either as a divergence entrenching or convergence constituting mechanism. As noted, by

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[55] ibid, para 156.

[56] See Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114. See also Article 52(4) of the Charter of Fundamental Rights of the European Union [2009] OJ C 326.

[57] *D.H. and Others v the Czech Republic* App no 57325/00 (ECtHR, 13 November 2007).

[58] ibid, para 182.

redefining the object of consensus as a specific question of a rule, or an abstract question of a principle, courts can manipulate the likelihood of them finding the existence of consensus: it is easier to find on the level of principles than on the level of rules. Simply by redefining the question, courts can thus affect the likelihood of reaching a certain outcome in a case, which, in turn, determines whether the lack of consensus entrenches the status quo, or the existence of a consensus constitutes a converging force for all the constituent units of a system.

4 Temporality of Consensus

Courts have not only examined if consensus on an issue exists, but have also examined whether consensus is recent or long-standing. Recency of consensus is thus another typological variable of consensus that has been relevant in the decision-making processes of courts and in debates surrounding consensus. Most often, the recency argument has been used by courts or dissenting minorities to disqualify or diminish the weight that consensus analysis should play in the case and in determining its outcome, thereby also affecting how consensus would accommodate the diverse views held by states. A dissenting opinion of Justice Scalia in *Atkins* v. *Virginia* raises the issue well and gives a glimpse at this discursive use of the argument:

> 'a major factor that the Court entirely disregards is that the legislation of all 18 States it relies on is still in its infancy. The oldest of the statutes is only 14 years old; five were enacted last year; over half were enacted within the past eight years. Few, if any, of the States have had sufficient experience with these laws to know whether they are sensible in the long term. It is myopic to base sweeping constitutional principles upon the narrow experience of [a few] years'[59] [citations omitted]

In his dissent, in which Justice Thomas and Chief Justice Rehnquist joined, Scalia scolded the *Atkins* majority for basing their decision—that sentencing an intellectually disabled person to death was unconstitutional—on national consensus that was too recent at the time. Consensus, in their view, should have been long-standing in order to justify the foreclosure of diversity in approaches to this issue amongst the states, as well of democratic contestation, and mandate a convergence by basing a norm of constitutional law on the views of a (recent) majority.

Although recency of consensus might seem like a rather straightforward category at first, things get blurred when recency and longevity of consensus, on the one hand, and trends in the laws of constituent units as a basis of consensus, on the other hand, are discussed side by side. Trends as basis of consensus form an important part of the argumentative practice and courts rely on them regularly in deciding whether a consensus exists or not.[60] When they do so, courts declare that an (emerging) consensus exists based not on a certain majority of states taking a particular view, but instead on there

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[59] *Atkins v Virginia*, 536 U.S. 304 (2002) at 344 (Scalia. J., dissenting).

[60] See *supra* n 16 and 17.

being a trend, a steady shift in favour of that view amongst the states. Because trends have an inherent temporal component to them—they establish the existence of 'consensus' on the basis of how positions of states have changed through time—the difference and the relationship between them and the perspective of temporality of consensus—its recency or longevity—gets obfuscated at times.[61] To avoid confusion and appreciate the argumentative dynamics at play here, it is important to distinguish between laws of constituent units and trends in those laws as distinct bases of consensus, and to understand that each of them can be viewed from the perspective of temporality. Both consensus established on the basis of a majority of domestic legislation laws *and* consensus established on the basis of trends may be either recent or long-standing.

A hypothetical might shine better light on this difference. When courts seek consensus on the basis of domestic legislation of constituent units, they will look for a certain minimum number of states that follow a particular solution. In the case of the CoE with (now) 46 member states, let us presume 30 states. Whenever 30 states are in favour of a solution, the court will find that consensus on the basis of laws of constituent units exists. When courts examine if this consensus is recent or long-established, they will examine how those 30 states have been following that solution; for instance, 30 states need to be in favour of the same solution for 10 years in order for the court to find consensus to exist. However, if courts look for the existence of a trend in domestic laws as a basis of consensus, they will examine the direction of change in the states' attitudes towards the issue at hand. It will not matter if 30 states subscribe to a particular solution; it will only matter that the number of states subscribing to that solution is increasing with time. Finally, if a court examined trends from the viewpoint of temporality, the direction of change in the states' attitudes would have to be observable for a certain period of time; to borrow the words of SCOTUS, what would matter is 'the consistency of the direction of change'.[62] In our hypothetical, what would then matter is that the total number of states that subscribe to a solution would be on an upward trajectory for, say, a period of 10 years.

Therefore, any typological exercise on consensus analysis must reflect the distinction between trends as a basis of consensus and laws of constituent units from the perspective of temporality as a basis of consensus. Moreover, from the perspective of consensus as a legal mechanism of divergence or convergence, temporality may determine consensus' attitude towards diversity and its accommodation by diminishing the impact that consensus might have on the outcome of a case, as the discussion between the dissenters and the majority in *Atkins* demonstrates.

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[61] See, for instance, John Murray, 'Consensus: Concordance, or Hegemony of the Majority', *Dialogue between judges, European Court of Human Rights, Council of Europe, 2008* (2008) 12; Paul Mahoney and Rachael Kondak, 'Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015) 132; *S.H. and Others v Austria* App no 57813/00 (ECtHR, 3 November 2011), para 96-7.

[62] *Atkins v Virginia*, 536 U.S. 304 (2002) at 315.

5 Automaticity of Consensus

Finally, the fourth typological dimension of consensus analysis refers to how consensus influences the outcome of the case. Does the outcome of consensus analysis, i.e. the (non)existence of consensus, fully determine the outcome of the case, or do courts also decide cases against consensus, or perhaps look for additional arguments to justify their conclusions? In other words, do courts regard the outcome of consensus analysis as binding or not? This question has been discussed many times by authors discussing different courts and across institutional contexts. There is an agreement amongst them that consensus analysis is generally not considered as binding by courts; it is just one of the many factors and argumentative practices that constitute the decision-making process.[63]

This is certainly true in many cases. For instance, in *Graham* v. *Florida*, SCOTUS ruled that capital punishment imposed on a minor for a non-homicidal offence is in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. After assessing whether there was a national consensus in favour or against the impugned punishment, the Court held that guided by '"the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," […], the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.'[64] Put differently, the state of national consensus did not automatically determine the outcome of the case and the Court did not feel bound by the (non)existence of consensus; it was the Court's own assessment that, in the end, determines the outcome of the case.

In other cases, however, courts have been more deferential to consensus, even to the extent that the (non)existence of consensus could be considered as automatically determining the outcome of the dispute. In *Oliari and Others* v. *Italy*, the ECtHR ruled that Article 12 of the ECHR does not grant the right to marry to same-sex couples solely because there is no consensus amongst states parties to the ECHR on the issue. This is the entirety of the Court's reasoning regarding the Article 12 claim:

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[63] Francisco Javier Mena Parras, 'Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights' [2015] Revista Electrónica de Estudios Internacionales 11; O'Mahony and Dzehtsiarou (n 4) 336; Youngjae Lee, 'Federalism and the Eighth Amendment' (2013) 98 Iowa Law Review 69, 73; Wildhaber, Hjartarson and Donnelly (n 7) 248–250, 256; John Murray, 'The Influence of the European Convention on Fundamental Rights on Community Law' (2009) 33 Fordham International Law Journal 1388, 1414; Murray (n 61); Michael S Moore, 'Morality in Eighth Amendment Jurisprudence' (2008) 31 Harvard Journal of Law & Public Policy 47, 52; Wayne Myers, 'Roper v. Simmons: The Collision of National Consensus and Proportionality Review' (2006) 96 Journal of Criminal Law and Criminology 947, 951; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 New York University Journal of International Law and Politics 843, 851.

[64] *Graham v Florida*, 560 U.S. 48 (2010) at 2022.

'The Court notes that in Schalk and Kopf the Court found under Article 12 that […], as matters stood (at the time only six out of forty-seven CoE member States allowed same-sex marriage), the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The Court felt it must not rush to substitute its own judgment in place of that of the national authorities […] The same conclusion was reiterated in the more recent Hämäläinen (cited above, § 96), where the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples.

The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.'[65]

It would be difficult to describe the effect of consensus analysis on the outcome of this case as anything but automatic. Without offering any other arguments to justify the outcome, the Court rejected the applicants' Article 12 claim solely on the account of it not being able to find a consensus amongst CoE member states in favour of same-sex marriage, be it on the basis of a trend in domestic legislation, or on the basis of a majority of laws of constituent states. It rejected the notion that the legislative trend in favour of the recognition of same-sex marriage that had emerged since *Schalk and Kopf*[66] via *Hämäläinen*[67] and through *Oliari* was sufficient to find the existence of an (emerging) consensus. Nor was there a majority of states in favour of same-sex marriage to justify the finding of consensus on the basis of laws of constituent units. As the outcome of consensus analysis that the Court had conduced pointed against the protection of same-sex marriage, the Court automatically concluded that Article 12 did not protect the right of same-sex couples to marry; the Court did not examine any other arguments other than the absence of a consensus in reaching that conclusion.

Admittedly, however, much like the categories that were discussed in relation to generality and temporality of consensus, 'automatic' and 'non-automatic' consensus analysis are also simply analytical categories of a phenomenon that is not inherently discrete. Here as well, automaticity of consensus is a category that lies on a continuum and should be accounted for in this way; in individual cases, courts can consider consensus analysis as completely binding, completely non-binding, or anything in between. In the context of the ECHR, Dzehtsiarou has proposed a helpful framework that transcends the "automatic" versus "non-automatic" distinction and better reflects the continuous nature of automaticity of consensus. According to this framework, consensus creates a 'presumption that favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties. This presumption can be rebutted if the Contracting Party in question offers a compelling

[65] *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), paras 191-192.

[66] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010), paras 61-63.

[67] *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014), para 96.

justification.'[68] In other words, the stronger the consensus on an issue, the stronger the presumption in favour of that solution. And on the flipside, the stronger the presumption in favour of a solution, the stronger the justification needed to rebut it. On the extreme polar ends of this continuum lie the "automatic" and "non-automatic" consensus analysis. The former when consensus is so overwhelming that is establishes such a strong presumptions in favour of it that no justification could rebut it; and the latter when there is no consensus or the consensus is so fragile that it establishes such a weak presumption that any potential justification would be sufficient to rebut it. *Oliari*, then, could be read as establishing such a strong presumption against same-sex marriage due to an overwhelming lack of consensus that no justification that would be strong enough to rebut it, explaining why the Court did not even bother to include any reasons other consensus analysis in its justification.

Automaticity is crucially important also from the perspective of the diversity accommodating nature of consensus as it determines the role that consensus analysis has in the decision-making processes of courts. In *Oliari*, for instance, consensus seems to have automatically determined the issue, thereby further entrenching the existing divergences between states in their approach to same-sex marriage. In an alternative universe, the ECtHR could have used consensus in a non-automatic way, deciding that there are cogent reasons, despite the lack of consensus, to read Article 12 of the ECHR as granting the right to same-sex marriage and thus diminish the role of consensus as entrenching divergences. Therefore, by manipulating the role consensus has on an individual case, courts can also manipulate the wider role it has in how divergences amongst states are accommodated.

6 Conclusion

At the end of the day, the picture of consensus analysis that emerges across all four typological variables is a complex one. The method is far from being a monolith; courts have an extremely wide discretion in how the employ consensus in each individual case. This decision can have important repercussions not only for the outcome of that case and for the parties involved in it, but also the structural relationships between constituent units in multilevel polities. Table 9.3 collates all the typological considerations and variables discussed in this chapter and gives the complexity of the generalised view of consensus analysis a visual representation.

[68] Dzehtsiarou (n 5) 9. He also identified three justifications that can override consensus in the ECHR context: (i) the text of the ECHR; (ii) historical and political justifications; and (iii) moral sensitivity of the matter in question. See ibid 30–36.

<table>
<tr><th colspan="4">Consensus analysis</th></tr>
<tr><td rowspan="2">Bases of consensus</td><td>Core meaning</td><td colspan="2">Laws of constituent units
Practices of constituent units</td></tr>
<tr><td>Peripheral meanings</td><td colspan="2">International treaties
Decisions of international tribunals
Regional law
International soft law
Regional soft law
Internal soft law
Foreign legal orders
Trends in laws of constituent units
International trends
Margin by which legislation of constituent units is passed
Judges' perception of social consensus
Scientific developments and the views of experts
Statements of religious authorities
Polling data</td></tr>
<tr><td colspan="2">Level of generality</td><td>Legal principles (spectrum)</td><td>Legal rules (spectrum)</td></tr>
<tr><td colspan="2">Temporality of consensus</td><td>Long-standing (spectrum)</td><td>Recent (spectrum)</td></tr>
<tr><td colspan="2">Automaticity of consensus</td><td>Automatic (spectrum)</td><td>Non-automatic (spectrum)</td></tr>
</table>

Table 9.3. A general typology of consensus analysis

But it may well be that even a graphic representation in the form of a table does not do justice to the complexity of the method and the many options courts have when employing it. Perhaps some numbers might help: even under the most benevolent assumption that the generality, temporality, and automaticity of consensus are discrete dichotomous variables and are not on a continuum, courts can use consensus in its core meaning in at least 6,264 different ways.[69] If we add the peripheral meanings of consensus to the calculation, the number is over 8.2×10^{15} different ways of justifying judicial

[69] This calculation conservatively assumes that there are three different types of required majorities when counting laws and practices of constituent units (simple, qualified, unanimity) and that levels of generality, temporality and automaticity of consensus are discrete dichotomous variables. With these assumptions in mind, the number of combinations of consensus analysis in its core meaning is obtained through the expression: $n = 8(54+27^2) = 6{,}264$.

decisions through consensus.[70] It is only by deconstructing the method, as we have done in this chapter by creating a general typology of consensus analysis, that such complexity can be grasped and meaningfully analysed. Indeed, only in this way can we begin to fully understand all the ways in which courts in multilevel systems can manipulate consensus as a diversity accommodating mechanism; one through which courts can either impose uniform standards and constitute convergences, or one through which courts can give the constituent units a *carte blanche* to regulate an issue as they will, thereby legally entrenching the existent divergences.

[70] This calculation makes the same assumptions as above. The number of combinations of consensus analysis in its core and peripheral meanings is obtained using the expression: $n = 8(2(27x15!)+27^2x15!)$.

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