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Currently mired in controversy, the European Court of Human Rights and the Convention itself have come in for stern criticism from a diverse array of stakeholders. Of particular controversy is the Court’s utilisation of the Living instrument doctrine, which it first expressly recalled in its 1978 Tyrer v. UK decision. Confusion has continued to surround how this doctrine came about and its potential to allow the Strasbourg Judiciary to cross over the constitutional separation of judiciary and legislature. However, while the substantive idea of the Convention as a living instrument capable of evolving with European Society is legitimate, confusion still exists about how it operates and to what extent it might be used to alter existing Convention Standards. This study sets out that at the heart of this modern legitimacy crisis in the Convention system is a failed dialogical model of the Convention institutions. However, clearer explanations and a better understanding of appropriate roles of the various institutions and improved channels of dialogue may lead to a more accepted Convention system and act to calm some of the conflict surrounding the Convention today. After examination of various aspects of Convention law and practice the eventual argument is that the current crisis is largely one of failed dialogue between Convention stakeholders and is best address through an improved understanding of and discovery of European Consensus.
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I, THOMAS MICHAEL WEBBER

declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

The European Convention on Human Rights and the Living Instrument Doctrine: An Investigation into the Convention’s constitutional nature and evolutive interpretation

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;

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List of Abbreviations
ECHREuropean Convention on Human Rights
ECtHREuropean Court of Human Rights
CoMCommittee of Ministers
PACEParliamentary Assembly of the Council of Europe
USCSupreme Court of the United States of America
EUEuropean Union
CJEUCourt of Justice of the European Union
VCLTVienna Convention on the Law of Treaties
Chapter 1: Introduction and Overview

“The proposition that the Convention is a ‘living instrument’ is the banner under which the
Strasbourg Court has assumed power to legislate what they consider to be required by
‘European public order.’”

*Lord Hoffmann, former Lord of Appeal in Ordinary.*

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was created in the post Second World War era by the Council of Europe (CoE). It was opened for signature on 4th November 1950 and entered into force on 3rd September 1953. The original reasons and purposes for the Convention are open to interpretation but it can be said that it was either seen as something of a collective pact against totalitarianism, or by some as a potential fledgling bill of rights for Europe. It is also clear from its Preamble that it intended to secure “...universal and effective observation of the rights” it contained. The Preamble also suggests that the Convention aims at increasing unity between the member States and reaffirms collective values of democracy, freedom and the rule of law.

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2 More commonly known as the European Convention on Human Rights and referred to throughout this study as ‘The Convention’ and ‘the ECHR’.
6 ibid at para 4.
7 ibid at para 5.
8 ibid para 6.
1.1 The Development of the ECHR

From its early days the Convention has grown significantly in stature, but not without some controversy. The original Convention text came into force as a compromise to ensure that it would indeed come into being amongst controversy and political wrangling.\(^9\) As such there was no compulsory Court of Human Rights like today. Instead, a Court was to be established later, when enough member States (eight) had granted the optional right of individual petition to the Court.\(^10\) Eventually the Court was instituted in 1959, but even then it did not enjoy jurisdiction over all member States of the Convention.\(^11\) This led to the Court being something of a damp squib in its early years with very few cases.\(^12\) In fact in 1965 Henri Rolin,\(^13\) one of the Judges of the Court when speaking extra-judicially was hesitant to even call himself a judge.\(^14\) Indeed such was the state of the case load of the Court at that stage that Rolin tellingly entitled his speech ‘Has the European Court of Human Rights a Future?’\(^15\) As is now well-known, it was not until later that the Court ‘came of age’,\(^16\) when more States granted the optional right of individual petition\(^17\) and the Court started to deliver

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\(^9\) See e.g. Bates (n4)at 41.
\(^10\) See e.g. Bates (n4)at 9.
\(^11\) Bates (n4)at 11.
\(^12\) Bates (n4)at 11 and 103 and A Lester, ‘The European Court of Human Rights after 50 Years, (2009) EHRLR 461 at 465-466.
\(^13\) N.B Henri Rolin was a judge of the Court from 1959-65 and 1971-73, in addition to this he was vice president of the Court from 1965-68 and then President of the Court from 1968-71.
\(^15\) Ibid.
\(^16\) For use of this term see e.g. Bates (n4)at 357 and R Rysdall, ‘The Coming of Age of the European Convention on Human Rights’ (1996) EHRLR 18 at 28.
\(^17\) Previously the right of individual petition was contingent on the member State lodging a declaration granting the right to their citizens. This right could be time limited. See Article 25 of the Original Convention text which reads:

“(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right

(2) Such Declarations may be made for a specific period”
some of its most famous judgments,\(^{18}\) which among others include: \textit{Golder};\(^{19}\) \textit{Handyside};\(^{20}\) \textit{Engel}\(^{21}\) and of course importantly for the purposes of this study \textit{Tyrer v UK}.\(^{22}\) These judicial developments alongside other political occurrences, such as renewals of the optional right of individual petition, enabled the Convention to grow into arguably the world’s most effective treaty for the protection of human rights.\(^{23}\) Indeed, the creation of a permanent Court of Human Rights and a compulsory right of individual petition following Protocol 11\(^ {24}\) could be argued to fit perfectly with former President of the Court, Sir Humphrey Waldock’s statement in 1958 that:

\begin{quote}
“If you regard the Convention as a \textit{constitutional instrument- as a European Bill of Rights} for the Individual- then it seems difficult to deny the importance of granting to the individual a personal right to place his grievance before the Commission.”\(^ {25}\)
\end{quote}

The Convention also benefitted from a change in the judging structure within the Court in response to overwhelming case load by Protocol 14.\(^ {26}\) All this leads to a suggestion that, perhaps, the

\(^{18}\) Or infamous, depending on your point of view.
\(^{19}\) \textit{Golder v. United Kingdom} (App.No. 4451/70) (ECtHR 21 February 1975).
\(^{21}\) \textit{Engel and others v. the Netherlands} (App.Nos. 5100/71; 5101/71; 5102/71; 5354/72) (ECtHR 8 June 1976).
\(^{22}\) \textit{Tyrer v. United Kingdom} (App.No. 5856/76) (ECtHR 25 April 1978).
\(^{25}\) Wallock (n4) at 359.
\(^{26}\) Amongst other things, Protocol 14 to the Convention has allowed for single judge chambers to dismiss application that are manifestly ill-founded, and enabled committee of three judges to decide certain well-founded applications. It also changed the terms of office for judges. Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS: 194 (Opened for signature 13th May 2004, Entry into force 1st June 2010.) On the Court’s case overload necessitating the creation of Protocol 14 see DJ Harris, M O’Boyle, EP Bates and CM Buckley, \textit{Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights}, (Oxford University Press 2014, 3rd Edn) at 104. See also: Lester (n12) at 467; A Mowbray, ‘Crisis Measures of Institutional Reform for the European Court of Human Rights’, (2009) 9(4) HRLR 647 especially at 647-648; H Keller, A Fischer and D Kuhne, ‘Debating the
Convention has grown to take on a quasi-constitutional status. Such a possibility jars with the perspective of those who see the Convention as more of a ‘collective pact against totalitarianism’ and advocate a restrictive rule of treaty interpretation for sovereignty limiting treaties, and may lead to some degree of controversy.

1.2 UK Criticism of the Court

The Convention’s success has not come without its critics. Criticism of the Court has come from many quarters, and not simply the expected complaints resulting directly from litigants on the losing side of a Strasbourg decision. Particularly in recent years, and perhaps fuelled by controversies such as the prisoner voting cases and the Abu Qatada deportation saga, among others, in the United Kingdom the Court’s influence has been controversial. This controversy may have become particularly acute in recent years, over a decade on from the entry into force of the Human Rights

Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals’ (2011) 21(4) EJIL 1025 at 1026-1028.

27 This approach dictates that treaties which limit the sovereignty of States should be interpreted in a way that least effects State sovereignty and it should be assumed that all sovereignty limiting aspects of the treaty were included in the treaty by the States parties concluding it. See e.g. CC Morrisson, ‘Restrictive Interpretation of Sovereignty- Limiting Treaties: The Practice of the European Human Rights System’, (1970) 19(3) ICLQ 361 at 362.

28 The prisoner voting cases include, but are not limited to: Hirst v. United Kingdom (No.2) (App.No. 74025/01)(6 October 2005) and Greens and M.T. v. United Kingdom (App.Nos. 60041/08 and 60054/08) (ECtHR 11 April 2010) for a detailed account see E Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ 14(3) 2014 HRLR 504 and Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Draft Voting Eligibility (Prisoners) Bill Report (2013-14, HL 103, HC 924) especially at paras 31-32. The committee stated: “A Second issue that has been raised by critics of the judgment in Hirst is that the ECtHR has ignored the basis of its jurisdiction by engaging in unwarranted extension of the rights contained in the Convention under the “living instrument” doctrine.” The implication here is that the Convention’s living instrument doctrine is at the heart of the controversy over the Court’s creative interpretation of the Convention. In this connection see the joint dissent in the Hirst judgment itself which suggests the majority were taking an evolutive approach and warns of the Court against assuming “legislative functions”: See Joint Dissent Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in Hirst (n28) at para 6.

Act 1998 which, in the words of the former President of the UK Supreme Court, has led to
“...judgments of United Kingdom courts, striking down executive action on Convention grounds, or
holding legislation to be incompatible with the Convention, as defined by the Strasbourg Court.”30 As another eminent commentator, Sir John Laws,31 has put it, there is a “...resentment felt among many shades of opinion that under the pressure of the Strasbourg court the law of human rights has got too big.”32

Some of the hostility directed towards the Court has been based on the idea that it has interpreted the Convention far too liberally, and moved the human rights it protects far beyond what was ever intended by those who drafted it. At the heart of the controversy here has been the Court’s ‘living instrument’ doctrine,33 and what some see as its potentially ‘legislative effect’, as far as the sovereign States parties to the Convention are concerned. The legislative effect occurs because the

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31 Sir John is a current Lord Justice of Appeal in the United Kingdom.
Convention establishes a system of binding international legal obligations.\footnote{Article 1 of the Convention establishes that: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”} Due to the requirement contained in the Vienna Convention on the Law of Treaties (VCLT) that international law obligations be carried out in good faith\footnote{Article 26 of the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.} and that domestic law cannot be adduced as a reason not to fulfil international law obligations,\footnote{Article 27 ibid.} the ECHR would gain a form of primacy, at least in international law, above domestic law. Where member States were found in violation of the Convention, they would then be obliged to change their laws to comply with the judgment.\footnote{Convention Article 46(1) states that: “The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”} Thus the judgments of the Court have a potentially legislative effect.\footnote{For use of the term ‘legislative effect’ see: Lord Phillips (n30) at 4. See also Bates, British Sovereignty (n4) at 387. See also A Drzemczewski, *European Human Rights Convention in Domestic Law* (Oxford University Press 1983) at 62.} Such an effect has been acknowledged by the current UK judge at the Court, Paul Mahoney,\footnote{Prior to his taking office at the European Court of Human Rights on 1st November 2012 he was President of the European Union Civil Service Tribunal (2005-2011) and prior to this he had a long service of the European Court of Human Rights becoming the Deputy Registrar of the Court in 2001 and subsequently being promoted to Registrar of the Court in which role he served until 2005.} who has said:

“through evolutive interpretation [of the Convention] (i.e. through adding a new meaning, neither written on the face of the text nor previously inherent in it), to overturn its previous case law and push the application of the Convention into areas where previously it did not reach, and thus to convert what was previously neutral into an obligation for the contracting states”.\footnote{Quoted from an unpublished text of Judge Paul Mahoney (of October 2012) which was quoted in: L Wildhaber, A Hjartarson and S Donnelly, ‘No Consensus on Consensus? The Practice of the European Court of Human Rights’, (2013) 33(7-12) *HRLR* 248 at 262}
This legislative perception of the living instrument doctrine is also maintained by former Minister for Justice, Chris Grayling, but in his case with distrust.\textsuperscript{41} Connected to this comes criticism by figures such as Dominic Raab MP\textsuperscript{42} - formerly a minister within the Ministry of Justice, responsible for human rights reform - on how the Court has come to regard the Convention as a ‘living instrument’. In 2009 Raab wrote:

“In Tyrer v UK, the Strasbourg Court held that judicial corporal punishment on the Isle of Man was sufficiently degrading that it breached the prohibition on torture and inhuman treatment, without any basis in the text of the Convention or the negotiating records, for such a novel conclusion. In so deciding, the judges shrouded their reasoning in legal jargon, which betrayed a blatant shift of approach- from a more disciplined judicial interpretation and application of Convention rights to an overtly political renovation and rewriting of the law”.\textsuperscript{43}

Such a statement is emblematic of UK political discord with the Convention, in certain quarters at least, and the way the Strasbourg judiciary are interpreting it.\textsuperscript{44} Other statements from leading


\textsuperscript{42} Dominic Raab MP is a Conservative Member of Parliament for Esher and Walton (since May 6\textsuperscript{th} 2010) and was appointed as a Parliamentary Under Secretary of State, Minister for Human Rights, at the Ministry of Justice on 12 May 2015. He holds a law degree from the University of Oxford and a masters degree in international law from the University of Cambridge and was an international lawyer and former adviser in the Foreign and Commonwealth Office.

\textsuperscript{43} D Raab, The Assault on Liberty: What Went Wrong with Rights, (Fourth Estate, 2009) at 130.

\textsuperscript{44} In 2014 the Conservative Party, which have formed the largest political party in the House of Commons after both the 2010 and 2015 UK general elections, published proposals to reform the UK’s human rights regime, including its relationship with the European Court of Human Rights. Reference was made to the ‘mission creep’ of the Court and it having “...used its living instrument doctrine’ to expand Convention rights into new areas, and certainly beyond what the framers of the Convention had in mind when they signed up to it.” Conservative and Unionist Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s
politicians include the former Home Secretary, Jack Straw MP in his Hamlyn Lecture series of 2012-2013 in which he spoke of the perceived self-aggrandisement of the Court’s authority saying:

“Strasbourg has got into this difficulty because it believes that its extended definition of human rights should apply uniformly across all forty-seven member states. That would have been fine if there were warrant for this in the treaties and, crucially, if they had any means of ensuring that in practice there was a uniform enforcement of their judgments across those forty-seven member states. But there are not.”

Straw then drew a comparison with the enlargement of the European Union’s jurisdiction and power, suggesting that the various renegotiations, including the Maastricht Treaty and the Lisbon Treaty had, in his view, made such enlargement legitimate. However, by comparison, he doubted the legitimacy of what had occurred with the ECHR saying:

“Where has been the equivalent political, democratic engagement over the jurisdiction that Strasbourg has taken unto itself? Where are the treaty texts, where are the records of debates in the parliaments of the Council of Europe’s member states? They don’t exist.”

Such statements suggest a discord against what is perceived by some as the Court’s aggrandised jurisdiction, without the prior dialogue with and consent of the member States. What is notable

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45 Jack Straw has also held office as the Lord High Chancellor of Great Britain as a part of his role as Secretary of State for Justice which he held from 28 June 2007-11 May 2010.


47 Ibid at 42.
about these two examples are that the two quoted politicians\textsuperscript{48} come from the two main opposing political parties in the United Kingdom suggesting that the issue is not simply one of party politics. It is also noteworthy that Jack Straw was a Minister responsible for the passage of the UK’s Human Rights Act 1998 which for the first time incorporated the Convention directly into UK law.\textsuperscript{49}

Yet, criticism of the Convention and the Court is not monopolised by politicians. In relatively recent years even some senior members of the UK judiciary have been highly critical of the approach taken by the Strasbourg judiciary. They have criticised the Court’s interpretation of the Convention and once again the living instrument doctrine has come under the spotlight. Lord Hoffmann in his influential Judicial Studies Board lecture (2009) took the opportunity to launch a scathing attack on the appropriateness of what he saw as the Court’s ‘constitutionalist’ approach to the ECHR and its interpretation.\textsuperscript{50} He bemoaned the potential for the Court’s interpretations to effectively and unilaterally create new legal obligations binding upon the member States.\textsuperscript{51} He noted what he thought was the constitutional inappropriateness of an international court, “[e]ven if the Strasbourg judges were omniscient”, in imposing new and uniform legal standards, through their interpretation of the Convention, upon member States.\textsuperscript{52}

\textsuperscript{48} It should be noted that these quotes are not exhaustive of the political discontent surrounding the Convention. See e.g.: D Davis and J Straw, ‘We Must defy Strasbourg on Prisoner Votes’, The Telegraph (London, 24 May 2012) <http://www.telegraph.co.uk/news/uknews/law-and-order/9287633/We-must-defy-Strasbourg-on-prisoner-votes.html> accessed on 10 January 2015.

\textsuperscript{49} For more on the incorporation of the Convention into UK law see e.g. A Le Sueur, M Sunkin and JEK Murkens, Public Law: Text, Cases and Materials, (Oxford University Press 2013, 2\textsuperscript{nd} Edn) at 188- 196 and A Lester, ‘Human Rights and the British Constitution’, in J Jowell and D Oliver, The Changing Constitution, (Oxford University Press 2011, 7\textsuperscript{th} Edn) 70-101 at 79-100.

\textsuperscript{50} Hoffmann (n1) at 431.

\textsuperscript{51} ibid at 429.

\textsuperscript{52} ibid 416 at 431.
In 2013, Lord Sumption, of the UK Supreme Court, criticised the Court’s “...tendency to convert political questions into legal ones”. He went on to complain that the Court “...has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying.” Continuing in this vein he stated of the Court’s ‘living instrument’ doctrine:

“The way that the Strasbourg Court expresses this is that it interprets the Convention in light of the evolving social conceptions common to the democracies of Europe so as to keep it up to date. Put like that, it sounds innocuous, indeed desirable. But what it means in practice is that the Strasbourg court develops the Convention by a process of extrapolation or analogy, so as to reflect its own view of what rights are required in a modern democracy.” (Emphasis added)

Even judges who are usually regarded as being in favour of the Convention have suggested reforms to it to address concerns over the Court’s creativity when it utilises the living instrument doctrine, or, as it is also known, evolutive interpretation. Lady Justice Arden, who herself has sat at the Court (as an ad hoc judge) on behalf of the United Kingdom, and is Head of International Judicial Relations for England and Wales has expressed concerns with the Court’s capacity for innovation. In 2014, against the backdrop of the previously mentioned prisoner voting controversy, she suggested that a system of provisional judgments (i.e. non-binding) judgments be instituted for decisions that might

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54 Ibid at 7.
55 Ibid at 7.
57 See above note 26.
"...significantly develop [the Court’s] jurisprudence." The necessity for such reforms and methods will be considered in the final part of this study, but it is interesting to note here that even supporters of the Convention acknowledge that there may be problems with the Court’s use of the living instrument doctrine.

Another such area of concern about Strasbourg jurisprudence has been voiced by Baroness Hale on the potential emergence of Socio-economic rights. Hale used the example that while the Court has acknowledged there is no Convention Obligation to be provided a home by the State (Chapman v. UK), nevertheless she claimed that Strasbourg was "developing a duty not to deprive a person of the home he already has even in circumstances where there is no duty in domestic law to continue to supply him with it." Hale argued that the situation of a State failing to continue to supply a home is fundamentally different to an interference with family and private life relationships because it, in effect, entails a positive obligation on the State. Hale then went on to question whether this was the beginning of the emergence of socio-economic rights in the Convention, "...even though they are nowhere to be found in the Convention? And is this a good thing or a bad thing?" Hale has self-proclaimed herself to be a supporter of the Convention, and so such concerns, which she addressed at the Court’s annual Dialogue between Judges event in 2011, may further suggest a general concern about the expanding nature of Convention law that is not isolated to critics of the Convention system alone.

61 Hale (n59) at 541.
62 Ibid at 542.
63 Ibid at 543.
Such is the extent of criticism that it has become necessary for former Presidents of the Court to defend the Convention, including with special reference to the living instrument doctrine. Sir Nicolas Bratza, the ‘British’ judge at the Court from 1998-2012 and former President of the Court, has done so in a lecture entitled: ‘Living instrument or dead letter- the future of the European Convention on Human Rights’. In doing so he rather tellingly acknowledged:

“This is a problematic time for human rights in this country [the UK]—a time when the European Convention, and the institution established by the member states to interpret and apply it, are increasingly under attack and when the threat that the United Kingdom will withdraw from the Convention system, in whose creation it played such a leading and distinguished role, is more real today that it has ever been.”

What such acknowledgments demonstrate is that the criticism of Strasbourg has now reached a level where it has gone beyond mere inflammatory rhetoric, warranted or not. Addressing the issue of the legitimacy of the Court’s creative interpretation of the Convention seems to be becoming necessary to restore confidence in the Convention system. This absence of confidence, for the purposes of this study at least, may indicate severe problems with the working of the Convention. Alternatively, this unprecedented admonishing of the Convention could be the result of misunderstanding and ambiguity surrounding the way the Convention is interpreted in practice, particularly with respect to the much-criticised ‘living instrument’ doctrine. The latter proposition is to some extent supported by Alastair Mowbray who suggests “A greater judicial willingness to

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64 From 4th November 2011 to 31 October 2012.
65 Bratza (n33).
66 ibid at 116.
67 At least severe by measurement of the political outcome of those problems as just discussed.
elaborate upon the application of the doctrine in specific cases would help to alleviate potential fears that it is simply a cover for subjective ad-hockery.\textsuperscript{68} The underlying issue of what Mowbray suggests is a lack of dialogue between the Court and other Convention actors which will be addressed in this thesis and in part 1.6 of this chapter.

Against this backdrop, this study focuses on the Court’s ‘living instrument’ doctrine, which will be briefly described below. It will be shown that both the possibility of problems in the way the Court employs the ‘living instrument’ doctrine and the way it is understood or misunderstood are likely to have played their part in the current war of words, for as the proverb goes, there is ‘no smoke without fire’. And certainly this is partially endorsed by Judge Bratza when he states, in his recent lecture:

\begin{quote}
“I do not of course suggest that the evolutive approach of the Court has always been beyond reproach”.\textsuperscript{69}
\end{quote}

And by Franz Matscher, the former judge in respect of Austria (1977-1998) who has written:

\begin{quote}
“Nevertheless – and I would like to stress this – evolutive interpretation is a method which must be applied with great care. I also concede that the Convention organs have in this way on occasion reached the limits of what can be regarded as treaty interpretation in the legal sense. At times they have perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making. But this, as I
\end{quote}

\textsuperscript{69} Bratza (n33) at 126.
understand it, is not for the Court to do; on the contrary, policy-making is a task for the legislature or the Contracting States themselves, as the case may be.”

This controversy surrounding the living instrument doctrine is a good reason that an in-depth study, such as this contribution, is necessary at the current time. This is especially so in the wake of possible UK withdrawal from the Convention within the aforementioned and ongoing ire towards the Convention. Recitals such as the statement immediately above, although authoritative leave something of precision and comprehensiveness to be desired. It is this half picture of the working of the Convention that indicates a failed dialogical model of the Convention and also may have led to frustration towards the ECHR system. Such confusion is what this thesis will seek to clarify and identify potential reforms to enhance the channels of dialogue in the Convention to avoid it occurring again, and in so doing enhance the legitimacy of the Convention in the eyes of its stakeholders.

1.3 What is the Living Instrument Doctrine?

The above discussion clearly indicates that the Court’s creative interpretation of the Convention is controversial and, perhaps, misunderstood. While, judicial development of law (including common law) accepted, it is arguable that the ECtHR’s interpretation has grown beyond that which might be

70 Matscher (n33) at 69-70. What is particularly notable about Mastcher’s writing is that he was a judge at the Court (in respect of Austria) who sat in the Tyrer case and was a judge at the Court over a period in which it has been said Convention law underwent a “veritable transformation” (see E Bates, The Evolution of the European Convention on Human Rights: From its inception to the Creation of a Permanent Court of Human Rights, (Oxford University Press, 2010) at 320).

foreseeable in the guise of ordinary judicial development.\textsuperscript{72} As a part of this concern the Court’s ‘living instrument’ doctrine has great potential for controversy and misunderstanding about how it is utilised by the Court, so let us briefly introduce the concept at this point.

A crucial preliminary question to answer is: ‘What is the living instrument doctrine?’ In \textit{Tyrer} it was famously stated that:

“\textit{The Court must recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field.}”\textsuperscript{73}

Unfortunately, this passage is unclear about how the living instrument doctrine works and what it does. From the Court’s statement (above) it is clear that the doctrine means that the Convention can be interpreted differently over time. It is also clear that the Court’s interpretation of the Convention will be affected by ‘developments and commonly accepted standards’ in the member States. It therefore seems apparent that the doctrine may be based upon commonality between the member States to the Convention. That said, and as we shall see in chapter 4, the Court can consider more than simply the developments within the member States when adopting an evolutive interpretation of the Convention.\textsuperscript{74}

\textsuperscript{72} See for instance Baroness Hale (n59) at 539.

\textsuperscript{73} \textit{Tyrer} (n22) at para 31.

\textsuperscript{74} An example of this is that the Court considers treaty obligations that are common to the member States. E.g. it did this in \textit{Van der Mussele v. Belgium} (App.No. 8919/80) (ECtHR 23 November 1983) at para 37 when it was considering the applicability of Article 4(2) (the prohibition of forced or compulsory labour) to Belgian requirements that junior advocates provide certain free legal service.
Discussing the living instrument doctrine Professor Merrills has suggested that in interpreting the Convention, the Court could have remained rigidly committed to the standards of human rights protection existing in the minds of the drafters in the 1950s. Alternatively he argues “...the Court would be able to look beyond the particular conceptions of 1950 and take into account contemporary ideas”.\(^75\) It is this latter approach that Merrills ultimately proposes for the Court. The Court’s previously mentioned statement in \textit{Tyrer} suggests\(^76\) that it concurs with Merills’ approach. However, Merrills highlighted the dilemmas the living instrument doctrine raised for the Court: (i) anticipating and (ii) not keeping up with consensus when required.\(^77\) What this tells us, at least from Professor Merrill’s point of view, is that the Convention was not meant as a static treaty but a living document and that the ‘living instrument doctrine’ is an important aspect of this. However, his caution, suggests that the ‘living instrument’ approach does not mean that judges can ‘make it up’ as they go along, as may be suggested by this chapter’s originating quote, from Lord Hoffmann.\(^78\) Instead, their role in utilising this doctrine is more to reflect the contemporary standards, through updating Convention law, that are relevant to the substantive clauses in the ECHR. As such, from Merrills’ discussion, taking a ‘living instrument approach’\(^79\) means interpreting the Convention in-line with contemporary standards by reference to objective criteria (which he fails to enunciate,) that have occurred in the member States. This is very much in-line with the understanding of the Council of Europe’s own Committee of Experts on the reform of the Court’s understanding. They state:

\(^{75}\) Merrills (n33) at 73.
\(^{76}\) \textit{Tyrer} (n22) at para 31.
\(^{77}\) Merrills (n33) at 74.
\(^{78}\) Hoffmann (n1) at 428. See also: Raab (n42) at 131.
\(^{79}\) I.e. to use the living instrument doctrine in coming to the Court’s decision.
“Under the case-law of the Court, the Convention is seen as a living instrument, to be interpreted in the light of present day conditions. Thus the rights guaranteed have been held to apply to situations that were not foreseeable, when the Convention was first adopted, as for instance the use of new information technology or artificial procreation, and to situations which were in fact foreseeable, but where there have been societal developments since the adoption of the Convention, as for example in cases relating to sexual preferences.”

Professor Greer has offered this, perhaps clearer, commentary upon the meaning of evolutive interpretation; 81

“The principle of evolutive, or dynamic, interpretation, a principle the Court has developed for itself, facilitates the abandonment of outmoded interpretations of the Convention when significant, durable, and pan-European changes in the climate of public opinion have occurred, for example that homosexuality and trans-sexualism are aspects of private life requiring respect from public authorities.” 82

Whilst this is true it still leaves something to the imagination of the reader. Like Merrills, Greer suggests the living instrument doctrine has a role to play in updating Convention jurisprudence. However, this description is perhaps too simplistic as it does not rule out re-interpreting the Convention due to textual amendments to the Convention by the member States. Evolutive


81 Evolutive interpretation is generally recognised as another way of describing the interpretation of the Convention using the living instrument doctrine.

82 Greer (n23) at 214.
interpretation instead entails the Court, through its interpretation, changing the meaning of a term in the Convention without the direct and express intervention of the member States, in line with its living instrument methodology.\textsuperscript{83}

Perhaps because to date there has not been an in-depth study devoted to the Convention as a living instrument\textsuperscript{84} definitions of the living instrument tend towards either grouping it with judicial activism\textsuperscript{85} or giving simple reference to the Court’s description, or aspects of it, detailed in \textit{Tyrer}.\textsuperscript{86} This vagueness, as will be discussed, has led to confusion surrounding the doctrine. This confusion will need to be addressed both on a doctrinal level and on a dialogical level by the Convention’s various stakeholders and this will be one of the principle aims and benefits of this study. Harris, O’Boyle & Warbrick follows a similar pattern usefully explains:

“When deciding a case by reference to the dynamic character of the Convention, the Court must make a judgment as to the point at which a change of policy of the law has achieved sufficiently wide acceptance in European states to affect the meaning of the Convention. In doing so the Court has generally been cautious, preferring to follow state practice rather than to precipitate a new approach.”\textsuperscript{87}

\textsuperscript{83} The Court’s living instrument methodology is discussed in more detail in chapters 4 and 5.
\textsuperscript{84} It is hoped that this thesis will go towards correcting this omission.
\textsuperscript{86} E.g. P Leach, \textit{Taking a Case to the European Court of Human Rights}, (Oxford University Press, 2011 3\textsuperscript{rd} Edn) at 162; K Reid, \textit{A Practitioners Guide to the European Convention on Human Rights}, (Sweet & Maxwell, 2011 4\textsuperscript{th} Edn) at 69; P van Dijk and GJH van Hoof (Eds), \textit{Theory and Practice of the European Convention on Human Rights}, (Martinus Nijhoff Publishers, 1998) at 77.
\textsuperscript{87} Harris, O’Boyle, Bates and Buckley (n26) at 9.
This usefully adds to the previously cited works and grants some basic understanding of what the living instrument doctrine is. The living instrument doctrine can thus be taken to refer to the Court’s ability to interpret the Convention differently over time depending on changes, including those common amongst Convention member States. However, it indicates a change in the substantive content of Convention rights where the Court interprets these common changes as implying an amendment to the meaning of the Convention clause/s at issue. This is controversial as it may amount to a ‘quasi-legislative’ role for the Court, which entails a possible incursion on State sovereignty. Whilst this analysis and definition is limited by the virtue that this is an introductory chapter further enunciation of the living instrument doctrine will ensue throughout chapters 3, 4 and 5 of this study. This will include consideration of the appropriate role of judges in evolutive interpretation of the Convention.

1.4 Diverging approaches to Convention Interpretation

Possible confusion over how the Court has interpreted the Convention as a ‘living instrument’ may, in part, have led to a variety of views on the proper purpose of, and approach to, interpreting the Convention. As previously discussed, Professor Merrills suggested there are two diverging approaches to interpreting Convention clauses: taking the intended meaning of the Convention as being unchanged from the meaning it would bear in the 1950’s, and accepting that the drafters deliberately left the Convention open to interpretation as and when a particular case or issue came to Court, thus empowering the Court to interpret the matter as it deems appropriate at the time.

88 This is also commonly referred to interchangeably as ‘evolutive interpretation’, ‘dynamic interpretation’ or ‘taking a living instrument approach’ and will be referred to interchangeably using these terms.

89 This is broadly in-line with the requirement to interpret treaty provisions in-line with subsequent practice of the member States as detailed in Article 31(3)b of the Vienna Convention on the Law of Treaties, although it shall be noted that the nature of this interpretation, arguably, goes beyond the standards detailed in the Vienna Convention on the Law of Treaties, See. E.g. Letsas (n33) 65.

90 Merrills (n33) at 72-73.
As will be recalled, Professor Merrills argued the Court ultimately has endorsed the latter approach via its living instrument doctrine which may suggest something similar to a ‘constitutional role’ for the Convention.\(^91\) So the more one perceives the Convention was drafted as a type of ‘evolving documentary constitution for Europe’, then the more it is reasonable to expect creative interpretation from the Court, or at least not an approach that rigidly applies specifically what was intended in 1950. Such development as previously noted is not without precedent in national legal systems such as the UK’s system of common law or Canadian Constitutional law for instance.\(^92\) However, if one perceives the Convention is merely an ordinary treaty, to be interpreted restrictively in favour of sovereign States, albeit within the human rights field, then a more restrained approach would be expected. This is especially so if one adopts the view that the Convention was only ever intended to protect against the most severe human rights interferences of the nature experienced in the World War Two era. However, the living instrument doctrine seems to fit in with the ‘evolving constitution for Europe’ vision of the Convention and it is unlikely that many would argue against some form of updating of the Convention’s meanings.\(^93\) It is thus the extent of, and explanation of that updating by the Court that is likely to be controversial, the appropriate extent of which will depend on one’s own view of the role of the nature and purpose of the Convention.\(^94\) Nevertheless, it will be a contention of this thesis, that while the Court must retain its independent judicial interpretation of the Convention’s evolution, but that evolution flows from the implied will and consent of the member States.

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\(^91\) *Ibid* at 73.

\(^92\) *Hale* (n59) at 534-5.

\(^93\) See e.g. the comments of the Right Honourable Dominic Grieve MP (former Attorney General for England and Wales 12 May 2010- 15 July 2014): D Grieve, ‘Why Human Rights Should matter to the Conservatives’, (2015) 156(1) *The Political Quarterly* 62 particularly concerning *S & Marper v. UK* at 66-68 and more generally on the living instrument doctrine at 67-68. Although it should be noted that some commentators would seemingly suggest that any updating role of the Strasbourg judiciary is inappropriate see e.g. Raab (n43)at 131.

\(^94\) This will be discussed in greater detail in the next chapter, which will argue that the more one views the Convention as akin to an ordinary international treaty the less appropriate it would be for the Court to be creative, whilst the more akin to a type of international bill of rights one views the Convention to be, then the more appropriate they might believe it to be for the Court to take a creative approach to the interpretation of the Convention (albeit, of course, within limits).
1.5 Controversy Surrounding the Living Instrument Doctrine

What may appear as judicial updating, via the living instrument doctrine, of the Convention’s substance\(^95\) can be particularly controversial. It is well-established that a key role of a court is to interpret and apply the law.\(^96\) Paul Mahoney, in a seminal article on interpretation of the Convention stated precisely this: “The European Court’s mandate under the Convention is to interpret and to apply, not revise.”\(^97\) Yet, while it has long since been acknowledged that some degree of law making takes place in courts,\(^98\) this should not amount to its general approach to interpretation. Then again, the living instrument doctrine goes further than mere literal interpretation of the Convention. The Convention’s modern day jurisprudence is not stuck to the interpretation that would have been given in the 1950’s when it was originally concluded.\(^99\) It is also not hidebound to follow the specific intentions of the founders of the Convention. Rather, it would seem, the Court regards itself as bound to follow the founders’ general intentions in establishing an international system for the protection of human rights.\(^100\) As such the Court has found that although it must respect legal certainty it is capable and entitled to adopt a more expansive interpretation of the Convention.\(^101\) It is the extent to which the Court exercises this capability to render expansive interpretations of the Convention that is controversial. This may be particularly so given that the Convention is an international treaty with an international court, so its judgments have the potential to impact on

\(^95\) Whether or not the Court, itself, has developed the Convention or has merely reflected and declared an inherent feature of or naturally occurring change of the Convention itself may be contested and will form a key theme of this thesis.

\(^96\) See e.g. Le Sueur, Sunkin and Murkens (n49)at 581.

\(^97\) Mahoney (n33) at 60. At the time of writing this article, Mahoney was working as an official at the Registry of the European Court of Human Rights.


\(^99\) Letsas (n33) at 59.


\(^101\) E.g. Christine Goodwin v. United Kingdom (App.No. 28957/95) (ECtHR 11 July 2002); Chapman (n60).
State sovereignty. As a result of this any decisions that potentially erode the States’ sovereignty will require careful justification and explanation.

As has been stated, the living instrument doctrine is potentially seen as an activist doctrine of the Court. As such it risks offending the sovereignty of the member States if used inappropriately. In principle, the doctrine may damage legal certainty and create the situation where member States do not understand the extent of the obligations they are agreeing to when acceding to the Convention, or have uncertainty about their Convention obligations going forward. Some may argue this is the UK situation in relation to the recent prisoner voting saga.

It is important to take a moment to briefly clarify however, that the living instrument doctrine does not refer to how the Court interprets the Convention in light of unforeseen circumstances, such as technical or scientific advances for instance advances in surveillance technology (Klass v. Germany), but rather situations that could have been foreseen, where the Court interprets the

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103 See e.g. Mahoney (n33) at 58.
104 See e.g. Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (n28) at 20 para 60- “We note the Court’s approach has developed unpredictably in recent years. We also note the concerns expressed by some witnesses over the “living instrument” doctrine, and the uncertainty implicit in that doctrine”
105 Klass and Others v. Germany (App.No. 5029/71) (ECtHR 6 September 1978). Here the Court, although not finding a violation of the applicants’ rights to respect for their family and private life (Article 8(1)), considered advances in surveillance technology which could not have been anticipated at the time of the Convention’s founding. In doing so it set out a general approach by stating:

“As the Delegates observed, the Court, in its appreciation of the scope of the protection offered by Article 8 (art. 8), cannot but take judicial notice of two important facts. The first consists of the technical advances made in the means of espionage and, correspondingly, of surveillance; the second is the development of terrorism in Europe in recent years. Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result...
Convention differently due to changing social standards in the member states such as the acceptance of homosexuality (*Dudgeon v. UK*)\(^{106}\). It has also been suggested that some of the latter category of cases would no longer be seen as controversial today, such as the aforementioned *Dudgeon case*\(^{107}\) or the *Marckx case* on the right of illegitimate children to maternal affiliation under Article 8 of the Convention.\(^{108}\)

In cases when the Court is overruling a previous decision, based on the living instrument doctrine, it has to some extent addressed the issue of a lack legal certainty in its *Chapman v. UK* case decision by stating:

“While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from the precedents laid down in previous cases.”\(^{109}\)

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\(^{106}\) *Dudgeon v. The United Kingdom* (App.No. 7525/76) (ECtHR 22 October 1981) This Court in this case found a violation of Article 8 of the Convention in relation to Northern Ireland’s laws prohibiting certain conduct between consenting homosexual people, this case is discussed further in chapter 4.3.3 of this study, but for the purposes of this explanation it is clear that homosexuality would have been known about at the time of the founding of the Convention.

\(^{107}\) For suggestion of this see Grieve (n93) at 66.

\(^{108}\) *Marckx v. Belgium* (App.No. 6833/74) (ECtHR 13 June 1979). This case will be discussed in greater detail in chapter 4.2.2 but for comment that it would no longer be seen as controversial today see: In this light see also Hale (n59) at 541.

\(^{109}\) *Chapman* (n60) at para 70.
However, this has not stopped criticism of the Court’s living instrument approach in the few cases where it has used evolutive interpretation to overrule previous case law.\footnote{110} Dominic Raab speaking of the Tyrer judgment in his previously cited attack on the Court’s living instrument approach thought it was tantamount to judicial rewriting of the Convention.\footnote{111} This suggested, at least in his view, that living instrument decisions, contrary to the Court’s above statement in Chapman,\footnote{112} are arbitrary impositions of the Strasbourg judiciary.

Criticism of the doctrine has not suddenly emerged. In fact, after the Court’s famous expression of the doctrine in Tyrer\footnote{113} criticism of the Court’s approach was clear. These ranged from the hyperbolic criticism that “The European ‘Court’ of Human Rights is not really a court: it has no powers and what it utters is no judicial decision, but a political opinion.”\footnote{114} To the more reasoned academic argument that “…the Court must be censured for its failure to produce a convincing and well-argued judgment.”\footnote{115} The latter argument appears to be at the core of the controversy surrounding the Court’s living instrument approach and has led to conflict within the Court’s judiciary, which, will be discussed further throughout this study. This is that when using a living instrument approach, the Court has poorly explained itself, leading to the possibility of confusion and conjecture about its appropriateness and about how evolutive interpretation works in practice. In other words, this is a failure of the Court to ensure adequate dialogue with the member States. In the past this dissent particularly came from Sir Gerald Fitzmaurice who was the UK judge at the

\footnote{110}{It is not necessary for the Court to overrule previous case law when employing the living instrument doctrine where no pre-existing case law exists. The contrast between the Court’s approach to the living instrument doctrine where the Court must overrule previous case law and where it does not need to are discussed in greater detail in chapter 4.}
\footnote{111}{Raab (n43) at 130.}
\footnote{112}{Chapman (n60) at para 70.}
\footnote{113}{Tyrer (n22) at para 31.}

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Court from 1974-1980. In Golder v. UK\textsuperscript{116} Sir Gerald concerned with (what he regarded as) judicial legislation in relation to the Court’s readiness to read a right of access to the Court\textsuperscript{117} into the text of Article 6(1) of the Convention (which did not explicitly include such a right) said:

“…the point here being, not whether the Convention ought to provide for such a right, but whether it actually does.”\textsuperscript{118}

And of the majority’s decision in Tyrer (which was understood as outlawing judicial corporal punishment)\textsuperscript{119} he stated:

“Modern opinion has come to regard corporal punishment as an undesirable form of punishment; and this, whatever the age of the offender. But the fact that a certain form of punishment is an undesirable form of punishment does not automatically turn it into a degrading one.”\textsuperscript{120}

It is in this context of distrust and uncertainty about the working of the living instrument doctrine that this study seeks to investigate how it was first instigated and how it might operate to facilitate the purposes of the Convention as a human rights treaty. Part of this result of this study is a

\textsuperscript{117} In Golder The majority had ruled that the right of access to Courts was inherent to Article 6 of the Convention (Right to a fair hearing): Golder (n116) at para 36.
\textsuperscript{118} Golder (n116) separate opinion of Judge Sir Gerald Fitzmaurice at para 2.
\textsuperscript{119} The majority of the Court found a violation of Article 3 of the Convention, that Tyrer had been subjected to degrading treatment, by six votes to one.
\textsuperscript{120} Dissenting Opinion of Sir Gerald Fitzmaurice in Tyrer (n22) at para 11.
recommendation for reform to inculcate dialogue flowing between the Court and member State institutions to alleviate the aforementioned confusion.

1.6 Dialogue and the ECHR

One aspect of this thesis previously mentioned is that of the failure of dialogue in the ECHR system. Dialogue may occur in different ways but roughly refers to communication, whether that be in statements, case decisions or other manners, regarding the working or interpretation of the relevant body of law. In this case we clearly are interested in the ECHR but other notable examples of dialogue have been illustrated that may usefully inform the reader’s understanding of dialogue in reading the evidence put forward in this study.

Perhaps the seminal work on a dialogical system comes from Hogg and Bushell who describe the Canadian Supreme Court’s (CSC) relationship with the Canadian Parliament and Government.\textsuperscript{121} They describe that while Canada has a supreme codified constitution, the Canadian Charter of Rights and Freedoms (much like the US constitution which will be discussed in chapter 2) the decisions of the CSC are not the last word in the development of Canadian Law. Instead judgments of the Court feed into a continual process of legislative development, where exercise of their strike down powers usually led to reform of the law to obtain the same social objectives in a charter compliant manner.\textsuperscript{122} In this sense Hogg and Bushell have suggested that the Court far from holding a position of mere constitutional veto over legislation, aides in the development of better legal frameworks.\textsuperscript{123}

\textsuperscript{122} Ibid at 96-97.
\textsuperscript{123} Ibid at 105.
While this approach to dialogue is interesting it is not without its critic. Aileen Kavanagh for instance has suggested of the metaphor of dialogue and responses to it:

“It certainly sounds attractive. But these kinds of general, abstract claims do not us very far in analysing what complex institutions like courts and legislatures actually do, still less provide a foundation for bold normative prescriptions about they should do.”

However, criticism has not stopped commentators noting the use of dialogue in different systems of law including for our purposes the ECHR. Indeed the then President of the Court, Jean-Paul Costa, has for instance stated: in the Court’s aptly named, annual Dialogue between judges Seminar:

“We wanted to convey our view that it is essential that domestic judicial authorities should assume ownership of the Convention; that there should be, so to speak a distribution of responsibilities in the field of human-rights protection between the national authorities and the Court.”

For the purposes of this study it may be useful to adopt the purpose of dialogue given by Luc Tremblay who states:

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“...it aims at taking decisions in common; reaching agreement; solving problems or conflicts collectively; determining together which opinion or thesis is true, the most justified, or the best; or which particular practical view should govern actions or decisions”

This as we shall see in this thesis is a problematic concept in Convention jurisprudence.

1.7 The Purpose and Themes of this Study

As has been shown, the Convention is surrounded in controversy, in the UK especially. It is at a pivotal stage in its history with the British former President of the Court noting that levels of disquiet directed at the Court and its judges are unprecedented. It is not possible for this study to answer all of the criticisms of the Convention, and certainly not one by one. Instead, it will focus on an explanation and analysis of the Court’s living instrument doctrine, which as we have seen, has been the subject of considerable criticism in the UK and the troubled dialogue surrounding it.

It is submitted that, from what the Court has said about the doctrine and its surrounding academic literature, it can be difficult to gain a full and comprehensive explanation of how the living instrument doctrine has come about in the Strasbourg jurisprudence, and how it works. This means that it is difficult reach an informed judgement on the legitimacy of the Court’s use of the doctrine.

128 Sir N Bratza, ‘The Relationship between the UK Courts and Strasbourg’ (2011) EHRLR 505 at 505: “The Vitriolic- and I am afraid to say xenophobic- fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention System for over 40 years.” And there current Conservative Government in 2014 (during their time in a Coalition Government with the Liberal Democrats) published proposals to change Britain’s relationships with the European Court of Human Rights with the potential for withdrawing from the Convention if they are unable to do so. Conservative and Unionist Party (n71) at 6 and 8.
As such, the primary objective of this thesis is to cast light on three areas: the (i) instigation, (ii) utilisation and, (iii) control of the living instrument doctrine by the Court. These themes roughly correspond to the three parts of this study. Analysis of these themes will enable the Convention’s stakeholders to assess their best course of action. This might be member States advocating reform of the Convention system, or a litigant considering whether they have a viable case. This may also, perhaps, include a potential new member State wishing to know the nature of what they are signing up to. Possibly most importantly, with talk of withdrawing from the Convention in parts of the UK in recent years especially after the prisoner voting saga, partly based on the notion that the Court has illegitimately invented the living instrument doctrine and otherwise employed it in ‘legislating’ ways (or so it is claimed) and that the Court is an unaccountable institution, the study will inform the debate against the background of policy makers in member States considering Convention denunciation. An important aspect of this will be to consider the nature of communication and input into the process of adjudicating and deciding on Convention Standards, not just by the Court but by the member States and the various Convention actors themselves.

In order to achieve the aim of this thesis, it is broken down into three main themes as detailed below.

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130 Denunciation is permitted under Article 58 of the Convention.
1.7.1 Theme One: Where did the doctrine come from? (Genesis of the Doctrine in Convention Case Law)

Firstly, in casting light on the instigation and utilisation of the doctrine it will be necessary to both locate the doctrine within its historical and structural framework. As such, the study will aim to help the reader come to their own informed understanding of the constitutional purpose of the Court as it evolved through the 1960s and 1970s (and beyond), and discuss how the living instrument doctrine first came about (again in the early years) in the European Commission on Human Rights’ and Court of Human Rights’ case law. This will mean that readers are able to gain a feel of the doctrine’s purpose and how it fits into the broader ambit of the Convention. Contrary to some suggestions, it shall be suggested that the doctrine was not in fact a construct of an activist court unilaterally ascribing to itself a potentially legislative power. This may help to dispel anxiety about the Court illegitimately taking upon itself a legislative mantel and suggest that, of itself, the doctrine is legitimate.

1.7.2 Theme Two: How the Doctrine works in practice, its limitations and the possibility of ‘(d)evolution’

After considering the legitimacy of how the doctrine came about, the second theme of this study concerns the appropriate use of the living instrument doctrine and how it operates. Analysis of

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131 Tyrer v. The United Kingdom, Series B, vol.24 1977-1978 (Carl Heymanns Verlag KG, 1981) and Tyrer (n22). It is commonly present in discussion of the living instrument doctrine that it first arose in Tyrer v. UK in 1978, when in fact it will be argued in Chapter 2 of this study that the living instrument doctrine is likely to precede this. See. e.g. Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (n28) at 20 para 31; D Raab, HC Deb, 10 February 2011, Vol 521, Col582 and D Davies, HC Deb, 10 February 2011, Vol 521, Col 497.

132 Raab (n43)at 130.

133 See Hoffmann above n1
existing case law will enable the identification of general principles of evolutive interpretation and evaluation of them within the Court’s interpretative method. In considering this theme, the Court’s use of consensus methodology will be considered in order to evince broad principles for the finding of Convention evolution.

This theme will include exploration of what the limits of evolutive interpretation might be. This is of critical importance to member States, in understanding the nature of their international legal obligations and how they may change over time, as interpreted by the Court, particularly as this may affect their sovereignty. However, the study will not aim to quantify absolute limits to evolutive interpretation, as it is acknowledged that this is not possible, except in broad terms, on the part of a piece of legal academia. Instead, it will consider how such limits might be defined by the Court interpreting the Convention as a living instrument, for example taking careful consideration of the Court’s consensus methodology.

The final aspect of this theme of the uses and effects of the living instrument doctrine, is the whether the living instrument doctrine may result in a reduction of Convention protection (this will be referred to as (d)evolution.) The Court has said surprisingly little on the possibility of ‘(d)evolution’\(^{134}\) and academic discussion of the issue is very sparse, with most mentions of it coming as a minor aspect of studies on other aspects of Convention law.\(^{135}\) However, an authoritative

\(^{134}\) To the author’s knowledge, Court discussion of evolution to a lower level of substantive protection has been confined to separate opinions of judges such as: E.g. \textit{Gorou v. Greece} (No.2) (App.No. 12686/03) (ECtHR 20 March 2009) partially dissenting opinion of Judge Casadevall at paras 8-9.

answer on this possibility has yet to emerge.\textsuperscript{136} On the basis of the principles enunciated in the Court’s existing case law explanations of the doctrine, this study will therefore show that in theory there are strong arguments that ‘(d)evolution’ should and must be possible.

An overall aspect of concern to all three previously cited parts of this theme will be how evolutive interpretation fits into or highlights strain in the dialogical model of the Convention system. What will be identified is that while evolutive interpretation highlights some level of dialogue between the Convention stakeholders, this is nevertheless problematic. Further consideration specifically of the dialogical system of the Convention then takes place in the final theme of this thesis.

1.7.3 Theme Three: The living instrument doctrine and Strasbourg accountability

The final theme of this thesis is accountability of the Court and what can be done to control Strasbourg if it over-reaches its judicial authority. As decisions of the Court are binding in international law on the respondent State (Article 46(1) of the Convention) and are usually followed in future cases,\textsuperscript{137} thus potentially having an \textit{erga omnes} effect,\textsuperscript{138} it is of great importance to all member States that the Court does not over-reach its authority. In the context of this study, one potential method of over-reaching would be the creation and imposition on member States of what might be considered ‘new obligations’ via evolutive interpretation. Thus having an effective system of checks and balances may be crucial for ensuring confidence and legitimacy in the Convention

\textsuperscript{136} In fact to the author’s knowledge only one article has ever been published on this. See V Chirdaris, ‘The Limits of Interpretation and the Principle of Non-Regression’ in D Spielmann (Ed) \textit{The European Convention on Human Rights: Essays in Honour of Christos L. Rozakis} (Bruylant, 2011) pages 81-106.


\textsuperscript{138} See Dzehtsia\textquotesingle rou and O’Mahoney (n135) at 342-343.
system, in the work of the Court, and the protection of the member States’ sovereignty. Whether or not the previously mentioned controversy surrounding the Court in the UK is fair, the lack of a system of ‘democratic override’ leads to questions whether the Court is sufficiently accountable to the member States. In this light, and as we have noted, Lady Justice Arden suggested a system of provisional judgments as a possible remedy to these issues.\textsuperscript{139} Adding to the debate for reform of the Convention system of checks and balances, Judge Spano (of the European Court of Human Rights) has forecast the need for greater recourse by the Court to the principle of subsidiarity.\textsuperscript{140} As such, it is also worth noting the relatively recent conclusion of Protocol 15 to the Convention which will for the first time expressly enshrine the principle of subsidiarity and the margin of appreciation into the Convention’s preamble.\textsuperscript{141}

This theme will lead to a conclusion that system of checks and balances may be of intermittent effectiveness which may raise doubts as to whether the Court is sufficiently accountable to the member States. This may lead to a lack of confidence in the ECHR system and concerns for the maintenance of member State sovereignty. Under these circumstances one contention under the theme of accountability will be that it may, be especially appropriate for the Court to exercise judicial self-restraint in its approach to the living instrument doctrine to avoid damaging its legitimacy. However, more broadly the accountability issues identified in this section will be used to show that a break down in (or the effectiveness of) the Convention system of dialogue between the Court and the member States has occurred. This theme will thus identify that in order to restore legitimacy, or the perception of legitimacy, to the Convention a new or reformed approach to dialogue between the Convention institutions and member States will need to be established.

\textsuperscript{139} See Arden n58
\textsuperscript{140} R Spano, ‘Unversality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity’, (2014) \textit{HRLR} 1 at 491.
1.8 Chapter by Chapter Overview of this Study

In order to cover the themes just discussed this thesis is split into three substantive parts, each containing various chapters.

1.8.1 Part One (chapters 2 and 3) - The Living Instrument and its Foundations

Part one is divided into 2 chapters. It considers the preliminary issues that provide the foundation for analysis throughout this thesis, such as what the purpose of the Convention is and how the living instrument doctrine fits into this. It starts by asking, what is the nature of the Convention and (consequently) the purpose of the Court in interpreting it? This should allow readers to consider or perhaps reconsider their own perspective on the Convention which will act as a lens in reading the analysis that ensues throughout this investigation. Part one then asks how the living instrument doctrine arose in the Strasbourg jurisprudence and how legitimate was this arrival into the Court’s case law?

1.8.1.1 Part 1, Chapter 2- The Nature of the Convention and the European Court of Human Rights (the Convention itself as a living instrument)

The first substantive chapter of part one will examine the role and function of the Convention at the Court, asking ‘what is the nature of the Convention and the Court, as we know and understand it today?’ This is significant because without knowledge of the nature of both, based on an appreciation of them as they are today and as they would have been perceived in their relevant form in say, 1950, it is impossible for an individual to come to their own understanding, at a general level, of whether the Court is acting legitimately in its use of the living instrument doctrine. That said,
the chapter acknowledges that it is not possible to come to a singular, objective and defined purpose of the Convention and thus the Court. Instead, it will be argued that there different views on the nature and purpose(s) of the Convention and the Court. It will thus be left to the reader on the basis of the discussion in the chapter about the gradual development and evolution of the Convention’s status, to come to their own conclusion on its nature and that of the Court. However, as a general observation it is contended that the more one sees the Convention as a type of ‘constitutional’ document, albeit at the level of European public law, then the more it follows that their assessment would find generous judicial use of the living instrument doctrine to be legitimate. By contrast, the more one views the Convention as an ordinary international treaty, the more one would find reliance upon judicial self-restraint to be more appropriate.

1.8.1.2 Part 1, Chapter 3: The Genesis of the Living Instrument Doctrine

The following chapter looks into the origins of the living instrument doctrine. As has been mentioned above, *Tyrer v. UK* is not the first case where the Court’s approach suggests that it was adopting an evolutive interpretation. Instead it is the first case where the Court expressly stated that the Convention is a ‘living instrument’. This chapter will thus help the reader to identify the origins of the living instrument doctrine and how it came about. It will also dispel the myth that the Court simply “….assumed the power to legislate” through the living instrument doctrine. It does this by looking at how the doctrine developed in the case law of both the Court and the Commission on

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142 E.g. Gunner Beck, making specific example of the ECHR, has argued that “…systems of human rights systems and much of the thinking underlying them ultimately lack both normative foundation as well as conceptual certainty.” In G Beck, ‘Human Rights Adjudication under the ECHR between value pluralism and essential contestability’, (2008) *EHRLR* 214 at 215.

143 *Tyrer (n22)*.

144 See e.g. Bates, British Sovereignty (n4) at 395.

145 *Tyrer (n22)* at para 31.

146 See Hoffmann (n1) at 429.
Human Rights and the important, yet little known, 1975 Colloquy speech by Max Sorenson\textsuperscript{147} and a chapter in Sir Francis Jacob’s classic textbook of 1975\textsuperscript{148} preceding the \textit{Tyrer case}.\textsuperscript{149} The chapter for the first time takes an in-depth look at the full proceedings of the \textit{Tyrer} litigation. These include the events leading to the application being made to the Commission; the Commission’s consideration of the case; pleadings to the Court\textsuperscript{150} and finally the Court’s decision itself.\textsuperscript{151} This is because, as will be shown, the full proceedings indicate that the doctrine can in fact draw some claim to legitimacy from the way it was recognised in the Court proceedings by the litigating parties (which included the United Kingdom, of course) and the Court itself. The Chapter also considers the reception of the \textit{Tyrer judgment} and what remained unclear about the living instrument doctrine from the Court’s 1978 judgment.

\textbf{1.8.2 Part Two- Principles of Legitimacy and the Scope of the Living Instrument Doctrine}

Building on the previous chapter, part two, which has two individual chapters, addresses the scope and operation of the living instrument doctrine. It divides the consideration into two chapters. The first chapter addresses the application of what might be termed ‘ordinary’ evolutive interpretation\textsuperscript{152} and its limits. The second chapter in this part addresses the theoretical question of whether or not the living instrument doctrine can ‘reduce’ the level of substantive protection contained in the Convention, and if so what the limits of this are (so-called ‘(d)evolution’)? Both issues are important as the Court has offered insufficient explanation of the living instrument

\begin{itemize}
\item \textsuperscript{148} FG Jacobs, \textit{The European Convention on Human Rights}, (Oxford University Press, 1975).
\item \textsuperscript{149} \textit{Tyrer} (n22).
\item \textsuperscript{151} \textit{Tyrer} (n22).
\item \textsuperscript{152} ‘ordinary’ evolutive interpretation in this context refers to uses of the living instrument doctrine which results in an increase in the substantive protections of the Convention.
\end{itemize}
doctrine so they remain unclear. They also bear great importance for member States in understanding their future Convention obligations.

1.8.2.1 Part 2, Chapter 4- Evolutive Interpretation and its Limits

The first chapter of this part describes how the Court has adopted a model of finding consensus among member States to identify Convention evolution. It discusses how the Court has considered mutual domestic legislation and practice, treaty obligations, statements of the various bodies of the Council of Europe, and changing social perceptions in member States in its consensus methodology. The chapter finds the Court’s overall use of consensus is an appropriate, albeit potentially cumbersome, way of respecting the sovereignty of the member States. It thus acts to both legitimate and control evolutive interpretation. As such this chapter will necessarily give significant focus on consensus in its analysis. However, it also warns that the Court’s explanation of its consensus methodology is unclear and that the Court needs to exercise discretion (perhaps via the Court’s margin of appreciation doctrine) in order to respect the principle of subsidiarity. This restraint is particularly necessary in cases highly acute national sensitivity, such as abortion in the Republic of Ireland, where it may be appropriate for the Court to instead utilise its margin of appreciation doctrine. This displays a suitable level of judicial deference to the democratic debates taking place in that member State.

This chapter also considers whether, in principle, there are any absolute limits on the Court’s ability to expand Convention law using the living instrument doctrine. It will aim to define principles in that

153 See e.g. Spano (n140) at 5. It should be noted that the principle of subsidiarity expressly stated in Protocol No. 15 amending the Convention on Human Rights and Fundamental Freedoms (Opened for signature 24 June 2013, not yet in force).
154 See A, B and C v. Ireland (App.No. 25579/05) (ECtHR 16 December 2010).
regard. For example, the Court has explained that the Convention cannot evolve wholly new rights which have no clear basis in the Convention text.\textsuperscript{155} In terms of the increase in the scope of rights via the living instrument doctrine it will be argued that due to the Court’s need to find a certain level of consensus between the member States, this will become increasingly difficult. However, in principle, assuming the presence of sufficient consensus, the evolution of the Convention in this manner could be unlimited.

\textbf{1.8.2.2 Part 2, Chapter 5- (D)evolutive Interpretation and its Limits}

Whilst, the possibility of Convention evolution to increase rights protection is settled,\textsuperscript{156} as mentioned already the possibility of a ‘reduction’ in (substantive) rights protection is still controversial, and lacking in discussion.\textsuperscript{157} However, it is this aspect of evolution that may help to make clear the rationale underpinning the living instrument doctrine and support a theory of the legitimacy of the doctrine itself. The chapter starts by defining what an evolution downwards ((d)evolution) actually means.\textsuperscript{158} This is necessary to distinguish between the Court’s granting a degree of latitude to the member States using the margin of appreciation, and the actual substantive reduction of Convention rights through evolutive interpretation. The chapter then proceeds to consider whether or not (d)evolution is possible in theory under the Convention. Discussion of practical methods of (d)evolution will be discussed briefly but will not form the main focus of this chapter. Instead some further analysis will be offered in the final part of this study.

\textsuperscript{155} \textit{Austin and others v. United Kingdom} (App.Nos. 39692/09; 40713/09; 41008/09) (ECtHR 15 March 2012) at para 54.
\textsuperscript{156} The majority of literature on the living instrument doctrine does not challenge its existence \textit{per se} but may challenge the extent or method of its use.
\textsuperscript{157} It has yet to be the subject of a majority judgment of the Court.
\textsuperscript{158} In preliminary terms a (d)evolution occurs when consensus among States changes to suggest a common approach that offers less protection than is currently granted in Convention case law. Here, the Court may interpret the Convention to have evolved necessitating a reduction in the level of protection by the Convention.
This chapter will suggest that it is necessary that the Convention *should* be able to (d)evolve in order to maintain consensus’ legitimating role in the living instrument doctrine,\(^{159}\) albeit that may be rather difficult to effect in practice. The chapter then asks, what are the limits to (d)evolution? This is important in defining the minimum content of obligations for member States and people within them. It could also be crucial in ensuring the effectiveness of the Convention as an early warning system against a backslide into totalitarianism,\(^{160}\) which spurred its creation in the first place. It will be argued that the minimum standard below which the Convention cannot (d)evolve is subjective. However, it is for the Court to define the base meaning of the words included in the Convention beneath which practice of member States, individual or collective, is incapable of being interpreted as conforming to the Convention. Should the member States wish to collectively reduce the level of protection required by the Convention below this minimum level, they would have to directly amend the Convention itself or risk a finding of violation. The possibilities for reform of the Convention text itself are left to the next and final substantive part of this study.

1.8.3 Part Three Checks and Balances: State Control of the Convention

The final part of this thesis considers the system of checks and balances that ensure that the Court does not stray beyond its legitimate role in interpreting the Convention. This is of crucial importance, because the Court’s application of evolutive interpretation could lead to the accusation that it is


\(^{160}\) Bates (2010) (n4) at 6.
illegitimately imposing new obligations on member States, with no democratic override to reverse such decisions.\textsuperscript{161} This part is again split into two chapters.

\textbf{1.8.3.1 Part 3, Chapter 6- Checking the Convention: A balanced System of Controls on the Court?}

This chapter introduces the systems of checks and balances to the Court. It notes that there are two types of system of checks and balances: unilateral actions or omissions by member States (such as refusal to implement a judgment and Convention withdrawal) and collective actions or omissions by the member States together (such as treaty amendment or refusal to enforce the Court’s decisions in the Committee of Ministers.) Chapter 6 identifies that whilst in theory methods of checking and balancing the power of the Court could be sufficient, their effect is inconsistent. It also identifies that the possibility of treaty amendment is cumbersome and thus impractical for an effective check on the Court’s powers.\textsuperscript{162}

Chapter 6 then moves on to consider possible reforms of the system of checks and balances, including but not limited to, a preliminary judgment mechanism,\textsuperscript{163} the unlikely and cumbersome possibility of direct treaty amendment either to the Preamble\textsuperscript{164} or to substantive Convention

\textsuperscript{161} This is particularly important as the judges are not directly elected by the citizens of the Council of Europe but instead are nominated by their respective member States and then elected by the Parliamentary Assembly, see: Article 22 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950).

\textsuperscript{162} It has been suggested that treaty amendment is “…rather unlikely” by Mattjhis de Blois: See M de Blois, ‘The Fundamental Freedom of the European Court of Human Rights’ in R Lawson and M de Blois (Eds) The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers (Kluwer Academic Publishers, 1994, Volume III) pages 35-59 at 44.

\textsuperscript{163} See Arden above n58

\textsuperscript{164} As will occur should Protocol 15 enter into force (Protocol No. 15 amending the Convention on Human Rights and Fundamental Freedoms (Opened for signature 24 June 2013, not yet in force))
clauses or changes to the relationship between the Court and individual member States\textsuperscript{165} or enhancement of the Court’s dialogue both with domestic Courts and member State officials.\textsuperscript{166} The reforms discussed in chapter 7 do not claim to be a fully exhaustive list. However, they illustrate relevant considerations to be taken when reforming the Convention in order that member States may come to an informed opinion of the most appropriate method or methods of Convention amendment. This chapter aims not just to look at the efficacy of various methods of reform, but also makes brief comment on the appropriateness of such methods of reform and how they affect understanding and dialogue surrounding Convention law. A potential example of this might be if in the midst of the aforementioned prisoner voting controversy, the member States could amend the Article 3 of the first protocol to allow for the complete disenfranchisement of all people found guilty of a criminal offence or in custody. While, currently it is likely that given the Court’s previous case law that this blanket ban would be unlawful,\textsuperscript{167} such an amendment would make it become legal. Whilst this is possible, it would contradict the tenor of the Convention as an instrument for the human rights protection within the member States. So while it might ultimately be legally valid, it would likely be normatively invalid and should be avoided by the member States.\textsuperscript{168}

\textbf{1.8.4 Chapter 7- Conclusion}

This chapter will concisely re-emphasize the narrative of the living instrument doctrine’s gradual emergence in the Convention’s case law. The key contention of this study will be argued, that the principle of the Convention as a living instrument does not appear to be at issue \textit{per se}. Instead, the

\begin{footnotesize}
\textsuperscript{165} The Conservative Party (who now form the Government of the United Kingdom following the 2015 general election) proposed in 2014 to reform the relationship the UK has with the Court to render its judgments advisory in nature. Conservative and Unionist Party (n71) at 6.

\textsuperscript{166} This has in part taken place since 2006 at the opening of the judicial year where the Court holds a conference entitled ‘Dialogue between Judges’ with presentations by eminent speakers (both judges of the Court and member States’ courts and eminent scholars in the field.)

\textsuperscript{167} \textit{Scoppola v. Italy} (No.3) (App.No. 126/05) (ECtHR 22 May 2012) at para 96.

\textsuperscript{168} N.B this does not preclude the possibility that such amendments would be invalid in international law due to conflicts with other norms of international law.
\end{footnotesize}
source of the controversy arises over ambiguity in the use and scope of the living instrument and a perceived threat to the national sovereignty of member States. As such the Court will need to make clearer within its judgments and through a process of dialogue with Convention stakeholders how the doctrine operates and has affected its decision making in the instant case. It may also be that to restore confidence and improve legitimacy in the Convention system that the member States may wish to take remedial action to the system of checks and balances to make it more robust and reliable.

1.9 Conclusion

This study, it is submitted, plays an important role in dispelling misunderstanding surrounding the Court’s living instrument doctrine. At a time of unprecedented discontent towards the Convention with the present potential for the UK denouncing the Convention, this study is aptly timed. By explaining the context of the living instrument doctrine and its scope, it may help to disarm some aggressive posturing and provide an insight for making appropriate reforms of the Convention system. The study shows that the Court has enunciated a working pattern for the living instrument doctrine, albeit somewhat ambiguously. It also suggests that the future of judicial interpretation of the Convention is to some extent clear and sufficiently certain to avoid offending the rule of law. However, it also casts light on anomalies in the Court’s approach and the need for further explanation of the living instrument doctrine. This is to further improve understanding of its operation. The study also identifies possible need for limited reform of the system of checks and balances to formalise and increase clarity in the relationship between the Court and the member States. The latter point may then help to reduce the feeling of a foreign court imposing new

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169 For instance the suggestion that the living instrument doctrine was invented in the Tyrer v. UK case of 1978. See Tyrer above N131
171 See Mason above n38.
standards on member States offending both national sentiments and the principle of State sovereignty. On the whole what this study seeks to do is give explanation in a cohesive manner on what we already do know about how the Convention acts as a living instrument doctrine, but also show that at present it is not always the case that one arm of Convention law understands what the other is doing or its legitimate concerns. As such in clarifying knowledge and understanding of existing living instrument doctrine arrangements this study is then able to contribute suggestions for improving the general dialogue in the Convention and thus defray some of the tension surrounding the Convention based on misunderstanding. This potentially enables more precise substantive debate by stakeholders about the proper direction and constitutional settlement of European human rights law through the platform of the Convention.

172 See e.g. Hoffman (n1) at 431.
Chapter 2: The Nature of the Convention: An Ordinary Treaty or itself a Living Instrument?

“What was initially established as an international system for the collective enforcement of fundamental rights and freedoms in Western Europe has developed over the last fifty years into a constitutional bill of rights for the entire continent.”

Hans-Christian Krüger, former Secretary of the European Commission on Human Rights.¹

2.1 Introduction

What is the Convention? What is it for? How should it work? These fundamental questions lie at the heart of the proper operation of the Convention. It is impossible to gain a principled understanding of the legitimacy of the ECtHR’s approach to interpreting the Convention without first considering these questions. They are even more fundamental to evaluating the Court’s evolutive interpretation methodology. This is because the results of such interpretations may be unclear from reading the Convention text alone.

Whether the Court is engaging the living instrument doctrine or it is conversely utilising the margin of appreciation doctrine (MoA),² it is crucial that it does so in-line with the Convention’s nature and purpose and with appropriate respect for State sovereignty. Stating this is simple, but as we shall see, identifying what, precisely, the present day Convention is for can be an elusive endeavour. However,

as the originating quote of this chapter suggests, the Convention has grown over its lifetime and its ‘quasi-constitutional’ properties have come to the fore.\(^3\)

In order to provide an initial understanding of the nature of the Convention from which to proceed from in this thesis, this chapter first compares the role of the Court with the Court of Justice for the European Union (CJEU) and the US Supreme Court (USSC). The CJEU is selected as a case study due to the Convention and the European Union’s (EU) similar historical and geographical foundations. The USSC is selected as a case study because it is a well-known example of a constitutional court that has been called upon to consider similar issues to the Strasbourg Court.\(^4\) They have also previously been a fertile ground for comparisons between the two courts and their development of their respective bodies of law.\(^5\) After these brief comparisons, the chapter focuses on the difficulty in deciphering a static vision of the Convention and its purpose. Based on this understanding the chapter briefly considers how the Court is ‘supervised’ from potentially going beyond the legitimate bounds of its role as interpreter of the Convention.\(^6\) In offering this analysis the chapter inevitably carries a theme of the power relationship between the Court and the Convention member States. However, it also considers how the Convention has, overtime, grown in stature from being subject to questions over its future (in the 1960s),\(^7\) to being said to have ‘come of age’ (1990s),\(^8\) and how the member States have played an important part in sanctioning this evolution in the role and function of the Convention itself. The chapter concludes that while the Court is constrained by Westphalian

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\(^{3}\) For discussion on the author’s use of the term ‘constitutional’ see below text to n13.

\(^{4}\) E.g. the legality of the death penalty and racial discrimination.


\(^{6}\) The Convention system of checks and balances will be analysed in depth in chapter 7 and potential reforms of this system will be considered at length in chapter 8, thus, for the avoidance of repetition, consideration at this stage will be thematic rather than specific.

\(^{7}\) See H Rolin, ‘has the European Court of Human Rights a Future?’ (1965) 11 Howard Law Journal 442 at 442.

notions of State sovereignty, it is not entirely subservient to the will of the member States. As a Convention where obligations are owed by member States to individuals within their territory, the Court must tread a fine path between State sovereignty and an effective and up-to-date system of human rights protection. The appropriate manner in which the Court should do this very much depends on the degree of ‘constitutional’ (or ‘quasi-constitutional’) status conferred upon it by the member States when they set it up and further supported its development over the Convention’s lifetime. In the absence of agreement on this issue, individuals’ views on the level of ‘constitutional’ pedigree the Court possesses may vary affecting their assessment of the Court’s legitimacy.

Before going any further in this analysis it is worth taking a moment to explain what the author means by way of the term ‘constitutional’. It has been noted that the Convention was discussion of the Convention as a ‘constitutional’ or ‘constitutional-like’ has been mainly from commentators, or Strasbourg judges or Commissioners speaking extra-judicially and it was not until the 1990’s that the Strasbourg organs made reference to the idea of the Convention as a ‘constitution’ in their decisions and reports. The first such mention of the term by the Court was in Loizidou v. Turkey (preliminary Objections). Here in relation to Turkey’s reservation to its optional declaration of jurisdiction of the Court in respect of Cyprus, the Court stated:

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12 Or lack thereof.
14 Loizidou v. Turkey (Preliminary Objections) (App.No. 15318/89) (ECtHR 23 March 1995). This case is discussed in chapter 4.
“Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and the Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of public order (ordre public).”\textsuperscript{15}

Unfortunately the Court did not explain further what it meant by this. Professors Lawson and Schermers\textsuperscript{16} have suggested about the meaning of the Court’s ‘constitutional instrument of public order’ phrase:

“In our view it indicates that the Convention while not pretending to be the all-embracing ‘basic law’ of a ‘European State’, lays down fundamental rules of law and principles which regulate the behaviour of the European States and determine, to a certain extent at least, their legitimacy. It also indicates that all States Parties to the Convention have a legitimate interest in full compliance with these norms by all European States.”\textsuperscript{17}

What they seem to be suggesting, is that the Convention has a semi-normative quality, but that this does not reach the level of embeddedness or entrenchment as domestic constitutions (or perhaps the supremacy of EU law, which will be discussed shortly.) It also indicates that the Convention, as a human rights treaty, bestows rights upon individuals, regardless of citizenship, within the jurisdiction of the member States. They should therefore be interpreted broadly in favour of individuals and not restrictively, as might occur if the Convention were seen as simply a collective pact against

\textsuperscript{15} Ibid at para 75.
\textsuperscript{16} Professor Lawson is currently Professor of European Law at Leiden University and Professor HG Schermers served as a member of the European Commission on Human Rights between 1981-1996.
\textsuperscript{17} RA Lawson and HG Schermers (Eds), \textit{Leading Cases of the European Court of Human Rights} (ARS Aequi Libri 1997) at xxvii.
totalitarianism. However, one might also reasonably read into this that the Court will be resistant to any interpretation of the text that goes against what it might see as the ‘spirit of human rights’ inherent in the Convention. This description, just given, is what the author refers to when using the term ‘constitutional.’ However, it is acknowledged that the degree of, or outcome of the ‘constitutionality’ of the Convention may be the subject of reasonable disagreement. As such the more one views the Convention as a type of human rights constitution for Europe, the more it would be reasonable to interpret the rights it contains expansively, and the less the Court should be restricted by the notion of State sovereignty. As suggested the following sections will compare the ECHR with both EU law and US constitutional law, and the succeeding section will consider the evolution of the Convention system, itself, as a living instrument. These will greater enable the reader to decide, from their own perspective, the degree of ‘constitutional’ status the Convention possesses and set the tone for the reader’s consideration of the issues explored in parts two and three of this study. Overall however, it will be the assumption of this thesis that the Convention has a form of presumed constitutional status whereby State sovereignty or other legitimate concerns may rebut the presumption of the Convention’s constitutional force.

2.2 A Tale of Two Europes

When we speak of Europe we must first consider which Europe it is we are talking about. In European public law there are essentially two Europes. These are the European Union (EU) as it is today, comprising of 28 member States, and the Council of Europe (CoE), which comprises of 47 member States. Whilst this study focuses on the ECHR, which is a creation of the CoE, it is

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19 It has had other names throughout its history e.g. The European Coal and Steele Board and the European Community.
20 The creation of the Council of Europe predates the founding of what is now known as the European Union.
instructive to draw comparisons between the two enterprises in order to understand better, the
development of the nature and purpose of the Convention itself. This is because, the EU and the CoE
share similar objectives and genesis but their approaches to achieving them diverge for good
reasons. Unfortunately, confusion between the organisations may hinder an understanding of the
living instrument doctrine within the Convention context.

Both organisations arose after the Second World War. Coincidentally, all 28 members of the EU are
members of the CoE and the ECHR. Both share, at least to some extent, a common aspiration for the
development of peace.\textsuperscript{21} However, the two organisations took drastically different approaches to
creating the preconditions for peace.\textsuperscript{22} Whilst the CoE created a human rights Convention whose
first aim was to protect from the totalitarian excesses seen in the Second World War,\textsuperscript{23} the newly
formed European Coal and Steel Board (ECSB), to which the EU’s origins may be traced back to, took
an economic approach based on the Schuman Declaration. This declaration of 9\textsuperscript{th} May 1950 started
with the proposal to place the production of coal and steel under a singular high authority. It did so
to create “common foundations for economic development as a first step in the federation of
Europe”.\textsuperscript{24} It further went on to inculcate peace through economic cooperation as one of its aims by
stating:

\textsuperscript{21} See e.g. AWB Simpson, \textit{Human Rights and the End of Empire: Britain and the Genesis of the European
\textsuperscript{22}Ibid at 157.
\textsuperscript{23} See e.g. Bates (n13) at 5.
\textsuperscript{24} R Schuman, ‘The Schuman Declaration’, (9 May 1950) available at
\textlangle http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC0QFjAA&url=http
%3A%2F%2Fwww.eurotreaties.com%2Fschuman.pdf&ei=4oOTUoDTM4GGywP4j4KYCQ&usg=AFQjCNHA0KHvp
QeC23jvUhlDyuSz6mWQ\rangle at Para 4.
“The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.”

What we see here is a clear intention for the ECSB to be a stepping stone in the longer-term mission to create a Europe united on economic lines, similar to the Convention Preamble aims “…to take the first steps for the collective enforcement of certain...” human rights. Both legal systems thus similarly recognize that they are a preliminary stage of the development for which they aspired to, but it is the method of development that they take, and have taken, that differs. As such their nature and approach has varied and so has the acceptability of the decisions of their judicial organs.

It has been acknowledged that the EU “…started out as an economic treaty, of limited ambitions, with the aim of creating a common market.” This then progressed through various different treaty stages. Full discussion of the key developments of the EU is outside the scope of this study.

However, a brief understanding of the purpose of the EU as an entity striving to create unity through economic development and trade is useful. It enables the reader to understand the context of the CJEU’s key findings which represent ‘constitutional moments’ in the development of the EU’s legal order, much as the Tyrer case is for the Convention.

25 Ibid at Para 5.
29 This was originally called the European Court of Justice but will be referred to in this thesis as the Court of Justice for the European Union for ease of reference and consistency with modern literature.
In the lead up to the CJEU’s seminal decisions in *Costa v ENEL*\(^{31}\) and *Van Gend & Loos*\(^{32}\) it is important to consider the treaty background. One aspect of the treaty background, which incidentally differs from the Convention,\(^3\) is that the EU is specifically empowered by Article 114 TFEU to harmonise law among the member States with the “...object of establishment and functioning of the internal market.”\(^{34}\) This may justify a certain level of activism from EU institutions, including the CJEU which is missing from ECHR.

In *Van Gend & Loos*\(^{35}\) the CJEU established the doctrine of direct effect, even though this was not expressly mentioned in the treaty. The CJEU\(^{36}\) famously stated:

“...the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights within limited fields, and the subjects of which comprise not only member states but their nationals.”\(^{37}\) (emphasis added)

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\(^{30}\) By ‘constitutional moment’ I mean a moment of significant importance to the historical development of the institution in question.

\(^{31}\) Case 6/64 *Costa v ENEL* [1964] ECR 588 at 593.


\(^{34}\) For further explanation of Harmonization in EU law see *Craig and De Burca* (n28) at 183-187 and *Weatherill* (n28) 87-93.

\(^{35}\) *Van Gend en Loos* (n32) for further details see A Vauchez,’The Transnational politics of judicialization. Van Gend en Loos and the making of EU Polity’ (2010) 16(1) *European Law Journal* 1 especially at 11-17. See also: *Craig and De Burca* (n28) at 183-187 and *Weatherill* (n28) 81-82 and 94.

\(^{36}\) It was then called the European Court of Justice.

\(^{37}\) *Van Gend en Loos* (n32) at 12.
As is well-documented elsewhere, this statement was revolutionary and showed great assertiveness by the CJEU. However, unlike the ECtHR’s introduction of the living instrument doctrine into the express, recordings of the Strasbourg Court’s decisions in Tyrer, the CJEU made the above statement rather differently. Whilst in Tyrer the ECtHR ‘recalled’ that the Convention is a living instrument, the CJEU, in a teleological reading of the EEC Treaty, explicitly referenced the object and purpose of the EEC to establish a common market, found in the EEC treaty and its Preamble. This was a strong justification of principles for its approach. In effect, it appeared to be saying that if it failed to recognise the principle of direct effect, it would be tantamount to judicially undermining the purpose of the EEC treaty, and the States’ intentions in creating it, so it felt compelled to take the approach that it did. The ECtHR on the other hand did not justify the living instrument doctrine in such a firm way, meaning the CJEU could more strongly insinuate its ‘constitutional’ status than the ECtHR. As such the acceptance of this decision would prove a pivotal moment in EU law, allowing for emboldened decisions of the CJEU in future. The lack of such a clear moment in Convention canon does not mean that such a constitutional status does not exist, but nevertheless may lead to confusion and misunderstanding with regards to the precise nature of the Convention’s status.

Shortly after Van Gend & Loos the CJEU had further cause to define the new European legal order. In Flaminio Costa v. ENEL the Court enunciated the principle that EU law is supreme over the member States’s national laws. Of course, this notion of EU (then ‘EC’) law supremacy was, again,

39 Tyrer v. United Kingdom (App.No. 5856/76) (ECtHR 25 April 1978) at Para 31: “The Court must recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.” (emphasis added)
40 Van Gend en Loos (n32) at 12: “The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples.”
41 Van Gend en Loos (n32).
42 Costa v ENEL (n31) at 593.
likely to be controversial. There was no supremacy clause in the relevant treaty texts. However, as if foreseeing this controversy, the CJEU sought to justify the principle. Importantly it did so by making reference both to the object and purpose of the treaty, and the necessity of the principle to the overall functioning of the EU as a whole. In this light it stated:

“By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the members states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.

The Integration into the laws of each member state of provisions which derive from the Community and more generally the terms and spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.”

Here the Luxembourg judges went back to the foundations of the member States’ legal agreement, highlighting to the States the nature of the obligations they had agreed to. In doing so the CJEU sought to make clear that it was not taking upon itself extra powers or extending powers to a new status by itself, or so it maintained. Instead it was apparently seeking to demonstrate that EU law’s supremacy was inherent at its instigation, and that, as a natural corollary of this, the CJEU,

43 Costa v ENEL (n31)at 593 at 594.
necessarily had the power to act as a type of Supreme Court within its own limited field (something that the ECtHR either failed or was unable to do for the living instrument doctrine.) This fits in with Weiler’s constitutional reading of the EU that “...the Community has become an entity whose closest structural model is no longer an international organization but a denser, yet non-unitary polity, principally the federal state.”

However, it is important to note that the decisions of the CJEU in *Van Gen den Loos* and *Costa v. ENEL* were not accepted without controversy. Hjalte Rasmussen stated critically of the CJEU’s teleological decisions:

“In *Van Gen den Loos* the fundamental choice of methods of interpretation was between a literal one which in combination with the long-established interpretive principle according to which transfers of sovereignty are to be interpreted narrowly, would sustain the view that Article 12 did not produce direct effects. The alternative method, adopted by the Court, is goal-oriented. It seeks by interpretation to further social, economic and political integration by judicial fiat.”

Rasmussen was suggesting that, similarly to more successful arguments about the ECHR, contrary to the suggestion of the CJEU, direct applicability was in fact the product of an activist approach and not universally accepted at the time. However, with the benefit of hindsight it has now become one of the fundamental aspects of the European Union’s legal order. This, as we shall see later in this

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45 JHH Weiler, *The Constitution of Europe: “Do the new clothes have an emperor?” And other essays on European Integration*, (Cambridge University Press, 1999) at 12.


chapter, may to some extent have occurred with the ECHR, but it has happened much more implicitly. As such understanding of the crystallisation of the Convention’s constitutional-like status is less clear than that of the EU.

To reiterate the teleological approach adopted by the CJEU in Van Gend & Loos\textsuperscript{48} and Costa v. ENEL\textsuperscript{49} offer an interesting comparison to the ECtHR’s approach in Tyrer.\textsuperscript{50} It is suggested that the ECtHR would do well to heed the example of the CJEU and more explicitly link the living instrument doctrine’s rationale to the Convention’s broader mission. As we shall see this did not happen in Tyrer, and, so far as the author is aware, has never done so.\textsuperscript{51} This may be because the nature and purpose of the Convention is more vague and contestable.\textsuperscript{52} This vagueness is compounded by the present lack of case law explaining the ECtHR’s approach to it.\textsuperscript{53} Consequently it is harder to see how the doctrine dovetails with the Convention’s nature through its Preamble aims. Thus when the Court invokes the living instrument doctrine, it may be more open to criticism for unilaterally creating and imposing new obligations on member States\textsuperscript{54} than the CJEU might be for taking a similar approach. The ECtHR would thus be wise to enter into a dialogue with member States setting out a clear and compelling explanation of the doctrine’s rationale and how it fits in with the nature of the Convention as a treaty built on a background and acceptance of cultural diversity.\textsuperscript{55}

\textsuperscript{48} Van Gend en Loos (n32)
\textsuperscript{49} Costa v ENEL (n31) at 593 at 594.
\textsuperscript{50} Tyrer (n39)
\textsuperscript{51} There will be an in-depth consideration of the circumstances leading up to, during and after the Tyrer case in the next chapter.
\textsuperscript{52} See e.g. Hoffmann (n5) at 216.
\textsuperscript{53} This is discussed in greater depth in chapter 4.
\textsuperscript{54} See e.g. Hoffmann (n5) at 428.
\textsuperscript{55} Indeed cultural diversity has been described as the “ideological background” of the Court’s margin of appreciation doctrine by former Austrian Judge on the Court, Franz Matscher (See F Matscher, ‘Methods of Interpretation of the Convention’, in R.St.J Macdonald, F Matscher and H Petzold (Eds), \textit{The European System For The Protection of Human Rights}, (Martius Nijhoff Publishers, 1993) p63-82 at 76.) Paul Mahoney (Current UK judge at the ECtHR has described the Convention ... whilst the Convention can be seen as establishing a legal community with a common ethos in human-rights matters, underlying that legal community is an inexhaustible cultural and ideological variety among the Member States. In interpreting and applying the Convention, the Court should act as a force contributing to the preservation of that “marvellous richness” of
2.3 Similarities between the US Supreme Court and the ECtHR

The ECtHR has been accused of considering “…itself [to be] the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.” So evaluation of the differences and similarities may aide the understanding of the nature of the Convention and its interpretation. Such a comparison enables insight into the extent, if at all, that the ECtHR has taken upon itself a more ‘constitutional’ role. It is, however, important to lay out some key differences in the context of the two courts. Firstly, it is obvious, but still important to note, that the USSC is a domestic supreme court of a single, albeit, federal, nation State. Its existence is expressly provided for by Article III of the US Constitution. Contrastingly, the ECtHR, is an international court set up to decide on disputes relating to the implementation of a single treaty. It is thus arguable that the ECtHR should be less creative than the USSC, and its legitimacy is more likely to be questioned if it does not adopt a cautious approach to the interpretation of the Convention, especially, for example, in areas touching on social policy.

Although different, there are many similarities between the ECHR and the US Constitution meaning that a comparison may help one consider how the ECHR should be appropriately interpreted. It has been commented that “[the] substance of the Convention (the provisions containing the material diversity or, at least, should not undermine it by seeking to impose rigidly uniform solutions valid for all the different democratic societies making up the Convention community.” See P Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’ (1998) 19(1) HRLJ 1 at 2-3.

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56 Hoffmann (n5) at 424.
57 Article III S1 of the US Constitution states: “The Judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during the continuance in office.”.
58 Article 19 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950). For more on the establishment and role of the Court see Harris, O’Boyle, Bates and Buckley (n2) chapter 3.
59 L Hoffmann (n5) at 423-424.
61 See Dzehtsiarou and O’Mahoney (n5) at 309-310.
human rights guarantees) is similar to a constitutional human rights catalogue or a national human rights bill.” This is broadly accurate of the ECtHR and USSC as both Court’s consider cases dealing with similar subject matter. Both, like the Canadian Charter of Rights and Freedoms, have been described as ‘living’ and the USSC has famously interpreted “…[the US constitution’s] meaning from the evolving standards of decency that mark the progress of a maturing society” in the case of *Trop v. Dulles.* This recognises that the text of the US Constitution itself does not bear the full canon of US Constitutional law. Instead of a model of constitutional change through direct textual amendments, the method of developing the US constitution includes judicial re-interpretation of it. Leading US Constitutional lawyer, Professor Bruce Ackerman, for example, presents a hybrid model of constitutional development stemming from textual constitutional amendments, judicial decision making and landmark statutes. This is arguably similar to ECHR law which is well-known to have an originating text that is evolutively interpreted by the ECtHR and has been amended by protocols and optional protocols. Ackerman accepts that the USSC has a role in confirming the validity of and interacting with legislative means of amending US constitutional law. For instance he opines the

63 Some examples of these are given in this section. Bernhardt also notes elsewhere: “Since human-rights conventions are designed to set standards for the internal order of States, they use notions which are familiar to and employed in national law.” (See R Bernhardt, ‘Thoughts on the Interpretation of Human-Rights Treaties’ in F Matscher and H Petzold (Eds) Protecting Human Rights: The European Dimension Studies in honour of Gerard J. Wiarda (Carl Heymanns Verlag KG 1998) 65-71 at 66.)
65 B Ackerman, ‘The Living Constitution’ (2007) 120 Harvard Law Review 1737 at 1743 and Dzehtsiarou and O’Mahoney (n5) at 311.
67 Ackerman (n65) at 1741.
68 This can clearly be seen in the important case of *Roper v Simmons* 543 US 551 at 563 where the USSC expressed: “Three terms ago the subject was reconsidered in Atkins. We held that standards of decency have evolved since *Penny* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment.” Here the USSC held that it is unconstitutional to impose the death penalty for crimes committed before the age of 18, because this would violate the eighth amendment of the US Constitution outlawing cruel and unusual punishment. See also HJ Abraham, *The Judicial Process,* (Oxford University Press, 1998 7th Edn) at 356-359 and RJ McKeever, *The United States Supreme Court: A political and legal analysis,* (Manchester University Press, 1997) at 19 and Dzehtsiarou and O’Mahoney (n5) at 321-322.
69 Professor Bruce Ackerman is currently Sterling Professor at Yale Law School and has been named by Foreign Policy Magazine to its list of top global thinkers.
70 E.g. see generally Ackerman (n65) at 1741-1742; landmark statutes are statutes that are an important part of a key scheme of legislative reform.
USSC’s role in interpreting statutes entails a political element, either accepting the social view advanced in the statute and declaring it constitutionally valid or striking it down as unconstitutional. This is particularly important in relation to ‘landmark statutes’ given that they are likely to encapsulate the direction of the incumbent administration. This is what Ackerman calls ‘normalization of movement politics’\(^\text{71}\) and reflects what he sees as the appropriate model of maintaining “...that the American people have remained an active force in governing their own affairs.”\(^\text{72}\) In a sense the ECtHR may unintentionally act in a similar way by not finding violations of the Convention where member States may enact legislation which may encroach on Convention rights, perhaps by utilising the MoA. However, the ECtHR must be careful not to overstep the mark into overt political stewardship of Convention law as unlike the USSC it is still an international Court with no such mandate.

The USSC’s judicial endorsement of what is effectively a form of ‘constitutional’ status for a statute does not preclude further change in that area. The USSC can continue to affirm and disavow the importance of its own constitutional case law but this does not stop it from later reaching a different conclusion. An example of this given by Ackerman is the famous case on the constitutionality of racial segregation of Schools in *Brown v. Board of Education of Topeka case.*\(^\text{73}\) Of this case he says:

> “We put the cart before the horse when we treat *Brown* as a super-precedent without recognizing that Brown’s canonization is a product of the very same popular sovereignty dynamic that gave us the land-mark statutes.”\(^\text{74}\)

\(^{71}\) The idea of ‘normalization of movement politics’ refers to ideals or values involved in political movements being adopted as a part of the background within which the Court’s interpret the law, see: Ackerman (n65) at 1760.

\(^{72}\) Ackerman (n65) at 1812.

\(^{73}\) *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954) (USA), This decision concerned the US Supreme Court’s overturning of its previous decision in *Plessy v. Ferguson* 163 U.S. 537, that the policy of racial segregation in schools known as ‘separate but equal’ was unconstitutional.

\(^{74}\) Ackerman (n65) at 1790.
What he may mean here is it was the political movement against segregation that drove the USSC to overruling its previous decision in *Plessy v. Ferguson,* finding that the ‘separate but equal’ policy violated the 14th Amendment of the US constitution. If so, the lesson to be learnt here may be that, in the US Constitutional model of the separation of powers it is the USSC that ultimately decides on the constitutionality of law. However, it does so, on the basis of popular sovereignty, the idea that certain popular political movements attain an accepted normative status. Such a perspective on the case may be supported by Dzehtsiarou and O’Mahoney who argue that: “There are two ways in which such a decision, one that overrules earlier cases by way of an evolutive type of reasoning, such as in this case, *Brown v. Board of Education* can potentially be handed down: (1) either the judges may claim that the older decision was wrong all along; or (2) they may self-consciously reappraise what changed conditions in society demand of their interpretation of a provision.” In the ECHR context, the impetus for this form of decision making by the Court might be the consensus to change standards found in shared evolution of member States’ legal position in each specific area of Convention law. However, and as will be discussed later, there is a certain level of reluctance to what may be seen as regressive evolutive interpretation by the Court, potentially limiting its ability to change its mind later on the correct settlement for Convention rights.

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75 *Plessy v. Ferguson* 163 U.S. 537.
77 Ackerman (n65) at 1790. The controversy brought about by the powers this grants to the USSC is evident in Senator GW Norris’ statement that: “We have a legislative body, called the House of Representatives, of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have, in reality, another legislative body, called the Supreme Court, of nine men; and they are more powerful than all the others put together.” - *Congressional Record,* 21 Cong. 2d Sess., Vol 72, part 4, p. 3566 (February 13, 1930) quoted in *HJ Abraham, The Judicial Process,* (Oxford University Press 1998 7th Edn) at 352.
78 Dzehtsiarou and O’Mahoney (n5) at 321-322.
79 Ackerman (n65) at 1757-58.
80 The concept of ‘(D)evolutionary’ interpretation will be discussed in chapter 5.
Constitutionally, judicial power is vested in the USSC and its inferior courts,\textsuperscript{81} so legally the USSC’s decision is final.\textsuperscript{82} There is similarity here with the ECtHR,\textsuperscript{83} however, it requires the Committee of Ministers (CoM) to supervise the implementation of its rulings.\textsuperscript{84} This potentially gives rise to an international legal obligation to amend an aspect of domestic law.\textsuperscript{85} Then again, because of the lack of a hierarchical relationship between the ECtHR and the CoM, as well as other reasons, it has been argued that the ECtHR is not truly a ‘constitutional’ Court (in the sense of having, for example, strike down powers, equivalent to the US supreme Court).\textsuperscript{86} This lack of ‘traditional’ constitutional status of the Court leaves it vulnerable to the goodwill of the member States as adherence to its authority is not guaranteed, and makes recourse to comparative law techniques of limited application in the ECtHR. However, adherence to and implementation of the ECtHR’s judgments is extremely high,\textsuperscript{87} and so one can say that, in practice, the Court appears to possess some form of norm-setting quality or is very persuasive in a way that is akin to a norm-setting quality.\textsuperscript{88} For practical purposes, then, the Court’s functions can resemble a ‘constitutional’ court and the Convention a type of Bill of Rights.\textsuperscript{89} In this way the Court can be said to have a form of persuasive constitutional authority in the absence of formal constitutional authority. Again, this may make comparisons to domestic legal

\textsuperscript{81} See Article III section 1 of the Constitution of the United States of America.
\textsuperscript{82} Subject to a cumbersome constitutional amendment procedure set out in Article V of the US Constitution.
\textsuperscript{83} Decisions of the Grand Chamber are final (Article 45(1)) and decisions of a Chamber either when the parties declare they will not request a referral to the Grand Chamber; three months after the judgments if it has not been referred to the Grand Chamber or if the panel of the Grand Chamber rejects a request for a referral of the case (See Article 45(2). Decisions of the Court are binding on the respondent State in the case. See Article 46(1). See also Harris, O’Boyle, Bates and Buckley (n2) at 6-7.
\textsuperscript{84} Article 46(2) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950). See Harris, O’Boyle, Bates and Buckley (n2) at 162-165 and 181-184.
\textsuperscript{85} Article 46(1) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950). See also Harris, O’Boyle, Bates and Buckley (n2) at 6.
\textsuperscript{87} See Baroness Hale, ‘Beanstalk or Living Instrument? How Tall can the ECHR Grow?’, http://www.supremecourt.gov.uk/docs/speech_110616.pdf (accessed on 19th June 2011) at 21. See also See also Harris, O’Boyle, Bates and Buckley (n2) at 30.
\textsuperscript{88} Çali (n86) at 305.
interpretation of less relevant helpful to the Court. This persuasiveness underlines the need for the Court to carefully explain the logic behind its interpretation in order to continue to persuade the member States to comply and thus ensure its future persuasive constitutional credibility.

Nonetheless, the USSC can be very easily distinguished from the ECtHR because it is ruling on legislation within only one nation State, instead of ruling on acts (or omissions) within 47 sovereign nation States.\(^90\) Hence it has been argued by Lord Hoffmann, a former senior member of the UK judiciary, critical of the Court, in his influential *Law Quarterly Review* article that:

> “Even if the Strasbourg judges were omniscient, knowing the true interests of the people of the United Kingdom better than we do ourselves, it would still be constitutionally inappropriate for decisions of the kind which I have been discussing to be made by a foreign court.”\(^91\)

By contrast, this highlights that, whilst the USSC is the constitutional court for a single nation State, albeit one covering a large geographical area divided into 50 federal states, it still has jurisdiction over only one unified nation State, and the states have no option for unilateral secession.\(^92\) As such its judiciary are likely to have an innate understanding of the law and culture within its jurisdiction without fear of losing areas of its geographical jurisdiction. By contrast, even though the final paragraph of the ECHR’s Preamble declares the like-mindedness and common heritage of the

\(^90\) As the European Court of Human Rights does.

\(^91\) L Hoffmann (n5) at 431. The cases to which Lord Hoffman was referring concerned Article 6 (O’Halloran and Francis v United Kingdom (App.Nos.15809/02 and 25624/02) (ECtHR 29 June 2007) and Al Khawaja and Tahery v United Kingdom (App.Nos. 26766/05 and 22228/06) (ECtHR 15 December 2011) ) and Article 8 (Hatton and others v. United Kingdom (App.No. 36022/97) (ECtHR 08 July 2003). On this see similar points made by Chief Justice of Ireland, John L Murray: Justice John L Murray ‘Consensus: Concordance, or hegemony of the majority?’ (Dialogue between judges, European Court of Human Rights, Strasbourg 2008) available at <http://www.echr.coe.int/Documents/Discussion_2008_ENG.pdf> accessed 1 October 2014 at 40-41.

\(^92\) See the opinion of US Supreme Court Chief Justice Salmon P. Chase (delivering the judgment of the Court) in Texas V. White 74. U.S. 700 at page 735: “But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government, by the States.”
member States,\textsuperscript{93} this must now be considered somewhat out of date today. The Preamble being unchanged since the drafting of the Convention,\textsuperscript{94} in 1950, by 12 Western European nations which could be considered culturally similar and having a shared history.\textsuperscript{95} However, since the 1990s, in particular, the membership of the Convention has expanded dramatically, with the inclusion of the former Soviet States in the post-1990s era.\textsuperscript{96} One could therefore argue that, it should be more open for the USSC to allow for the growth and evolution of US Constitutional law than the ECtHR for Convention law.

A final aspect of the difference between the two Courts is the selection of the cases they hear. It has been reported by an Associate Justice Breyer of the USSC that it has a practice of taking cases to resolve conflicts between the lower courts, using its apex constitutional court status, and so providing the final, and thus authoritative, interpretation of the constitutional issue in dispute.\textsuperscript{97} As Breyer\textsuperscript{98} puts it:

\begin{quote}
“Even if the [USSC] does not provide a ‘better’ decision, a single Supreme Court provides a single interpretation of the law. And national uniformity has obvious advantages.”\textsuperscript{99}
\end{quote}

Unlike the USSC, the Strasbourg Court clearly does not enjoy this ‘constitutional’ authority and via its MoA doctrine is capable of escaping compulsion to rule on the minutiae detail of the application of Convention law. Remembering the quotation of Lord Hoffman above this would suggest that the

\textsuperscript{94} It should be noted that Protocol 15 of the Convention will add an extra recital into the preamble of the Convention but at the time of writing this has yet to enter into force.
\textsuperscript{95} Protocol 15 has recently been concluded and when it enters into force will amend the Convention’s preamble. This will be examined later in this chapter.
\textsuperscript{96} It should also be noted that Turkey, one of the original member States, is an officially secular state but with a Muslim majority population, in contrast to the other member States, casting doubt over the preamble recognition of common heritage.
\textsuperscript{97} S Breyer, America’s Supreme Court, (Oxford University Press, 2010) at 140.
\textsuperscript{98} He has been an Associate Justice of the Supreme Court of the United States and was nominated for appointment by President Bill Clinton. He assumed office on 3\textsuperscript{rd} August 1994.
\textsuperscript{99} Breyer (n97) at 140.
Court, because of its status as an international Court should be especially deferent to the member States. This then makes use of literature and approaches concerning dynamic or evolutive interpretation in domestic law contexts, such as to the USSC or English Common law, of limited application in the ECtHR.

However, the USSC does not exercise its status as a constitutional apex court dictatorially. Instead, in deciding upon its interpretation, it shows respect for the state legislatures, often taking something of a consensus approach, by looking to find consensus of approach in their different state laws when coming to its decision if that is relevant to the case. Based on the USSC’s approach then the difference between it and the ECtHR is that, where no clear consensus either way exists in an issue before the USSC, as it has no MoA doctrine per se it usually must decide the issue for itself. An example of this occurred in *Roper v. Simmons* where the percentage of States legislating against the death penalty for juvenile offenders was only 60% yet the Court ruled this manner of punishment was contrary to the eighth amendment of the US Constitution outlawing cruel and unusual punishment. Former Chief Justice of the Irish Supreme Court, Justice Murray, has identified two competing theories of consensus as they have been applied to the context of the USSC’s decision-making. The first is that consensus must be well-established, rather than of recent origin, must be overwhelming and will dictate the Court’s decision. The second theory, which would seem more fitting, to the USSC’s death penalty decisions at least, accords the Court the role of moral arbiter relying more on its own independent judgment, granting consensus a more moderate role in decision making. The ECtHR, on the other hand, takes a very different approach to this. When a case arises where there is an absence of clear consensus, the Court is more inclined to grant a MoA

100 See e.g. *Roper v. Simmons* 543 U.S. 551 at 564.
101 See Dzehtsiarou and O’Mahoney (n5) at 325. However, Dzehtsiarou and O’Mahoney do acknowledge that “…the U.S. Supreme Court has occasionally stressed the importance of deferring to a state legislature’s judgment on the position of the people of that state on a controversial issue.” at 325.
102 See Dzehtsiarou and O’Mahoney (n5) at 336-337.
and leave the issue as one for the member States to decide.\textsuperscript{104} It does not feel that it must, or is the most appropriate forum, to decide matters where there is little commonality among member States. This suggests that the ECtHR sees its constitutional position as not being rigidly above that of the member States, and instead is subsidiary to the decision making processes in the member States. Thus, where the USSC is constitutionally more able to take an assertive approach, the ECtHR may be more prone to respect local decision making through its MoA.\textsuperscript{105} Here what is particularly relevant to this study, especially the second part of this thesis, is that even the USSC as a domestic constitutional Court does not feel able to make decisions entirely of its own volition and will consider the consensus position among the member States. It is also important to note that where such consensus is not clearly pronounced, its decisions may still be the subject of criticism despite its expressly granted constitutional status. In comparison the ECtHR should thus be even more careful to explain its decisions and should, perhaps, ensure a sufficient level of judicial deference to the member States through the MoA and a clear use of consensus methodology.

Summing up, while this section has in not sought to exhaustively analyze the role of the USSC, nevertheless, it appears that the ECtHR, whilst being a very different institution to the USSC, does to some limited extent have common features with it. What appears to be clear is that the USSC’s overt constitutional status grants it a more emboldened ability, one could say constitutional legitimacy, to assert strong judicial authority in its judgments. However, the ECtHR is unable to do this because, while it is charged with having the final word on Convention interpretation, it does not enjoy the same constitutional authority to enforce its judgments as the USSC.\textsuperscript{106} It has been suggested that, through the ECtHR’s use of the MoA, the Strasbourg Court displays a greater “attitude of

\textsuperscript{104} Arai-Takahasi (n2) at 203. The margin of appreciation doctrine was first expressly utilised by the ECtHR in Ireland v. United Kingdom (App.No. 5310/71) (ECtHR 18 January 1978), although was first explained by the Court in Handyside v. United Kingdom (App.No. 5493/72) (ECtHR 7 December 1976). For more information on the margin of appreciation doctrine see: Yourow (n2) and Harris, O’Boyle, Bates and Buckley (n2) at 14-17.

\textsuperscript{105} This is especially so given the conclusion of Protocol 15 of the Convention which will be discussed in chapter 6.2.2. This is also creates further differences between the ECtHR and national courts in dynamic/ evolutive interpretation methods.

\textsuperscript{106} Article III Section 1 of the Constitution of the United States vests judicial power in the USSC.
deference”\textsuperscript{107} than the USSC. Given the point made earlier about the greater degree of cultural homogeneity in the USSC’s jurisdiction compared to the ECtHR’s this appropriately enables for more organic social-political discourse and growth to occur in member States. It is was also suggested that this necessitates the Court to engage in greater explanation and dialogue to ensure the persuasiveness of its rulings are followed by member States, lest it risk its constitutional position as the \textit{de facto} apex Court of the Convention, avoiding its being usurped by the member States either individually or collectively. However, both courts to some extent engage in the endorsement of movement politics, the USSC as suggested by Ackerman interprets the constitution in-line with prevailing socio-political understanding\textsuperscript{108} and this is largely uncontroversial.\textsuperscript{109} The ECtHR, as an international court, tends to put a greater focus within its interpretation on consensus standards amongst the member States.\textsuperscript{110} It is also noteworthy that a ‘living law’ technique is used in the US and forms an important part of accepted case law development of the constitution.\textsuperscript{111} However, this living law approach for the reasons of the USSC’s constitutional setting may provide only limited comparative support for the ECHR’s living instrument doctrine.

2.4 The Founding of the Convention: Itself a Living and Evolving Instrument

Against the backdrop of this brief comparison between the Convention system with other legal systems, and focussing now on the former, it is perhaps instructive to ask the question: ‘What is the Convention for?’ This is fundamental to understanding the exercise of the Court’s adjudicative

\textsuperscript{107} Breyer (n97) at 112.

\textsuperscript{108} \textit{Trop v Dulles} (1958) 356 U.S. 86 at 101. See also: Ackerman (n65) at 1790.

\textsuperscript{109} However for a contrary view to this see: A Scalia and BA Garner \textit{Reading Law: The Interpretation of Legal Texts} (Thompson West 2012) at 406.

\textsuperscript{110} This is discussed in much greater depth throughout this study but in particular in chapters 4 and 5. However, for an account of consensus see also K Dzehtsiarou, ‘European Consensus and Evolutive Interpretation of the European Convention on Human Rights’, (2011) 12(10) \textit{German Law Journal} 1730 at 1731. Note also that the ECtHR has on rare occasion considered the social perceptions present in European Society (e.g. \textit{Kozak v. Poland} (App.No. 13102/02) (ECtHR 02 June 2010) at para 98.)

\textsuperscript{111} \textit{Trop v Dulles} (1958) 356 U.S. 86 at 101. For brief comment on this case see: KL Hall (Ed), \textit{The Oxford Companion to the Supreme Court of the United States}, (Oxford University Press, 1992) at 880-881.
function regardless of which interpretative method or doctrine the Court is using. The Court must operate within its treaty and international context. It is within this context that it finds purpose and within this context it must interpret the Convention itself when faced with cases coming before it. As discussed in chapter 1, in recent times the Court been criticised for overstepping its place in the international constitutional order and acting in the proper place of domestic legislatures. 112

Provision for a European system of human rights protection was first set out in the Convention text of 1950. It would be impossible to comprehensively discuss all the reasons member States had for formulating and then ratifying the Convention. This is because treaty creation entails that individuals and States parties are likely to have differing motivations behind negotiating a treaty. However, the two most prevalent understandings of the purpose of the Convention at the time of its drafting that can be found in mainstream academic literature 113 are: “the conscience of which we all have need” 114 and “a type of collective pact against totalitarianism.” 115 The former view lends itself towards a potentially more expansive, ‘quasi-constitutional’ view of the Convention, along the lines of the Convention as a type of European Bill of Rights (albeit one in the form of an international treaty). The latter view lends itself to a more limited view of the Convention, and here the tendency may be to downplay the extent to which the Convention is different to an ‘ordinary’ international treaty and lead it to grow and evolve only in ways which protect against the extreme human rights violations experienced in the Second World War. 116 With this in mind it is clear that the original intentions of the parties could lead to a variety of different intended outcomes for the Convention. It is not possible to divine a singular, specific aim for the Convention. It is, however, possible to suggest that at its inception it was an enterprise based on an ideological belief that certain, minimum

112 See above chapter 1.2.
113 See e.g. Bates (n13) and Simpson (n21) at chapter 13.
115 Bates (n13) at 8.
116 An evolution that might still occur with this more limited conception of the Convention might be the Dudgeon case (Dudgeon v United Kingdom (App.No. 7525/76) (ECtHR 22 October 1981)) outlawing the prohibition of homosexuality, as a protection from the persecution of homosexuals which was experienced during the Second World War.
standards of human rights protection at the level of European public law were desirable and further progressive protection of rights was potentially more desirable still.\textsuperscript{117} It is also evident from the Convention’s Preamble that it was not intended to be the final word on international human rights protection within Europe; hence it speaks of the “[f]urther realisation of human rights and fundamental freedoms”\textsuperscript{118} and taking “the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.\textsuperscript{119} What this suggests is that the Convention as concluded by the 12 original States parties in 1950 was primarily designed to establish certain minimum standards and encourage and support further development of those standards as and when the States were ready.\textsuperscript{120} It was also fundamental that these rights be \textit{collectively enforced} in order to stop States from unilaterally backsliding on the agreed rights. As such they set up institutions to adjudicate on whether member States had sufficiently upheld Convention rights within their jurisdictions.\textsuperscript{121} However, at the early stages of the Convention’s life, two fundamental features of the Convention today were optional, namely recognition of the Court’s jurisdiction and the right of individual petition (former Articles 25 and 46 respectively.) In fact it was not until 1998 and the entry into force of Protocol 11 that these features became compulsory aspects of Convention membership for all Contracting Parties and the old Commission and Court of Human Rights were replaced with the current permanent Court. This, as we shall see, paved the way for a gradual evolution of the Convention’s role and, indeed, its nature, continuing to the present day.

\textsuperscript{117} Convention preamble paragraph 6.
\textsuperscript{118} Ibid at paragraph 3.
\textsuperscript{119} Ibid at paragraph 5.
\textsuperscript{120} Such as Optional Protocol 4 which was concluded in 1963 and would enable States, upon its entry into force and their ratification of it, to include new rights to the scope of their Convention obligations.
\textsuperscript{121} Article 1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950) requires that member States are responsible for upholding Convention rights within their jurisdiction, with Article 19 of the Convention (as it is today) establishing a Court to “…ensure the observance of the obligations undertaken by the High Contracting Parties”. Supervision of the execution of the Court’s decisions is carried out under, Article 46(2) of the Convention, is carried out by the Committee of Ministers which as previously noted is comprised of representatives from each of the member States. As such enforcement is carried out through this Committee on a collective basis by the member States.
As we look back the ‘first steps approach’ seems to have prevailed, with the UK, one of the previously cautious founding States, ratifying the Convention in 1951, and today still a Convention member State, despite its previously reported resistance to a permanent Court with compulsory jurisdiction, which of course the Convention now includes. However, insofar as current status of the Convention required key structural changes to the Convention itself, such as the instigation of a permanent Court, this took place over many years and via express amendment of the Convention (particularly Protocol 11,) and not judicially declared measures. This may imply a State-centred approach to Convention development. What this suggests is that the nature of the Convention system today is the result of the will of the member States, although perhaps given the previously cited ire towards the Convention system, some of this may have been unintentional.

How then does the living instrument doctrine fit into this? As we shall see, later in this chapter and within the study, the Court has an important role to play in the development of the level of protection afforded by the substantive rights protected within the Convention. But this role is not carried out in isolation to the actions and collective will of the member States.

2.5 The Evolving Mission of the Convention

It is clear that the Convention has evolved considerably from its humble origins in 1950. As noted, it has been amended by protocols, and this continues today, the latest being Protocols 15 and 16. It has also been the subject of judicial development of concepts and doctrines within the ECtHR’s

122 Bates (n13) at 6.
123 Ibid at 8-9.
125 Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 213, (opened for Signature 24 June 2013, not in force) and Protocol No. 16 to the Convention for the protection of Human Rights and Fundamental Freedoms CETS No.: 214, (Opened for Signature 2 October 2013, not in force). At the time of writing these protocols have yet to enter into force. For commentary see: Harris, O’Boyle, Bates and Buckley (n2) at 168-171.
jurisprudence. This can be seen in copious contexts, but a few examples include autonomous
concepts,\textsuperscript{126} the living instrument approach\textsuperscript{127} and the margin of appreciation.\textsuperscript{128} As the Court is not
vested with legislative power \textit{per se},\textsuperscript{129} this judicial development of Convention doctrines and
concepts begs the question, are they legitimate?

Given that it is not possible precisely identify a specific and universally accepted purpose for the
Convention, either as an ordinary international treaty or a human rights constitution, it is at least
possible to find a clear, albeit general, purpose of the Convention to protect individual’s Convention
rights.\textsuperscript{130} It is also clear that member States are responsible for ensuring the effective protection of
the Convention rights.\textsuperscript{131} But it cannot escape attention that the Convention is unambiguously an
international treaty “…it has been elaborated, concluded and ratified according to practice and rules
valid for treaties, and it can be denounced.”\textsuperscript{132} While the original intention of avoiding a return to
totalitarianism and human rights violations associated with World War 2\textsuperscript{133} era is still clearly a valid
ambition of the Convention, it has long since progressed from this. It has grown beyond this
minimalist treaty aim to encompass a broader, more advanced approach to human rights in Europe
that may be considered ‘quasi-constitutional’ in nature.\textsuperscript{134} Indeed, it has been said by a former
president of the Court that:

\begin{itemize}
  \item \textsuperscript{126} \textit{Engel and others v. The Netherlands} (App. Nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72) (ECtHR
8 June 1976). See also Harris, O’Boyle, Bates and Buckley (n2) at 373-374.
  \item \textsuperscript{127} \textit{Tyrer} (n39) at para 31.
  \item \textsuperscript{128} \textit{Sunday Times v. United Kingdom} (App. No. 6538/74) (ECtHR 26 April 1979). See also Harris, O’Boyle, Bates
and Buckley (n2) at 14-17.
  \item \textsuperscript{129} \textit{Mahoney} (n60) at 60.
  \item \textsuperscript{130} Para 6 of the Preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms
  \item \textsuperscript{131} Article 1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention
  \item \textsuperscript{132} \textit{Bernhardt} (n62) at 302.
  \item \textsuperscript{133} See e.g. Bates (n13) at 8.
  \item \textsuperscript{134} See e.g. L Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’, (2002) \textit{HRLJ} 161 at
\end{itemize}
“Both the treaty character and the ‘constitutional’ aspect of the Convention should be seen together, but in the course of time the constitutional aspect has become predominant.”

While it is thus not possible to accurately define a singular, static aim or nature for the Convention, it should be noted that the Convention has changed over the years to encapsulate something between an ordinary international treaty and “...a type of European Bill of Rights.” As de Blois indicates, at the time of the creation of the Convention “...there was a fear for a political role of the Court”; it would seem then that the potential growth in the Court’s role from a restrictive treaty-natured system to a more ‘constitutional’ tenor, which might by some be considered quasi-political in nature, was always considered a possibility at its instigation and so such growth might not of itself be sensibly considered an unnatural and arbitrary innovation of the Strasbourg judiciary. Indeed, former President of the Court, Rudolf Bernhardt has noted that the nature of cases coming before the Court do not concern the classic ‘core of human rights’, and the expansive manner of Convention interpretation including the living instrument doctrine itself “…underlines the constitutional character of the Convention.” It is also possible that the changes to date will not represent the final settlement on the Convention’s ever changing nature and evolving relationship with member States.

A reasonable place to start our consideration of the Convention’s changing nature is by looking at its optional protocols as they represent a textual amendment to the Convention directly instigated by

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135 Bernhardt (n62) at 302.
136 See e.g. Bates (n134) at 411.
137 Bates (n134) at 384.
139 Bernhardt (n62) at 304. Baroness Hale has further made comment on the potential expansion of Convention law into social-economic economic rights giving the example of cases concerning provision of council housing. See Baroness Hale (n60) at 541-542.
140 See e.g. the discussion on the recent emphasis of the Court on subsidiarity in R Spano, ‘Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity’ (2014) HRLR 1 at 5 as a recent aspect of the nature of the Convention.
the member States. As previously mentioned, a key change to the Convention took place in 1998 with the entry into force of Protocol 11.\footnote{Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby CETS No: 155 (Opened for Signature 11th May 1994, entered into force 1st November 1998). For detail on the reforms instigated by Protocol 11 see: R Bernhardt, ‘Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11’, (1995) 89(1) AJIL 145, E Bates, The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights’, (Oxford University Press 2010) at 439-440 and 460-465. See also Harris, O’Boyle, Bates and Buckley (n2) at 103-104.} This abolished the old Commission and part-time Court of Human Rights\footnote{Article 5(1) Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby CETS No: 155 (Opened for Signature 11th May 1994, entered into force 1st November 1998).} and created the permanent Court of Human Rights\footnote{Article 1 Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby CETS No: 155 (Opened for Signature 11th May 1994, entered into force 1st November 1998).} with a compulsory right of individual petition.\footnote{Article 1 Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby CETS No: 155 (Opened for Signature 11th May 1994, entered into force 1st November 1998).} This major step-change from the original, state-dominated, workings of the ECHR created, or at least reinforced, an ethos of individual justice within the Convention regime and strengthened “...the judicial character of the Convention”.\footnote{Ryssdal (n134) at 28.} Or as Judge Mahoney has described the Convention’s nature following the entry into force of Protocol 11: “The character of the system had evolved from voluntary towards binding, and from political towards judicial.”\footnote{P Mahoney, ‘The Changing Face of the European Court of Human Rights: Its Face in 2015’, (2014) 1(1) QMHRR 4 at 9.} This was because, Protocol 11 enabled the Court to give judgments free from the threat of disgruntled member States withdrawing from the Court’s jurisdiction, or failing to renew, their previously optional right of individual petition and cut off Strasbourg’s supply of cases.\footnote{Under former Convention Article 25. On the threat of non-renewal of the optional clauses see e.g. E Bates, The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights’, (Oxford University Press 2010) at 11.} This can be seen as an important constitutional moment in Convention protection of human rights, enabling the Court to assert greater authority over the member States and give emboldened decisions. Indeed such a position may have to some extent been foretold by Sir Humphrey Waldock in 1958 when he said:
“If you regard the Convention as a constitutional instrument- as a European Bill of Rights for the individual- then it seems difficult to deny the importance of granting to the individual a personal right to place his grievance before [Strasbourg]. If, on the other hand, the Convention is regarded rather as a pact for collective action to check the development of any totalitarian methods of government in member countries, then the individual’s right to recourse to [Strasbourg] may seem less important than of Member States.”

Although Sir Humphrey was speaking about the right for individual petition to the old Commission, the sentiment of what he was saying applies equally to the post-Protocol 11 Court where this is a compulsory feature of the Convention. So it can be said that the Protocol 11 regime of a permanent Court of Human Rights with a compulsory right of individual petition could be foreseen to underline the nature of the Convention as a type of ‘European Bill of Rights’. Waldock underlined his point by discussing the varying levels of acceptance of the Convention regime in 1958 showing disparity in the acceptance of the right of individual petition to the Commission. Certainly at the negotiation of the Convention it was feared that the creation of a compulsory Court would lead to judicial activism and thus, perhaps, strengthening the Court’s ‘constitutional’ position. From what was then a regime that was more State-dominated enterprise, the ECHR system became more of a mechanism of individual redress, which lent itself more to a ‘constitutional’ outlook. What this tells us about the Convention system is that, at least at the time of protocol 11 and perhaps Protocol 14, the member States tacitly agreed or it was a natural and foreseeable consequence of these actions that the Convention would embody a form of ‘constitutional’ force. Unfortunately, for the sake of clear dialogue, this has not been expressly declared by the member States, which may lead to different Convention stakeholders being at cross-purposes.

149 See Bates (n134) at 386.
150 Waldock (n148) at 359.
Judicial creativity within the interpretation of Convention rights highlights divisions between a ‘constitutional’, court-centred approach to protecting and developing human rights and those who view the Convention as being primarily for State-centred development. As Convention adjudication does not rely on reciprocity or nationality, commentators like Andrew Drzemczewski consider the Convention engenders a normative force *sui generis*. Drzemczewski for instance states of Convention adjudication:

“Reliance upon the traditional concepts in international law of ‘nationality’ or ‘reciprocity’ is also unnecessary. Thus, although constructed upon tenets of traditional treaty law, the Convention law transcends the traditional boundaries drawn between international and domestic law: in short, the Convention may be considered *sui generis*”

People who hold such views on the Convention’s nature will presumably think that a court-centred development of Convention law through the mode of evolutive interpretation is both necessary and legitimate in meeting the aspirations of the Convention’s Preamble. Former ECtHR President, Rudolf Bernhardt doubted whether either the maxim in international law that treaty interpretation should be carried out in favour of State sovereignty or the maxim that individual liberties should be construed broadly, is appropriate. Instead he considered that while human rights conventions are designed to effectively protect the rights they contain but also that States have a role to protect their citizens from abuses of rights. As such he suggested: a fair balance must be struck between these approaches. The ‘*Sui generis approach*’, favouring the second maxim Bernhardt discussed in favour of a broad interpretation of rights, confuses the fundamentals of law and international politics. However, between these two positions (i.e. the Convention having *sui generis* authority and

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the Convention being a treaty to be interpreted restrictively) is likely to exist the true, constitutional nature of the Convention. The Convention, like all international treaties, is only able to exercise power over States by their consent.\textsuperscript{154} It is effectively a multi-lateral contract between its members. Although unlikely, if the parties so choose they could denounce the Convention diminishing its authority.\textsuperscript{155} Arguably, it is this existential necessity of ensuring continuing State membership of the Convention, which provides legitimacy to Convention. In practice this represents a powerful argument that the Convention cannot enjoy a \textit{sui generis} legal status, even though the political movement surrounding human rights might wish it to.\textsuperscript{156} This need to persuasively secure continued support for and membership of the Convention partially elucidates the need for the Convention to have a somewhat deferential nature towards the needs of the member States. However, given that Article 1 of the Convention places the obligation to ensure the effective protection of the other Convention rights upon the member States themselves;\textsuperscript{157} appeasement of member States cannot enshrine the overriding purpose of the Convention as this would stop the Court’s ability to enforce it as a finding of violation would conflict with deference. As such, while the will of the member States is important given that the Convention is a human rights treaty, the Court must balance deference with the effective protection of human rights, and as discussed, it appears that the Court’s stance on this over the years has to some extent become more emboldened or ‘constitutional’ in character.

\textsuperscript{154} See e.g. I Brownlie, \textit{Principles of Public International Law}, (Oxford University Press 2003, 6\textsuperscript{th} edn) at 1.
\textsuperscript{155} See Article 58(1) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights as amended) (ECHR) (1950) which enables member States to denounce the Convention by giving a minimum of six months’ notice, although the author is aware that certain of the newer States may be unable to do so straight away due to the requirement of having been a member of the Convention for 5 years prior to the notice of denunciation. Bernhardt himself in another chapter in an edited book expressly noted this possibility when he said “It remains legally possible for States parties to the Convention to denounce it, or at least to no longer recognize the right of individual petitions and the jurisdiction of the European Court.” - Bernhardt (n62) at 303. However it should be noted that Bernhardt here was writing in 1994 prior to the entry into force of Protocol 11 which as previously noted made the Court’s jurisdiction and the right of individual petition compulsory.
If changes Convention’s substantive protections occurred by direct textual amendment of the Convention itself alone, it is likely that development of Convention law would be slow and risk becoming outdated. This is because negotiating international agreements is typically slow and complex. Some of the older Convention cases are good examples that Convention reform, via evolutive interpretation, need not be permanently controversial.\footnote{Although it is acknowledged at the time of the judgment it is likely that evolutive interpretation may be controversial.} Cases such as Dudgeon,\footnote{Dudgeon v United Kingdom (App.No. 7525/76) (ECtHR 22 October 1981). See also J Andrews, ‘Homosexual relationships in Northern Ireland – Dudgeon v. United Kingdom’ (1983) 7 ELR 141.} where the Court ruled that the UK criminal law prohibition on certain homosexual acts was contrary to Article 8 of the Convention would hardly be contentious today. However, it seems unlikely that at the time of the Convention original negotiation this would have been considered by the member States as included within the scope of Article 8.\footnote{For greater commentary on the development of homosexuality as a legal concern see e.g.: M Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’, (2003) 14(5) EJIL 1023 especially at 1029.} Certainly previous dismissals of similar complaints at the preliminary admissibility stage as not showing a \textit{prima facie} case of violation of the Convention suggests a view that such rights were not protected under Article 8 prior to Dudgeon. On this Judge Mahoney says “The range of protection afforded by the right to respect for private and family life in 1981 was thus held to have moved beyond its original 1950 contours because the Convention is a ‘living instrument’: ‘respect for private life’ had different connotations in 1981 and it is those connotations which the Court took to be binding on it in 1981.”\footnote{Mahoney (n60) at 62.} The point to be drawn from this is that the Court has seemingly surpassed an originalist interpretation. This may be controversial at the time, but with the benefit of hindsight the Court’s general approach to interpretation has generally been accepted by the member States.\footnote{Although it must be noted that the Court’s living instrument doctrine has been subject to criticism more recently See above Chapter 1.5.} This suggests that a part of the Convention’s nature and purpose is to keep pace with common developments in the member States, but also suggests a role for the member States in confirming the judgments of the Court by adhering
to them. It seems from this that the Court may have a valid, but limited, role to play in developing and endorsing European human rights standards so long as the member States do not disagree. In doing so the Court is giving effect to the implied intention of the member States to be bound to a different standard of human rights under the Convention.

2.6 Non Legislative Political Oversight and Influence of Convention Development

In order to reform the system of human rights protection offered by the Convention, from time to time the member States have directly amended the Convention text itself. However, direct treaty amendment is not the only means by which the member States may control the nature and direction of Convention development. This section discusses, in outline only, some of the potential means of influence open to the member States, with a more comprehensive and detailed analysis of the Convention system of checks and balances to be discussed in chapter 6 of this study. In keeping with this chapter, this section aims to demonstrate that the Court’s approach to Convention interpretation is unlikely to have arisen on the basis of a unilateral whim. Instead it shows that through various mechanisms such as the selection of the judicial bench and adherence to the Court’s judgments, the member States have silently suggested support for a ‘quasi-constitutional’ evolution of the Convention.

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163 This will be discussed further in this chapter and will form a part of the broader discussion to take place in chapter 6.
164 Or the Old Commission on Human Rights’ reports where relevant.
165 See above note 18
2.6.1 Judicial Selection

Whilst the judges of the Court sit independently of their member States, it should be noted that their method of selection may influence the overall mix of opinions and thus stance of the Court to interpretation. This is because a judge sits in respect of each member State, elected by the Parliamentary Assembly of the Council of Europe from a list of 3 candidates nominated by that member State. While the nominated candidates must be qualified to hold high judicial office in their own country or be a recognised jurisconsult, this provides considerable leeway for individual members to ensure the judge in respect of their State holds similar views to how the Convention should be interpreted as the nominating Government of that State. So in this limited ability to initially influence the judiciary, the member States may seek to promote or restrain a creative and/or ‘constitutional’ like approach of the Court. An anecdotal example of this was the appointment of Pierre Henri-Teitgen as the judge in respect of France (1976-1980), who famously spoke of the then proposed Court as “the conscience of which we all have need.” This was a time when many of the Court’s landmark judgments were delivered. Another example was the appointment of Sir Gerald Fitzmaurice as the judge in respect of the UK (1974-1980). Sir Gerald is known for his strong dissents, including in *Tyrer* itself, so his appointment during a period where it was reported the UK was purportedly considering withdrawing from the Convention, or the optional clauses as they were

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166 Article 21(2) of the Convention. Harris, O’Boyle, Bates and Buckley (n2) at 105.
171 *Tyrer* (n39).
then, \(^{172}\) may suggest an attempt by the UK to restrain the Court. So the Strasbourg judiciary may, in part, be reflective of member States’ views of the Convention as a whole. As such, this may form an aspect of a tacit system of dialogue between the member States and the Court.

2.6.2 Supervision of the Court’s Judgments

When the Court delivers a judgment in a case, it is binding in international law, upon the parties to the case only. \(^{173}\) However, because the Court has on multiple occasions confirmed that in the interests of legal certainty it will usually follow its previous decisions, \(^{174}\) its case decision is indirectly binding on all High Contracting Parties (who undertake to ‘secure’ the Conventions rights and freedoms to ‘everyone in their jurisdiction’). \(^{175}\) The Court though, does not directly supervise the implementation of its judgments. \(^{176}\) Nor does the Court have a power to strike down offending legislation in the respondent State, or directly correct the situation in the member State. Instead the primary role of supervision of the Court’s rulings lies with the CoM. \(^{177}\) The CoM is a political body and is not subject to the control of the Court. As such, should the CoM not wish to ensure the implementation of a judgment, it may have a *de facto* power of veto over that ruling. \(^{178}\) In this way the member States have a collective ability to endorse the Court’s approach without necessarily saying so. If the CoM generally supervises the execution of the Court’s judgments, and thus the

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\(^{172}\) Bates (n13) at 15.


\(^{174}\) Chapman v. United Kingdom (App.No. 27238/95) (ECtHR 18 January 2001) at para 70. On the precedent in the ECtHR see generally Harris, O’Boyle, Bates and Buckley (n2) at 21.


\(^{176}\) The Court has a potential role to play in clarifying its judgment where an issue of ambiguity in the interpretation of the judgment arises (see Article 46(3)). The Court may also be requested by the CoM to rule on whether the respondent state has failed to fulfil its obligation (see Article 46(4)). see generally Harris, O’Boyle, Bates and Buckley (n2) at 21.


\(^{178}\) By this I mean that whilst the legal validity of the judgment would remain, it would effectively be unenforceable.
respondent State implements the relevant judgment, then this may suggest that the Court’s approach is seen as being in-line with the vision the member States have of Convention law. Thus if the Court took a more creative approach to interpreting the Convention, effective supervision by the CoM might be taken as an endorsement that this is the correct approach for the Court. Thus in giving effective supervision of the UK’s implementation of the Tyrer judgment the CoM could be considered to have endorsed the living instrument doctrine as a legitimate part of Convention law.

2.6.3 Member State Withdrawal from the Convention

Alternatively, if a member State is unhappy with the Court’s interpretation of the Convention and is unable to garner support to amend the Convention, it may with withdraw from the Convention. This requires six months’ notice, and assumes that the member State has been a member of the Convention for five or more years. If such a threat were to become a reality, this might prompt the Court to take a more restrictive approach. It may also suggest the member State/s did not view the creative approach of the Court as being appropriate, implying that the Court has overreached its status. However, such issues are raised but nothing comes of them, or indeed are not raised at all, this may vindicate the Court’s approach. If collective (or even individual) denunciation, of the Convention or non-enforcement of Court judgments were threatened, this could send a powerful signal to the Court to exercise greater restraint in the relevant area of Convention law. However, here the problem being that rather than being a collegial approach this would be likely to occur with

![Footnotes](#)

179 *Tyrer* (n39).
181 A good example of this could be the UK’s current failure to implement the Court’s judgment in *Hirst v. The United Kingdom (No.2)* (App.No. 74025/01) (ECtHR 6 October 2005). See also D Nicol, ‘Legitimacy of the Commons Debate on Prisoner Voting’ (2011) PL 681 at 683-684. Another potential example of this could Switzerland’s threats to denounce the Convention after the Belilos case. For more on this see Bates (n13) at 428-429.
182 For a possible example of this see: Bates (n13) at 428.
a great degree of friction between the Court and the member State potentially harming the overall legitimacy of the Convention system.

2.6.4 Conclusion

Whilst there are other methods of placing pressure on the Court and thereby affecting the development of the Convention’s nature, those mentioned above have indicated scope for political control or influence over the Convention. This political endorsement or restriction of the Court may reflect a powerful legitimacy dynamic whereby the Court may either be encouraged, via these methods, to take a more creative approach, or be encouraged to take a more subsidiary role to the member States. It also suggests a relationship of continuous scrutiny and perhaps endorsement that supports or restricts the evolution of the Convention’s and the Court’s ‘constitutional’ status and position. In this way member States have a continuous, if somewhat indirect, feed into the direction of Convention law.

2.7 Conclusion

This chapter has attempted to cast light on the nature of the Convention. It has done this in order to aid in the overall enquiry of the thesis as to how the Convention may legitimately function as a living instrument and how the Court should utilise evolutive interpretation to ensure its rulings remain legitimate. The overall message has been that if at the time of the drafting of the Convention its nature and purpose were unclear, its path has emerged that can, perhaps, be described as ‘quasi-constitutional’ has been taken. As such the margin of appreciation doctrine may be seen as a natural corollary of this approach, by letting the Court lay down broad, universal standards but allocating

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183 These will be discussed in chapters 6 and 7.
the responsibility for the best method of implementation of those standards to the member States. However, the extent to which the Court can engage in creative interpretation of the Convention will very much depend on one’s view of the degree to which the Convention might be seen as a human rights constitution for Europe.

This chapter first considered the similarities and differences between the ECtHR and the CJEU and then the ECtHR and the USSC to shine a spotlight on what the Convention’s nature resembles, and importantly does not resemble. Whilst it noted the similar context in the genesis of the European Union and the Convention the two took different approaches. Unlike the EU, which initially was primarily about creating peace through trade relations, the ECHR primarily focussed on stopping a regression to the totalitarianism experienced during the Second World War, and broader ambitions to further develop human rights in the future. Certain key case law of the CJEU showed great activism on the part of that Court which might have been greatly criticised in a Convention context. However, the CJEU was careful to link its decisions to the express aims of the various EU treaties. This did not occur when the ECtHR ‘recalled’ that the Convention is a living instrument, suggesting that the living instrument doctrine, unlike the supremacy of EU law, could not easily be ascribed to an express treaty intention. For some this inability to correlate the living instrument doctrine to an express aim of the Convention may weaken the Convention law’s claim to legitimacy. The CJEU’s justification of direct effect in comparison to the ECtHR’s failure to sufficiently justify the living instrument doctrine in Tyrer may also, to some extent, suggest a clearer ‘constitutional’ role.

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185 See e.g. A Lester, ‘The European Court of Human Rights after 50 Years, (2009) EHRLR 461 AT 463 and Simpson (n21) at 157.
187 The examples discussed were Van Gend en Loos (n32) and Costa v ENEL (n31) at 593.
188 Tyrer (n39) at para 31.
189 Costa v ENEL (n31) at 593.
for the CJEU than might be easily adduced from the ECHR for the ECtHR. It is thus more important for the ECtHR to show persuasive reasons for its evolutive interpretation.

This chapter also drew comparisons with ECtHR and Convention with the US Constitution and the USSC that interprets it. From the outset it was noted that the USSC is different from the ECtHR by virtue of it being a domestic constitutional Court. It nonetheless considers similar issues to the ECtHR and shares some similar characteristics. A key example of one of these characteristics is that the US Constitution is described as a ‘living constitution’ Ackerman having stated that an analysis of the US Constitution and its amendments would not reveal the full body of law enshrined by the Constitution. Although the US has a clear separation of powers, the USSC in its judicial decisions was often called upon to endorse popular political movements by way of affirming or striking down key landmark statutory reforms, something which has been described as popular sovereignty. This compares with the ECtHR, which, when utilising a living instrument approach must consider the “present-day conditions” which may effectively endorse or disavow, changes in consensus (amongst other things) on the level of substantive protection of Convention obligations. However, the ECtHR is an international Court presiding over diverse national cultures, so whilst it may need to consider ‘popular sovereignty’ via consensus, it should be careful to remain sufficiently deferent and receptive to individual member States’ policy decisions. This difference in context suggests that while some limited use by the Court of academic literature and case law from national systems may be relevant it would be of limited help given its international setting.

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191 Ackerman (n65) at 1741.
192 Ackerman (n65) at 1790.
193 Tyrer (n39) at para 31.
The purpose of the Convention is essentially contestable, and as such it is only possible to define its broad aims. Those aims are: the Convention as “...a type of collective pact against totalitarianism” and laying the grounds for further realisation of human rights. Obviously the former aim, while still valid today is too minimal a conception of human rights to reflect the modern body of Convention jurisprudence. The latter, more ‘constitutional’ aim, to some extent explains the growth of Convention law. However, it is debateable to what extent the growth of Convention law through judicial innovation, particularly the living instrument doctrine, is suitable and legitimate. For this reason discussion of how States may impliedly consent and affirm the decisions of the Court via various oversight mechanisms becomes important. It is a key contention of this chapter that the member States may promote creativity or a change of ethos in the Court by amending the Convention text, either via protocols like Protocol 11 and 14 that promote the Court’s ability to hear cases, or by substantive optional protocols that add extra rights to the Convention itself. However, a corollary of this contention is that the States may also slow or restrict the action of the Court via this method too, as was seen with Protocol 14. This State-based support for the Convention lends greater legitimacy to a more ‘constitutionalist’ approach to interpreting it, whilst restrictions to the Court suggest a de-legitimisation of the Court’s ‘quasi-constitutional’ standing. It is thus suggested that the member States by failing to restrain the actions of the Court, and also to some extent promoting them through continuing to grant the right of individual petition and then amending the

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194 For more on this term see Beck (n52) at 216.
195 Bates (n13) at 8.
197 This has been suggested by Dr Ed Bates: Bates (n134) especially at 397.
198 Some of these were briefly discussed in this chapter but further discussion on the systems of checks and balances in the Convention will be given in Chapter 7.
treaty to make this a permanent and compulsory element of the Convention,\textsuperscript{201} have enabled or perhaps actively encouraged the promotion of a more ‘constitutional’ vision for the Court and this appears to be the approach the Court has taken with regards to the Convention. This puts a whole new perspective on allegations of the Court engaging in ‘mission creep’ which were discussed in the first chapter\textsuperscript{202} suggesting that some degree of expansive interpretation may be justified under the broader objectives of the Convention.\textsuperscript{203} In this light, the allegations of ‘mission creep’ may be partially explained as a reasonable disagreement on the appropriate boundaries between Strasbourg and the member States in deciding on the appropriate minimum level of Convention protection.

The Strasbourg Judges themselves are selected by the member States\textsuperscript{204} and whilst this is only periodic and they sit independently of nationality, this adds an element of influence in the make-up of the Court. However, far from being a negative, this may add an extra level of legitimacy, as each of the member States is represented by a judge nominated by that State.\textsuperscript{205} This, it is suggested, represents the possible presence of a gradually evolving outlook in the judiciary on the basis of their selection first by their member State and secondly by their election by the Parliamentary Assembly. Finally, if member States dislike the judgments of the Court they may be able to ignore them. Whilst this is unlawful in international law, it is for the CoM to supervise the implementation of the judgment.\textsuperscript{206} The ultimate sanction, if the CoM is so inclined, is to ask the rogue State to leave the CoE and thus the Convention.\textsuperscript{207} As a political body comprised of member States’ representatives,
effective supervision by the CoM may denote a general accord to assent to the Court’s ruling, underlining the legitimacy of its approach in that situation.

Overall the message of this chapter has been to show that the Convention does not have a clear and precise purpose but over time has evolved a ‘semi-constitutional’ nature to protect human rights. More importantly for this particular study, the rationale of the living instrument doctrine, unlike certain EU law doctrines, cannot be clearly discovered from a reading of the Convention text or the travaux préparatoires of the Convention. However, what is clear about the Convention is that its human rights characteristics have, with tacit consent and actions of the member States, overtime gradually evolved to take on something more akin to a ‘constitutional’ nature\(^{208}\) and this may legitimate a more creative approach by the Court. To what extent the Convention has attained some form of ‘constitutional’ status is open to differences of opinion, and one’s opinion on this will likely influence how creative they believe the Court can legitimately be in interpreting the Convention. However, the Convention seems to have taken something of a ‘constitutional’ status, albeit within the limited confines of the supervision of the member States. Consideration of how the living instrument doctrine fits into this potentially ‘constitutional’ nature of the Convention will be discussed in greater depth in the following chapter on its express introduction into Convention case law. What was also clear is that the development of the Convention’s constitutional characteristics has been partly by way of tacit acceptance and implication by the member States making its and the Court’s role in protecting human rights, somewhat ambiguous. As such it will be important to consider how both the Court and the member States communicate with and respond to each other

\(^{208}\) See e.g. the Court’s statement in *Loizidou v. Turkey* that the Convention is “...a constitutional instrument of public order”—*Loizidou (n14)* at para 75.
Chapter 3- The Genesis of the Living Instrument Doctrine

“Since about 1978, the European Court has adopted the view that the Convention was what it termed ‘a living instrument’. That meant that the Court could arrogate to itself the right to decide what its remit was. It did that without any mandate from this House or any other house of representative of the member states of the Council of Europe.”¹

Rt Hon David Davis MP, former Shadow Home Secretary (2011).

3.1 Introduction

As the originating quote of this chapter suggests, *Tyrer v. UK*² has gone down in history as the case where the Court first coined the ‘living instrument’ expression.³ Unfortunately it is also clear from that quote that confusion surrounding the legitimacy of the living instrument’s genesis persists.

There have been studies of the Court’s early jurisprudence⁴ and the *Tyrer* case has been mentioned in academic commentaries and text books,⁵ but there has been no study that looks at the genesis of the living instrument doctrine through the Court’s early case law and the various stages of the *Tyrer* litigation. This study’s main concern is the legitimacy of that doctrine’s inception, application and its scope. One of the central aims of this chapter is to correct the misconception that the Court simply

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¹ David Davis MP, HC Deb, 10 Feb 2011, vol 523, col 497.
³ It is unusual to find a description of the living instrument doctrine in text-books and other commentary that does not at least cite this case. For general examples of literature on the living instrument doctrine see e.g.: DJ Harris, M O’Boyle, EP Bates and CM Buckley, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights*, (Oxford University Press 2014, 3rd Edn) at 9 and B Rainey, E Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, (Oxford University Press, 2014, 6th Edn) at 74.
⁵ The breadth academic mention of *Tyrer* is too extensive to be fully featured but see e.g. P Mahoney, ‘Judicial Activism and Judicial Self-Restrain in the European Court of Human Rights: Two Sides of the Same Coin’, (1990) 11(1-2) HRLJ 57 at 61; G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press 2007) at 75-76; Bates (n4) at 326-33; Rainey, Wicks and Ovey (n3) at 74 and *Harris, O’Boyle, Bates and Buckley (n3)* at 9.
invented the living instrument doctrine in the *Tyrer* case. The chapter therefore seeks to address the legitimacy of the doctrine’s introduction into the Court’s case law and in doing so show that the way it developed in the Court’s case law is less than clear to a non-expert reader. This lack of clarity, it will be argued, has led to criticism of the Court over the years for simply having ‘invented’ the doctrine as an excuse to take on a legislative role. It will do this by identifying literature and case law prior to the *Tyrer* case, then moving on to an in-depth study of the *Tyrer* case including its pleadings. This will enable the reader to gain a better picture of a semi hidden narrative in the evolution of Convention law, potentially rectifying misconception around the doctrine’s emergence and thus enable legal discourse to focus on the proper extent to which Convention law may evolve, which will be address in the second part of this thesis. The chapter also considers how the living instrument doctrine and its emergence fits in with the nature of the Convention as a type of ‘constitutional’ document identified in the previous chapter, and it identifies the ambiguities left open in the Court’s *Tyrer v. UK* judgment. The Court’s post-*Tyrer* case law, which in part started to answer these gaps, is considered in Chapter 4.

Before considering how the living instrument phraseology has been used in the Court’s subsequent case law and how it may have influenced the Court’s thinking, it is worth examining how the Court came to make the statement that it did in *Tyrer*. Moreover, understanding the events preceding and following *Tyrer’s* infamous living instrument declaration enables a better appreciation of the Court’s vision of the Convention. As noted in Chapter 2, the more the Convention is considered to be like a

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6 Dominic Raab has discussed the Court’s living instrument statement in *Tyrer* in the following terms: “In *Tyrer v. UK* the Strasbourg Court held that judicial corporal punishment on the Isle of Man was sufficiently degrading that it breached the prohibition on torture and inhuman treatment, without any basis in the text of the Convention or the negotiating records, for such a novel conclusion. In so deciding, the judges shrouded their reasoning in legal jargon, which betrayed a blatant shift of approach — from a more disciplined judicial interpretation and application of Convention rights to an overtly political renovation and rewriting of the law.”- D Raab, *The Assault on Liberty: What Went Wrong with Rights*, (Fourth Estate, 2009) at 130.

7 For discussion on what is meant by the term constitutional see chapter 2.1.

8 This occurs in chapter 4 of this study.

9 *Tyrer* (n2) at para 31.
form of European human rights constitution, the more creative the Court can legitimately be. Understanding how the living instrument term was expressly introduced into the Court’s case law grants insight into how the doctrine fits into this understanding of the nature of the Convention overall. This may also enable a better appreciation of the trajectory of Convention enforcement under the Court and, with respect to individual judgments, their appropriateness.

In order to address these important issues, the chapter is divided into three main parts. The first part identifies the events and cases prior to the Tyrer litigation, it being recalled that the judgment itself was delivered in the late 1970s (nearly three decades after the Convention was opened for signature.) Through considering Sir Francis Jacobs’ leading Convention textbook from 1975 and Max Sorenson’s speech at an international colloquy the same year, as well as some key pre-Tyrer case law, the suggestion is made that the Court and the Commission were already interpreting the Convention in a creative manner prior to its express announcement of the living instrument doctrine. As such it will paint the picture that Tyrer did not, in fact, mark a sudden and unpredictable aggrandisement of the Court’s authority, as some have suggested,10 but was part of a prevailing view of the Convention as an instrument intended to be at least quasi-constitutional in nature. Because of the fame and confusion surrounding the Tyrer case, the second part of this chapter looks directly at its proceedings. It was undoubtedly, a landmark judgment in the Strasbourg case law, and, it is submitted, deserves close analysis for this reason. While the judgment of the Court is freely available to all from the Court’s HUDOC database,11 the Commission’s Report and the detailed oral and written pleadings before the Court (by the United Kingdom government, and the Commission) are not freely available.12 However, given the lack of explanation of the living instrument doctrine granted by the Court in its decision, taking a closer look at the entirety of the proceedings augments

10 See e.g. L Hoffmann, ‘The Universality of Human Rights’, (2009) 125 LQR 416 at 428; Raab (n6) at 130.
11 Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?id=001-57587>
12 The author here expresses thanks to the British Library for providing a copy of the pleadings of the Tyrer case.
the Court’s decision and enables greater comment to be made on the doctrine itself, and how it fits into Convention law as a whole. The final part of the chapter provides some reflective conclusions on the instigation of the living instrument doctrine, concluding that it is legitimate per se, but that it is appropriate to criticise the Court’s lack of clear explanation of the doctrine, and that this left many questions as to the legitimate manner and extent of its application.

PART ONE

3.2 Pre-Tyrer Indications of the Living Instrument Nature of the Convention

As suggested, the notion of the Convention as a living instrument pre-dates its first express statement as such by the Court in the Tyrer case of 1978. Certainly as early as 1975 express mention of the Convention as a living instrument was being made in academic Convention discourse. However, what might be described as the Court’s ‘creative’ streak pre-dates this. This chapter will now consider some of the Court and the Commission’s pre-Tyrer decisions/reports in order to illustrate how Strasbourg was already treating the Convention dynamically prior to the Tyrer case.

Even about the Court’s very first case, Lawless v. Ireland, in 1961, it has been said that:

“Until that first judgment was solemnly pronounced the Convention had been seen merely as rhetorical, aspirational, inspirational, theoretical and symbolic in nature. Suddenly and irrevocably the Convention was imbued with a dynamic force which was to have deep and

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13 E.g. M Sorenson, ‘Do the Rights set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975’, (Fourth International Colloquy About the European Convention on Human Rights, Rome, November, 1975), which will be discussed in greater detail in the next section of this chapter.

14 In this context a ‘creative’ interpretation would be an interpretation of the Convention that could be reasonably ascertained from interpreting the Convention text but does not encapsulate a change in the substantive Convention rights as they were previously understood.

15 Lawless v. Ireland (No.3) (App.No. 332/57) (ECtHR 1 July 1961).
lasting implications for the governments and citizens of the states of Europe. Thus, once the Strasbourg system was finally in top gear the status of human rights was immediately propelled from the abstract plane of potential protection to the solid plane of real protection.”

This statement indicated that prior to the Court’s first judgment, the Convention had the potential to play a relatively subservient role to the member States. However, the manner in which the Lawless decision was both expressed and came about immediately showed that the Court would not take a submissive approach and would instead actively and robustly interpret and apply the Convention. This goes some way to suggesting that Tyrer was not the catalyst for the Court’s creativity but simply a notable example among many along its evolutionary trajectory. Clovis Morrisson speaking about how the Commission in the Lawless case had amended its rules of procedure in order to allow for the applicant to receive a copy of its otherwise confidential report might be said to concur with the above the notion just mentioned when he said:

“Using the restrictive interpretation rule, one could conclude that the new rule of procedure and the Commission’s actions went far beyond what the framers had intended regarding the secrecy of the Commission’s proceedings.”

Another good example of this laying of foundations for the doctrine came in *Wemhoff v. Germany*\(^1\) in 1968. Here the Court, considering the lawfulness of the applicant’s pre-trial detention without bail (Article 5(3) of the Convention), stated:

“Given that [the Convention] is a *law-making treaty*, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”\(^1\)\(^9\) (Emphasis added)

What is striking about this statement is that the Convention must be interpreted in light of its object and purpose as a human rights treaty. This is particularly important as the Court is expressing that the Convention is not just an ordinary treaty – it was a ‘law-making treaty’ - and that in order to ensure the effective protection of the substantive Convention rights, the Court will not simply adopt interpretations that most favour State sovereignty. Whilst this statement was far from stating the Convention is a living instrument, it is early evidence of the Court asserting its judicial authority to interpret the Convention in a more expansive way based on the Court’s assertion that this is the most appropriate way to “...realise the aim and objective of” the Convention.\(^2\) More importantly the ‘law-making treaty’ aspect of the Court’s statement suggests further potential for judicial creativity.\(^3\) However, this is not necessarily a living instrument approach, which is about interpreting the Convention’s substantive standards in-line with present day conditions, as opposed to those of 1950. It does though give clues that the Court might have been treating the Convention as something of a ‘constitutional document’ i.e. that the Convention is meant to be interpreted

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\(^1\) *Wemhoff v. Germany* (App.No. 2122/64) (ECtHR 27 June 1968).
\(^2\) *Ibid* at para 8.
\(^3\) *Wemhoff* (n17) at para 8.
\(^3\) This was the suggestion of Caroline Forder in her article: see CJ Forder, ‘Legal Protection Under Article 8 ECHR: Marckx and Beyond’, (1990) *Netherlands International Law Review* 162 at 167.
expansively in contradistinction to a restrictive approach to interpretation that might ordinarily accompany international treaties. If this is so then as early as the first Convention cases it is possible to see a holistic approach being taken by the Convention institutions which, in hindsight, the living instrument doctrine fits into.

In the Belgian Linguistics Case of the late 1960s – i.e. a full decade before Tyrer - the Court was faced with an issue on language of instruction in certain schools in Belgium. The French speaking applicants wanted their children to be educated in French in a region in Belgium where instruction was officially given in Dutch. Although the children went to French speaking schools, grants and other State provision was withheld from those schools and official accreditation of certificates issued by those French speaking schools was refused. This case was highly contentious as the Belgian Government argued that no right to education in a chosen language was granted by the Convention. This is correct because Article 2 of the First Protocol only grants the general right to education in negative terms. It also argued that with regards to the nature of the inclusion of education within the Convention, as a ‘declaration of rights’, Article 2 of the First Protocol is not concerned with the organisation of the State’s institutions for provision of Convention rights (the so called ‘reserved domain’ argument.) For the purpose of this study, this case is most interesting first because of how the Court dealt with the ‘reserved domain’ argument in the preliminary objections hearing, and secondly because of how it found a violation of Article 2 of the First Protocol (right to education) in conjunction with Article 14 (right to non-discrimination).

22 For further discussion on the meaning of the term ‘constitutional’ for the purposes of this study see above chapter 2.1.
24 Article 2 of the first Protocol reads: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical conventions.”
In the Preliminary Objection judgment the Court rejected the ‘reserved domain’ argument. While this would be uncontroversial now, at the time it was the subject of intense political discord in Belgium. The Court cited former Article 19 of the Convention:

“the jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48 (art. 48)”

The politically sensitive context within which the Court rejected the ‘reserved domain’ argument indicated the Court displaying itself as holding the status of ‘master’ over the Convention law. As such it would not leave the interpretation of Convention rights at the behest of the member States.

The second important aspect of the Belgian Linguistics Case concerns the Court’s finding of a violation of Article 14 in conjunction with Article 2 of the First Protocol. As noted, the Convention right to education is worded in negative terms and so could not be said to include a right to education in a certain language. However, by a majority the Court found a violation on the basis that where a State goes further than required by a Convention Article, it may not do so in a way that discriminates between groups. Depending on one’s view, the Court in this instance may have increased the scope of its jurisdiction to include practices that relate to Convention rights but are not required by them. The Court in its reasoning justified its approach by stating:

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25 Belgian Linguistics case (preliminary Objections) (n23) at ‘Now the Court’ section, para 1.
26 See Forder (n21).
“The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the *social and technical developments in our age* which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between protection of general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.”27 (emphasis added)

It has been argued that this statement demonstrated that the Court was acknowledging that its approach to education was evolutive almost ten years before the *Tyrer Case*.28 Its references to “the social and technical development in our age” are reminiscent of the Court in *Tyrer* interpreted ‘in light of present-day conditions’.29 Indeed Morrisson has stated of the Commission’s approach to this case, which the Court later affirmed:

“In a very liberal interpretation of Article 14, it broadened the scope of the provision to embrace rights and freedoms that are within the *spirit* but not the language of the Convention. This approach was completely endorsed by the Court.”30

27 *Belgian Linguistics case (Merits) (n23)* at B. Interpretation adopted by the Court at para 5.
28 *Bates (n4)* at 235.
29 See *Tyrer (n2)* at para 31.
30 *Morrison (n17)* at 374.
What this suggests is that even in its earliest days the Court was viewing the Convention and its context as of a fundamental character and to be interpreted in an effective way, to protect the rights of individuals, and not in a restrictive and static manner. All this starts to give context amenable to the Court’s later expression of the living instrument doctrine and in-line with the growth of the ‘constitutional-esque’ status identified in the previous chapter.

This trend towards bolder interpretation of the Convention continued in *Golder v UK* (1975). Here the Court was faced with a complaint that a prison inmate had effectively been denied access to a court by being told that his prison governor would prevent his corresponding with a solicitor prior to potentially suing a prison officer for liable. In a landmark judgment, the Court confirmed that the right to a fair trial under Article 6(1) of the Convention included the right to access to a court. The Court’s interpretation was in spite of the absence within the text of Article 6(1) of express words to that effect (there is no ‘right of access to court’ within the text of that Article). In reaching its conclusion (by 6 votes to 3) the Court referred to the Vienna Convention on the Law of Treaties (VCLT), noting that the relevant provisions represented general principles of international law. It then stated:

“It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such

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32 *Golder* (n31) at para 36.

33 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 N.B. this was not yet in force at the time of the Court’s citation of it.
guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.”

However, it was not expressly clear from the wording of Article 6(1) that there was a right to instigate proceedings. On this point Sir Gerald Fitzmaurice dissented stating:

“...the point here being, not whether the Convention ought to provide for such a right, but whether it actually does.”

Sir Gerald’s dissent highlights the issue that the ECtHR is a Court, and as such it must avoid so-called ‘judicial legislation’. Whilst what the majority’s approach seemed eminently sensible, did its willingness to interpret Article 6(1) as including a right to access to a court (even though this was not expressly stated in it) reflect an aggrandisement of the Court’s status? The Court itself seemed to deny that it was aggrandising its status, as suggested by its statement:

“Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very first sentence of Article 6 para 1. (art 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (See Wemhoff

34 Golder (n31) at para 35.
35 The finding of violation was by 9 votes to 3.
36 Golder (n31) separate opinion of Judge Sir Gerald Fitzmaurice at para 2.
judgment of 27 June 1968, Series A no. 7, p. 23, para 8), and to general principles of law.  

(emphasis added)

Accordingly, it could be said that the majority’s approach was simply giving effect to the inferred intention of the drafters in ensuring the effectiveness of Article 6(1). It does though show the Court taking a robust approach to giving effect to Convention rights. This is not quite the same as taking an evolutive approach, but it may be seen as a preliminary indicator of the Court’s quasi-constitutional position to implement a strong and full-bodied approach to the protection of the Convention rights.

It is not just decisions by the Court that have given early indications of the Convention’s evolutive tendencies, the Commission on Human Rights had also done so. Perhaps the most notable example is the East African Asians Cases, where it reported that discrimination between citizens in admission to parts of a State’s territory on racial grounds was capable of constituting a breach of Article 3 of the Convention (degrading treatment). This was despite the fact that the UK had not ratified Protocol 4 of the Convention which, under Article 3 of that Protocol contained the right to enter the territory of a State for which one is a national. In coming to this conclusion the Commission made reference to the Advisory Opinion of the International Court of Justice on

37 Golder (n31) at para 36.

38 I use this term to suggest that the Court is something more than an ordinary international court seeking to interpret the Convention as restrictively as possible in favour of State sovereignty, but not with the same authority as a domestic constitutional court. As may already be apparent to the reader, this thesis leaves the precise level of constitutional authority to the individual reader to assess, acknowledging that this is a question upon which reasonable people may differ.

39 The Commission on Human Rights was abolished by Protocol 11 of the Convention replacing it and the old Court of Human Rights with a permanent Court of Human Rights.

40 East African Asians v. The United Kingdom (App.Nos. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70, 4478/70, 4486/70, 4501/70, 4526/70-4530/70) (EurComHR 14/12/1973).

41 East African Asians v. the United Kingdom (App.Nos. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4526/70-4530/70) (Commission Decision, 14 December 1973) at paras 184 and 207. See also Bates (n4) especially at 244. The interpretation adopted appeared to be a development from the Commission’s previous approach in the Indian residents case. On this comparative point see Duffy (n46) at 341 and 344.
Reservations to the Convention on Genocide.\footnote{42} Here the Commission likened the aforementioned Convention to the ECHR, going on to cite the ICJ’s statement of the Genocide Convention that:

“There the Convention was manifestly adopted for a purely humanitarian and civilising purpose...”\footnote{43}

This quotation can mean nothing more than a realisation that the Convention is aimed at preventing acts and omissions that are obviously ‘uncivilised’.\footnote{44} However, it might also form part of a mosaic of events indicating that the Commission was already beginning to see the Convention as a living instrument prior to the statement in Tyrer.\footnote{45} From the more constitutional perspective of this ‘civilising’ aspect of the Convention, which may be understood in the sense of progressive standards, it could be argued that, had this case come before the Commission some years before it did, it may have decided the situation differently. The problem with this is that the Commission does not expressly state this, nor that the Convention is a living instrument and more importantly the statements noted are buried in a report that was not officially made available to the public at the time.\footnote{46} Also the Commission stated in its report:

“The Commission considers that the racial discrimination to which the applicants have been publicly subjected by the application of the above immigration legislation constitutes an

\footnote{42} The International Court of Justice will henceforth be referred to as the ICJ.
\footnote{43} Advisory Opinion of the International Court of Justice on Reservations to the Convention on Genocide I.C.J Reports 1951, pp. 15, 23 cited in East African Asians Case (n40).
\footnote{44} An example of such would be the systematic murder and burning of Jewish and other prisoners by the Nazi regime during the Second World War.
\footnote{45} Tyrer (n2) at para 31.
interference with their human dignity which, in the special circumstances described above [5], amounted to ‘degrading treatment’ in the sense of Article 3 of the Convention."\(^{47}\)

This suggested that the Commission saw the protection of human dignity as being an important aspect of the Convention. Such a view of the Convention may be in-line with a more ‘constitutional’ reading of the Convention, which would be in-line with the living instrument doctrine. Unfortunately, however, if this was what should be inferred from the Commission’s use of these quotations, it falls far short of transparency to be expected from a quasi-judicial body (although, to be clear, the Commission did not have the formal status of being a judicial body). It thus did not help the legitimacy of the overall explanation of the Convention as a living instrument.

Summing up, on the cases discussed above, it seems clear from the above explanations that the Court and the Commission had given indications of the Convention’s living instrument tendencies prior to the *Tyrer* litigation;\(^{48}\) however, they are fleeting and inconclusive. It is unlikely that, without the benefit of hindsight and a specific investigation to this effect, an uninformed bystander would be able to identify the Convention’s living character prior to the Court’s statement in *Tyrer*.\(^ {49}\) This opacity damages the legitimacy of the Commission and the Court’s jurisprudence as stakeholders are unable to understand the approach the Court was taking in coming to its decision. This is particularly important given the Convention’s international treaty characteristic, meaning it does not, of itself, possess inherent legitimacy as, perhaps, a domestic Court might enjoy. This lack of clarity may also have fed into the misunderstandings that the Court in *Tyrer* simply ‘invented’ the living instrument doctrine instead of being a long-standing aspect of the Convention and its case law.

\(^{47}\) *East African Asians Case* (n40) .
At para 208.
\(^{48}\) *Tyrer* (n2) .
\(^{49}\) *Tyrer* (n2) at para 31.
3.3 Academic and Extra-Judicial Indications of the Living Instrument Doctrine

Although the discussion above gave some early indications of the Court and Commission’s approach to interpreting the Convention either dynamically or evolutively, as was noted this was not entirely clear to an objective bystander. However, prior to the Court’s decision in Tyrer some other discussion of the Convention’s living instrument nature was given in the form of a leading textbook published in 1975 and an international colloquy speech given in 1975 on the Convention, given by Max Sorenson. What is notable is that these insights were more explicit and descriptive both in their discussion of the Convention’s nature but also in their justification of it, then the Commission and the Court were in their decisions, even in the Court’s seminal statement in Tyrer. What follows is a discussion and analysis of their accounts of the Convention.

3.3.1 Dynamic Interpretation in Sir Francis Jacobs’ Leading Convention Textbook of 1975

Francis Jacobs⁵⁰ published a textbook on the Convention in 1975.⁵¹ During this time he was a member of the Secretariat of the Commission on Human Rights, and so his insights are of particular interest given both the timing of his book, in relation to the case of leading up to and including Tyrer, and his potential insider knowledge of the Convention at the time. Sir Francis anchored his approach to the Vienna Convention on the Law of Treaties (VCLT). In doing so he started by stating:

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⁵⁰ Now Sir Francis Jacobs, who is a former Advocate General of the Court of Justice for the European Union (1988-2006) and member of the Secretariat of the European Commission of Human Rights.

"The relevant provisions of the Vienna Convention are sufficiently general to give some guidance but must be applied with caution in view of the special features of the European Convention." (Emphasis added)

What this starts to suggest is that from his perspective, the Convention is not just an ‘ordinary international treaty’ to be interpreted restrictively. However, in stating this he went on to justify it by reference to Article 31(1) of the VCLT which requires treaties to be interpreted in-line with their objects and purposes. With hindsight after the Tyrer decision, the inference that can be made from this is that the living instrument doctrine is an important aspect of the Convention. He then subsequently cited the Pfunders case where the Commission said that the Convention should be interpreted objectively as it created fundamental rights that were intended to protect individual human beings from violation by the High Contracting Parties, rather than subjective rights created on the basis of reciprocity between States. He then went on to note that:

"...any general presumption that treaty obligations should be interpreted restrictively since they derogate from the sovereignty of States is not applicable to the Human Rights Convention."

Again here Jacobs was marking out a distinction that the Convention was not just, any international treaty, but instead a human rights treaty. As such it had something of a different character to an ordinary treaty and he went on to note the Court’s judgment in Wemhoff that the Court must seek the most appropriate interpretation to realise the aim and objective of the treaty and not the most

52 Ibid at 16.
53 Ibid.
54 Ibid.
restrictive interpretation. From this Jacobs went on to draw the conclusion “...that the interpretation of the Convention must be ‘dynamic’ in the sense that it must be interpreted in the light of developments in social and political attitudes. Its effects cannot be confined to the conceptions of the period when it was drafted or entered into force.” At this stage it is worth pausing to reflect on the similarity of this statement to the Court’s living instrument expression in Tyrer some 3 years later. Jacob’s use of the words ‘in light of developments in social and political attitudes’ bares strong resemblance to the Court’s noting that “… as the Commission rightly stressed, must be interpreted in light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”

Importantly Jacobs reconciled a ‘dynamic’ approach to extending Convention obligations through judicial interpretation by saying:

“It cannot be objected that this approach to interpretation extends the obligations of the Contracting States beyond their intended undertakings. On the contrary, this approach is necessary if effect is to be given to their intentions, in a general sense. They did not intend solely to protect the individual against the threats to human rights which were then prevalent, with the result that, as the nature of the threats changed, the protection gradually fell away. Their intention was to protect the individual against the threats of the future, as well as the threats of the past.”

55 Ibid.
56 Ibid at 17.
57 Tyrer at para 31
58 Jacobs (n51) at 18.
What Sir Francis may have been saying here is that the member States in ratifying the Convention did not intend to create a treaty with static meanings but one that is capable of adapting overtime to the needs of European Society in the given spheres of human rights law.

### 3.3.2 Max Sorenson’s International Colloquy Speech in 1975

The concept of the Convention as a living instrument can also be traced back to a Colloquy on the ECHR held in Rome between 5-8th November 1975. At this conference Max Sorenson, a judge of the CJEU, who would later become a judge of the Strasbourg Court, presented a paper on, what was, in effect, evolutive interpretation of the Convention. Given the history of enforcement machinery of the Convention, Sorenson discussed cases stemming from both the Court and the Commission on Human Rights. He also made recourse to examples from the ICJ to further support his argument that the standards of protection afforded by the Convention were capable of evolving over time and that there were signs this had already occurred. Sorenson went on to conclude “[t]he European Convention on Human Rights is a living legal instrument.” But his paper went on to caution the audience with the observation:

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59 Fourth International Colloquy About the European Convention on Human Rights, Rome, November, 1975
60 It was called the European Court of Justice (ECJ) at the time.
61 1980-1981. He was also a member of the Danish negotiating part of the Treaty of London which established the Council of Europe. He was also on the Commission of Human Rights (1955-73) and was its president from 1967-72). At this point it is worth briefly noting by way of giving context to Sorenson’s comments that will be discussed presently that he was involved in the CJEU’s *Nold v. Commission* judgment of the CJEU, which affirmed that fundamental rights formed general principles of law for the purposes of EC law. As such it is conceivable that his views come from the habits of a Court that enjoys a stronger mandate to rule on such matters than the ECtHR does within its respective context (for more discussion on this see chapter 2.2). If this is so, then it is likely that it is the more ‘constitutionalist’ vision of the Court that the doctrine stems from.
62 Sorenson (n13).
63 For more on the evolution of the enforcement machinery of the Convention see: Bates (n4) especially at 10-15.
64 E.g. Sorenson (n13) at 16.
65 On Sorenson’s use of previously decided case law see: Sorenson (n13) at 4 and on his conclusion that the Convention can evolve see page 13.
66 Sorenson (n13) at 22.
“It follows that the Convention is not designed to promote social reform, but it can be used both to preserve what has been achieved and also to express a newly emerging consensus and bring states which are lagging behind into line with a general trend in ideas and institutions in Europe.”

He was clearly suggesting that the Convention’s standards of protection were capable of evolution; however, from his view, evolution was not independent of the actions of member States. Instead evolution is generated by the member States adopting similar standards. Sorenson makes it clear that, at least from his view, the adjudicatory organs and the Convention are not designed to take an active legislative role in human rights reforms. As we shall see in chapter 4, this is very similar to the contemporary practice of the Court in seeking consensus standards amongst member States in its interpretation. However, arguably in “[bringing] states which are lagging behind into line with a general trend” to some extent this is the natural corollary of Sorenson’s conception of the Convention as a living instrument. The Court would in effect be indirectly legislating for the ‘laggard’ States, by declaring standards not meeting the evolved standard, a violation of the Convention.

Instead what Sorenson appears to mean is that the Convention and its enforcement organs should not promote social reform generally on a European level. However, he also says, the Convention can be used to preserve existing standards. If Sorenson’s arguments were adopted by the Court in its living instrument reasoning then it is likely that some degree of social reform will emanate from the Convention. This is because the Convention, at least from Sorenson’s perspective, will prevent ‘negative’ or ‘regressive’ social reform by way of reducing standards and force the ‘straggler’ States

67 ibid
68 This as will be shown in greater detail chapters 4 and 5 is broadly consonant with the Court’s approach to consensus finding. On consensus see e.g. P Mahoney (n5) at 74-75; S Prebensen, ‘Evolutionary interpretation of the European Convention on Human Rights’ in P Mahoney (Ed), Protecting Human Rights: The European Perspective (Koln Heymanns, 2000) 1123-1139 at 1128 and R Bernhardt, ‘Human Rights and Judicial Review: The European Court of Human Rights’ in M Beatty (Ed), Human Rights and Judicial Review: A Comparative Perspective, (Martinus Nijhoff, 1994 (Vol 34) 297-319 at 308.
69 Sorenson (n13) at 22.
70 Sorenson (n13) at 22.
in-line with the general trend. This is questionable because it can be argued that ‘straggler’ States had not agreed to this new standard, and so Strasbourg institutions could be said to be imposing new obligations on them that they did not agree to in 1950. Such an argument exposes the tension between evolutive interpretation and traditional notions of State sovereignty which treats the State as the ‘sole repository of sovereign authority’.71 These tensions are discussed further in chapter 5 when greater consideration of the possibility of ‘diminution’ of Convention standards by evolutive interpretation is considered. However, if the Convention is akin to a type of bill of rights for Europe, then arguably in ratifying and remaining a party to the Convention it could be said that those States have consented to the possible finding that its substantive standards have evolved, especially when the standard reflects a common European approach.

3.3.3 Conclusions

At this point what it is important to note is that, while the Strasbourg institutions had hitherto been fairly inexpressive of the Convention’s dynamic or living characteristics, Sorenson and Jacobs were both speaking in very clear and unambiguous terms about it. Both gave a much clearer justification and explanation of the approach being taken by the Court and the Commission and justified it with reference to the purpose of the Convention and the intentions of the member States. Crucially it would be difficult for even experts to gather from the dialogue flowing from the Convention institutions that the Convention either had some form of ‘constitutional’ status or that it was to be treated as a living instrument. Therefore it is perhaps understandable that, at least to some, the Court’s enunciation of the Convention as a living instrument may have come as something of a surprise.

71 For a brief definition of state sovereignty see e.g. M Ayoob, ‘Humanitarian Intervention and State Sovereignty’ (2002) 6(1) The International Journal of Human Rights 81 at 81.
At this stage we move on to discussion of the proceedings in the *Tyrer* case itself, to cast light on the proceedings of the Court and the Commission that led to the final and now infamous decision of the Court in 1978.

**PART TWO**

### 3.4 The *Tyrer v. UK* Litigation

Having considered early academic commentary and examples of what might be considered evolutive interpretation, or where the Court (as well as the Commission) has suggested something of a quasi-constitutional approach to the Convention’s interpretation, we now turn to consideration of the *Tyrer case*\(^\text{72}\) itself.

We start with, a brief description of the proceedings leading up to the judgment in the *Tyrer* case, as this is useful as the historical context helps build up a picture of how the living instrument doctrine fits into the nature of the Convention as a human rights treaty. It also helps us to assess how transparent the Court and the Commission were about its express introduction into the Strasbourg jurisprudence.

\(^{72}\) *Tyrer (n2).*
3.4.1 The Facts of the *Tyrer case* and Proceedings leading up to the Commission on Human Rights’ Report

In March 1972 15 year old Anthony Tyrer was convicted of assault occasioning actual bodily harm in Castletown, Isle of Man\(^73\) and was sentenced to three strokes of the birch.\(^74\) The applicant complained to the Commission in September 1972 that the punishment constituted inhuman and degrading treatment contrary to Convention Article 3, and also on the grounds of Article 14 (prohibition of discrimination).\(^75\) Finally, he complained his treatment contravened Article 8(1) of the Convention (his right to respect for his family and private life.)\(^76\) These events took place before Sorenson’s Colloquy speech. However, the operative parts of the proceedings occurred after it. Seeing the decisions in this broader context may help the reader gain an understanding of any potentially underlying agenda of the Commission and the Court in their decisions. It also grants the reader an insight into how the Commission’s and the Court’s views on the living instrument doctrine fitting into the nature of the Convention was coloured at the time of its express statement.

3.4.2 Proceedings before the Commission on Human Rights

In January 1976 the Commission was notified that Tyrer wished to withdraw his application. However, the Commission refused his request as “…the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues

\(^73\) The Isle of Man is a self-governing British Crown Dependency, with the ability to legislate for its own affairs and its own courts to enforce and interpret its own laws.

\(^74\) The birch refers to a collection of leafless twigs bound together to create a rod implement often used for corporal punishment.

\(^75\) This was because such a punishment was argued by Tyrer to mostly be ordered against people from financially and socially deprived backgrounds.

\(^76\) *Tyrer Pleadings (n76)* at 12.
involved.” This suggested that the Commission saw Convention law, and the importance of pronouncing on the issues at stake, as of a higher nature than just the mere resolution of the application before it. With the benefit of hindsight, the Commission’s statement seems to be in reference to the constitutional-like, standard setting nature of the Convention as a living instrument, and so the application was being treated not as an issue solely about the applicant’s case alone, enabling him to withdraw it at will, but about the quasi-constitutional standards of the Convention, to be applied in all of the member States. The Commission then adopted its report on 14th December 1976. These latter two events in isolation are of little interest, but taken in the context of the timing of Sorenson’s 1975 speech on the Convention as a living instrument, they are of greater curiosity.

Before the Commission, one of the Article 3 contentions was that the rest of the UK and most of the other member States of the CoE had already abolished judicially sanctioned corporal punishment.

Ultimately, considering its previous case law concerning situations of extreme treatment (mentioned below), the Commission did not consider that judicially sanctioned corporal punishment (birching) fell under the headings of torture or inhuman punishment, but it considered that a clear issue arose as to the meaning of ‘degrading treatment or punishment’. The Commission went on to say “Judicial birching humiliates and disgraces the offender and can therefore be said to be degrading treatment or punishment.” Given this precise phraseology it is arguable whether the Commission was regarded its approach as a living instrument or evolutive approach at all. The arguments of the applicant suggest a need for reform, perhaps indicating a violation of Article 3 would not have been found in 1950, when the Convention was drafted. However, noting the wording above, the Commission’s Report may be read as simply interpreting Article 3 in a creative manner to define a

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78 Sorenson (n13).
79 Tyrer Commission Report (n77) at para 11.
80 Tyrer Commission Report (n77) at para 32.
81 Tyrer Commission Report (n77) at para 35.
category of protection that was always included within it but had hitherto not arisen before the Strasbourg bodies. Express reference to the Convention as a living instrument or dynamic interpretation was entirely absent from the Commission’s Report. Instead, the closest it came to a ‘living instrument’ or evolutive reference was when it compared the Tyrer case to the earlier Inter-state cases, particularly the ‘Greek Case’ and the ‘Irish Case’, both of which concerned very serious allegations of ill treatment including torture. As the Commission put it:

“In this respect, reference to the previous jurisprudence of the Commission in inter-state cases is not necessarily relevant to an application of this kind [Tyrer]. These inter-state cases have arisen out of emergency situations and involved allegations of atrocious ill-treatment such as torture or treatment akin to torture.”

While it is possible, with some imagination, to interpret this as saying the Convention should be read ‘in light of present day conditions’ as it may be inferred that the Commission was saying these cases were out of date, it is more akin to standard distinguishing of the case on the basis of its circumstances. However, given the Commission’s reference to ‘emergency situations’, the point of the above quote was that the previous (inter-state) case law was exceptional in nature. It is possible that judicial corporal punishment would be found contrary to Article 3 at the time of the inter-state cases, but it was not tested before the Commission. The Commission’s approach appeared to be increasing the scope of the Convention by defining ‘degrading treatment’ as a separate category under Convention Article 3. This can be said to have widened the scope of Article 3, although, given

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84 Tyrer Commission Report (n77) at 33.
85 Ibid.
what the Commission said, this is unclear.\(^{86}\) As is noted below, in fact, it was not until the Commission’s pleadings before the Court that its reliance upon a dynamic interpretation became clear.\(^{87}\)

The Commission was not unanimous though.\(^{88}\) Mr Mangan dissented, expressing severe doubt about the degrading nature of birching. The most notable part of his dissent comes towards the end of his opinion, when he stated:

> “Protagonists of further provisions for the betterment of human conditions cannot, in my view, validly extend the scope of the Convention without further negotiation and agreement between the States parties to it.” \(^{89}\)

Mangan was cautioning against the approach of the majority, which might from his perspective be considered ‘legislative’ in nature.\(^{90}\) As such, his approach would place the emphasis for developing Convention law on the member States themselves. In this way his approach respects State sovereignty and avoids the risk of the majority in, potentially, having a law reforming effect on sovereign States. The contrast of Mangan’s dissent strengthens the suggestion that the Commission was engaging in evolutive interpretation, albeit without being clear about this.

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\(^{86}\) The Commission’s pleadings to the Court and the Court’s subsequent decision seem to suggest it has. These will be discussed in due course later in this chapter.

\(^{87}\) This will be discussed in more depth later in this section but see. *Tyrer Pleadings (n76)* at 57.

\(^{88}\) The finding of a violation of Article 3 was by a vote of fourteen members against one, see *Tyrer Commission Report (n77)* at 48.

\(^{89}\) Dissenting Opinion of Mr Mangan in *Tyrer Commission Report (n77)* at para 18.

\(^{90}\) This legislative occurrence is what might be classified as the living instrument approach.
Although the point was swiftly dismissed by the Commission, in *Tyrer*, the UK had argued on the basis of Article 63(3)\(^91\) of the Convention (Mr Mangan dissenting), the so-called colonial clause, that special consideration in applying Convention law to certain non-metropolitan territories should be made.\(^92\) The argument was that, as a territory to which Article 63 applied, it was for the UK and not the Commission to deal with the affairs of the Isle of Man, given that the Manx legislature had considered the issue of corporal punishment in 1963 and 1965 resulting in its retention. In dismissing the Article 63 argument the Commission took a restrictive approach to Article 63 saying that it could not find any significant social or cultural differences between the Isle of Mann and the UK relevant to the application of Article 3 of the Convention in this case.\(^93\)

The Commission’s restrictive approach with regards to Article 63, in keeping with its arguably evolutive Article 3 finding, suggested it was trying to assert the status of the Convention as a type of European Bill of Rights. However, even taken together the approach to the Commission took to the Article 63(3) point, and its distinguishing the Article 3 matter from previous case law, the Commission did not clearly show that it was interpreting the Convention using the notion that it is a living instrument. As such, at this stage, if it weren’t for the dissenting Commissioner’s report it would be arguable at best whether this was a living instrument case.

\(^{91}\) Former Article 63 of the Convention (Now Article 56) states:

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories name in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

3. The Provisions of this Convention shall be applied in such territories with due regard, however to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Commission to receive petitions from individuals, non-governmental organisations or groups of individuals in accordance with Article 25 of the Present Convention.

\(^{92}\) *Tyrer Commission Report* (n77) at 23.

\(^{93}\) Ibid at 46.
3.4.3 The Pleadings before the Court of Human Rights in *Tyrer*: evolutive interpretation recognised

Before discussing the Court’s judgment it is instructive to consider the pleadings before the Court. This enables informed analysis both on the reasons for the outcomes of the Commission’s Report, but also the reasons for the Court’s eventual decision, which has been criticised for its lack of application or in-depth discussion and analysis of commonly accepted standards. This is a criticism that, although to some extent may be true of the Court’s decision, is not fully justified when one takes the Court’s decision in context with the submissions made to it in the oral pleadings stage. At the very beginning of the public hearings the Commission’s principal delegate, Mr Kellberg, stated of the importance of the issue of corporal punishment and Convention Article 3:

“It is important because it deals with a matter which concerns the last vestiges of an old and ‘dépassé’ stage and methods that have been abandoned in the penal history of Western Europe. It deals really with one basic human right for all human beings, namely the inviolability of our physical integrity.”

This was not the candour of the Commission’s Report, which was ambiguous on this point. It is consonant with the approach that the Court took in its judgment towards commonly accepted standards. It also perhaps partly explains the Court’s lack of analysis of different standards of penal

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94 See *Letsas* (n5) at 76.
95 Both the pleadings before the Court and the Commission’s report are found in the Court’s Series B documentation which is not generally stocked in most University Libraries and is not available online. According to a ‘COPAC’ catalogue search there are only 2 copies in the UK at present (The author acknowledges with thanks the help of the British Library who supplied him with access to a copy of the reports.)
96 *Tyrer Pleadings* (n76) at 53.
97 *Tyrer* (n2) at paras 31 and 38.
policy within the Convention member States. It could be conjectured that the Court may simply have accepted the arguments of the Commission and thought further analysis unnecessary.

In relation to evolutive interpretation, in his pleadings to the Court on behalf of the Commission Mr Kellberg first contended that interpreting the Convention according to the original intentions of the contracting parties is not sufficient. Instead, he made reference to the approach of looking at the Convention’s object and purpose\(^{98}\) which prior to the public hearings of the case had been quoted in Sir Francis Jacob’s leading text book as “being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”\(^{99}\) and subsequent practice relating to it, which is detailed in the VCLT.\(^{100}\) Kellberg then went on to state most importantly that:

“...the Commission has reached its conclusion by a majority of its Members and this conclusion is also to be seen in the context of a dynamic interpretation of an international instrument drawn up twenty-five years ago after the horrors of the Second World War. The Commission could well have reached a different conclusion in such a case twenty-five years ago. But much has changed since then and meaning must be given notions of fundamental rights in present-day circumstances.” (Emphasis added)\(^{101}\)

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\(^{98}\) Tyrer Pleadings (n76) at 57.

\(^{99}\) Pfunders Case cited by Jacobs (n51) at 17.

\(^{100}\) Tyrer Pleadings (n76) at 57. This is in-line with the discussion of the Court in its Golder v. UK judgments which looked at Articles 31-33 of the VCLT in relation to access to the Court: See Golder v. the United Kingdom (App.No. 4451/70) (ECtHR 21 February 1975) at para 29.

\(^{101}\) Tyrer Pleadings (n76) at 57.
This quote is of great importance as it expressly and transparently outlines that this was the approach taken previously in the Commission’s Report and defined the Convention as a dynamic instrument that must be applied in its modern day context. Such an approach was not without its supporters at the time, as Sir Francis Jacobs and Max Sorenson had been advocating this at least as early as 1975.\textsuperscript{102} The Commission in stating the Convention was concluded 25 years previously, is suggesting that an originalist interpretation of the Convention would be ‘out of date’ and incongruent with contemporary State practice and beliefs. This suggests that the Convention is an instrument that must evolve to ensure the effective protection of modern understandings of human rights. This is ultimately the approach adopted by the Court in its decision.\textsuperscript{103}

The UK Government in its submissions, presented by Louis Blom-Cooper, did not originally contest the Commission's point on dynamic interpretation. Instead it was argued that the absolute nature of Article 3 of the Convention lent itself to a high threshold before which a violation could be found.\textsuperscript{104} In reply, the Commission’s delegate again re-iterated its previous statement that the Convention should be interpreted dynamically.\textsuperscript{105} This time, however, the Commission’s delegate added a more constitutional justification, stemming from the drafting of the Convention saying:

"Therefore as it stands right now, it might well be the subject of a dynamic interpretation- a phrase which has been used now and again by the Commission. \textit{That also has its mainspring in the very drafting of the Convention itself}. The United Kingdom themselves conceded

\begin{flushleft}
\textsuperscript{102} Jacobs (n51) at 18.  \\
\textsuperscript{103} Tyrer (n2) at para 31.  \\
\textsuperscript{104} Tyrer Pleadings (n76) at 63.  \\
\textsuperscript{105} Tyrer Pleadings (n76) at 57.  
\end{flushleft}
during the hearing on the merits before the Commission that the Convention has to be construed in the light of present day thinking..."\[^{106}\] (emphasis added)

While it may have been understandable that during Mr Blom-Cooper’s first submissions (the delegate in respect of the United Kingdom) that he was unprepared to rebut the first submissions of the Commission on dynamic interpretation of the Convention\[^{107}\] He was given the opportunity to reply to these submissions. It was precisely at this point that Mr Blom-Cooper, on behalf of the UK Government, could have, and perhaps should have, contested this approach to Convention’s interpretation. However, he did not. Instead he indicated he had nothing more to add on behalf of the UK Government.\[^{108}\] This omission may suggest acquiescence to the Commission’s approach, enabling and perhaps even vindicating the Strasbourg institutions’ living instrument approach, and its importance to the Convention’s identity about to be expressed in its decision. As a result it can be argued that the Court was supported in its poorly explained use of the living instrument doctrine, by the UK’s tacit acceptance of a dynamic approach to Convention interpretation.

The other advocate before the Court on behalf of the UK was the Attorney General for the Isle of Man, J.W. Corrin. He addressed the Court on the Article 63(3) issue of local considerations.\[^{109}\] He mentioned the feeling of remoteness of the Manx people in relation to a foreign court\[^{110}\] and

\[^{106}\] Tyrer Pleadings (n76) at 86.
\[^{107}\] As was discussed earlier, the Commission’s original Report on this case was unclear both as to the living instrument nature of the Convention as well as the need for it to be interpreted dynamically, so it would not necessarily be easily foreseeable that this was the line of argumentation that would be adopted by the Commission in its submissions to the Court.
\[^{108}\] Tyrer Pleadings (n76) at 90.
\[^{109}\] It is likely that the impetus behind the Article 63(3) submissions was that Article 3 rights are absolute and so no margin of appreciation applies to them, so in effect this was an attempt to use Article 63(3) in order to benefit from a margin of appreciation in this case.
\[^{110}\] Tyrer Pleadings (n76) at 68, N.B this has resonance with the Lord Hoffmann’s argument about the constitutional appropriateness of a foreign Court deciding domestic issues of the United Kingdom, although it should be noted that Corrin was giving submissions on the basis of former article 63(3) and not the margin of appreciation. Hoffmann stated of the ECtHR: "It considers itself the equivalent of the Supreme Court of the
discussed at length the work of the democratic institutions (on the Isle of Man) which had retained judicial corporal punishment. Corrin also submitted that the Isle of Man was already legislating to ban other forms of judicial corporal punishment and that if a finding of violation of the Convention was made the Manx Government would legislate in conformity. This may have suggested to the Court that any finding of violation would be unlikely to face significant political opposition, thus enabling it to confidently give an adverse decision without fear of reprisals such as the non-renewal of the UK’s optional grant of individual petition. On this note we now turn to the Court’s judgment.

### 3.4.4 The Judgment of the Court

When the Court delivered its judgment, like the Commission, it found a violation of Article 3 of the Convention. As is well-known in the annals of Convention law the Court proclaimed:

“The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by developments and commonly

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**United States, laying down a federal law of Europe.** The clear thrust of this was that it should not be aggrandising its jurisdiction this way and imposing uniform standards on member States: See Hoffmann (n10) at 424.

**111** Paragraph four of the of the Convention preamble states: “Reaffirming their profound belief in those fundamental freedoms that are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other hand by common understanding and observance of the Human Rights upon which they depend;” (Emphasis added)

**112** Tyrer Pleadings (n76) at 80.

**113** Tyrer Pleadings (n76) at 81. As an aside it can be noted that this did not occur until 15 years after the judgment was given and after the UK withdrew the optional right of petition to the Commission from the Isle of Man (See: P Edge, ‘Dancing to the beat of Europe’, (1994) NLJ 770 at 770.)

**114** Although it should be noted that subsequent to the Tyrer decision, the UK withdrew the optional right to individual petition with respect to the Isle of Man in 1981. See : Edge (n100).

**115** The Court’s finding of violation of Article 3 in this case was by 6 votes to 1 (Sir Gerald Fitzmaurice dissenting).
accepted standards in the penal policy of the member states of the Council of Europe in this field."

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These words have been echoed throughout subsequent Convention case law. 117 However, having discussed the full proceedings leading to the Court’s decision, consideration of the judgment itself may prove more enlightening of the Court’s approach. This section also considers the quality of the explanation of the living instrument doctrine in order to set the scene for further of considerations which should be made when the doctrine is employed by the Court.

First, the Court quickly confirmed it had jurisdiction to hear the case. 118 On the main ground of the application, that judicial corporal punishment as applied to Anthony Tyrer violated Article 3 of the Convention and having considered the local requirements issue (Art 63), the Court found a violation of the Convention. 119 Consideration of the lone dissenting opinion of Sir Gerald Fitzmaurice will follow discussion of the majority’s judgment.

Coming directly to the issue of whether the judicial corporal punishment inflicted on Tyrer was degrading or not, the Court first swiftly dealt with Mr Corrin’s Article 63 contentions. The Court dismissed his argument that the treatment was not degrading because it had popular support on the Isle of Man, because such local support may, in part, have been due to its degrading nature. 120

116 Tyrer (n2) at para 31.
117 A more comprehensive review of these cases follows this chapter and a list of cases which include the phrase ‘living instrument’ can be found in appendix A of this study, however, some notable examples include: Van der Mussle v. Belgium (App.No. 8919/80) (EctHR 23 November 1983) at para 32; Soering v. The United Kingdom (App.No. 14038/88) (ECHR 07 July 1989) at para 103; Loizidou v. Turkey (Preliminary Objections) (App.No. 15318/89) (ECHR 23 March 1995) at para 71.
118 Tyrer (n2) at para 23.
119 Tyrer (n2) at para 39.
120 Tyrer (n2) at para 31.
Secondly, in relation to his point on the efficacy of the deterrent factor of corporal punishment, the Court found this to be an irrelevant consideration, stating “it is never permissible to have recourse to punishments which are contrary to Article 3 (Art. 3), whatever their deterrent value may be.”

Given the unqualified wording of Article 3, on the face of it this argument is broadly correct. This statement may also be viewed as showing the Court asserting its authority over this issue. Such a display is an important, affirmation of the Court’s legal legitimacy to rule on Convention law in the face of a democracy based challenge to its authority as was the case here.

The Court then went on to recall that the Convention is a living instrument as previously quoted. Let us pause to consider what the Court meant. It stated that it “...must also recall that the Convention is a living instrument” (emphasis added). The Court’s feeling that it must have had to recall the living instrument doctrine suggests that it felt compelled to treat the Convention this way, perhaps as the narrative of this chapter suggests, because it saw the Convention as a type of European Bill of Rights. As such, from that perspective at least, the Court’s expression of the living instrument did not need further explanation as it simply reflected the Convention’s status as a quasi-constitutional document. Indeed, given that this was the first time the Court had expressly stated that the Convention is a living instrument the Court’s failure to do what some might have expected and give a greater explanation and justification may fit in with this ‘constitutional’ narrative. In other words, given our discussion of possible constitutional viewpoint of the Convention, it may have thought it was ‘so obvious it goes without saying’ that the Convention is a living instrument. However, without the benefit of a more in-depth knowledge of Convention law this is far from the case and

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121 Tyrer (n2) at para 31.
122 Tyrer (n2) at para 31.
124 This has been suggested by Dr Ed Bates in his book: Bates (n4) at 329.
the Court should have been more clearly outlined its reasoning and approach. It is likely that this lack of explanation may have led to some of the confusion and controversy surrounding the Court’s evolutive interpretation today.¹²⁵

The Court, in reference to the Commission’s submission, stated that the Convention “…must be interpreted in the light of present-day conditions.” It indicated those ‘present-day conditions’ were the ‘developments and commonly accepted standards in the penal policy of member States of the Council of Europe’.¹²⁶ However, the Court failed to give any detailed analysis of the use of, or lack of use of, judicial corporal punishment within the existing CoE member States.¹²⁷ Neither was this to be found in the Commission’s Report or the pleadings of the case. Instead the Court only expressed scant consideration of this in connection with its discussion of Article 63(3) of the Convention. Here it simply said:

“…it is noteworthy that, in the great majority of member states of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times;”¹²⁸

The Court also noted that the legislation on the Isle of Man had been under review for many years.¹²⁹ This was in connection to the need for the Isle of Man to retain judicial corporal punishment as an effective deterrent against violent crime. However, the Court’s analysis failed to consider the reasons behind the lack of use of judicial corporal punishment. As Mr Corrin had submitted with respect to the UK, it was removed as a punishment because it was considered

¹²⁵ See chapter 1.5.
¹²⁶ Tyrer (n2) at para 31.
¹²⁷ For criticism of the Court in this regard see, Letsas (n5) at 76.
¹²⁸ Tyrer (n2) at para 38.
¹²⁹ Tyrer (n2) at para 38.
ineffective and not because it was degrading.\textsuperscript{130} This may have been the case for the other member States, but the Court expressed no consideration of this.

Coming back to the issue of consensus, it is also possible that the Court may have taken a strict numerical approach to member States’ abolition of this punishment, but, if so, it did not show this. Rather it stated vaguely that in the ‘great majority’ of member States corporal punishment was not used. If this was the case, the Court should have explained its approach more explicitly.\textsuperscript{131}

Alternatively, given the much smaller membership of the Convention at the time of \textit{Tyrer} (18 member States at the time of the communication of the Court’s decision, compared to 47 States today),\textsuperscript{132} the Court may have expressed an innate, subconscious understanding of European Society as it understood it.\textsuperscript{133} While this to some extent may have been reasonable at the time, despite its reference to the ‘great majority’ of States having no judicial corporal punishment, it submitted that this is too vague as to the approach the Court would take to interpret the Convention as a living instrument. As has been pointed out by George Letsas:

\begin{quote}
“...the Court never made clear how the notion of the ‘living instrument’, applied in the case at issue, led to a specific decision. There was no reference to Member States’ criminal law, no comparative study done on judicial corporal punishment and no attempt to establish that
\end{quote}

\begin{footnotes}
\item[130] \textit{Tyrer Pleadings} (n76) at 73.
\item[131] K Dzhetsiarou argues that this is one of the manners in which a court can ensure legitimacy of its judgment: K Dzehtsiarou and V Lukashevic, ‘Informed Decision Making: The Comparative Endeavours of the Strasbourg Court’, (2012) 30(3) \textit{Netherlands Quarterly of Human Rights} 272 at 276
\item[132] There were fifteen member States at the time of the application being accepted by the Commission on Human Rights how three States subsequently ratified the Convention prior to the Court’s decision (France, Greece and Switzerland).
\item[133] By this I mean the member States of the Convention at the time of the judgment.
\end{footnotes}
the abolition of corporal punishment is a commonly accepted standard in the Council of Europe.”

As such, the Court had presented the living instrument doctrine to the world at large, but failed to demonstrate how it worked and would work in the future. With the benefit of hindsight and with the growth of Convention membership to 47 member States today, this ‘innate, subconscious understanding’ approach is unlikely to exist sufficiently and further explanation was needed going forward in the Court’s subsequent case law to avoid damaging the perceived legitimacy of the Court’s newly enunciated doctrine. After all, unlike the US Supreme Court discussed in chapter 2, the ECtHR does not preside over States of relatively similar cultural and legal approaches, so it should arguably seek both to find and communicate greater justification for its evolutive decisions.

The Court also noted that public awareness of the punishment, may be relevant in assessing whether a punishment was degrading, but the absence of public awareness would not, of itself, stop a punishment being degrading. In this regard it stated that “…it may well suffice that the victim was humiliated in his own eyes, even if not in the eyes of others.” This legal standard is in-line with the contemporary practice of the UN. The Court continued to note that:

134 Letsas (n5) at 76.
135 Further case law enunciation which as will be shown in chapter 4, has sadly not so far provided sufficient explanation of the consensus methodology the Court uses to justify its living instrument approach. See also K Dzehtsiarou, ‘European Consensus and the Evolutive interpretation of the European Convention on Human Rights’, (2011) 12(10) German Law Journal 1730.
136 Tyrer (n2) at para 32.
137 Tyrer (n2) at para 32.
138 It is sufficient that the victim feels reduced in stature by being subordinated to the authority that issued the punishment. For more in-depth comparative analysis on Torture, inhuman and degrading treatment see: M Nowak, ‘What Practices Constitute Torture US and UN Standards’, (2006) 28(4) Human Rights Quarterly 809 and for more discussion of Nowak’s acknowledgement of role of ‘powerlessness’ see specifically at 832-833.
“The very nature of corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that ... constituted an assault on precisely that which is one of the main purposes of Article 3 (art. 3) to protect, namely a person’s dignity and physical integrity.”139

This approach to considering the dignity of the individual is an important insight into the Court’s thinking about the object and purpose as a human rights treaty. It is a clear departure from the more fundamental but restrictive vision of the Convention’s mission of protecting only against the atrocities seen in World War 2, and suggests a more progressive and potentially expansionist role for the Convention. It would ar that the living instrument doctrine would appear to play a key role.140

The Court’s approach to dealing with the Article 63(3) submissions lent itself to confirming how it saw the Convention as a type of European Bill of Human Rights.141 Here it noted that there was no evidence to suggest that law and order could not be maintained without this form of punishment142 and then noted:

“The Isle of Man not only enjoys a long-established and highly-developed political, social and cultural traditions but is an up-to-date society. Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as

139 Tyrer (n2) at para 33.
140 The Court also decided that the offence for which the punishment was given was irrelevant to Article 3. (Tyrer (n2) at para 34.)
141 See: Tyrer (n2) at paras 38-40.
142 Tyrer (n2) at para 38.
sharing fully that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble to the Convention refers.”

This enabled it to explain that Article 63(3) was designed in consideration of the less developed colonies that some members States were responsible for. In these cases it might not be possible for the Convention to fully apply to them, but this was not so for the Isle of Man. This reference to the ‘European family of nations’ and the Convention preamble, may indicate that the Court perceived the Convention is an instrument of western European tradition and democratic values, for which the Isle of Mann formed a part. The Court accordingly found a violation of Article 3. This may suggest it was promoting the ideals of liberal democracy and human rights emanating from the Convention and interpreting its clauses to promote maximum development of those values. As such the Court was refusing to interpret Article 63(3) as allowing member States to simply choose not to maintain the substantive rights in their dependent territories, but instead may have read the clause as allowing for inability to meet Convention standards due to developmental reasons alone.

Summing up, the Tyrer judgment on its own expressly tells us very little about the Court’s vision of the Convention as a living instrument, other than that it must be adaptable to changing circumstances based on commonly accepted standards. It is possible that this judgment represents an example of the Court’s gradual aggrandisement of its constitutional position into a quasi-constitutional Court. This may have been encouraged by several events including Max Sorensen’s speech in 1975, development of key case decisions advancing Convention principles.

143 Tyrer (n2) at para 38.  
144 Tyrer (n2) at para 38.  
145 Tyrer (n2) at para 39-40.  
146 See Tyrer (n2) at para 31.  
147 Sorensen (n13).
and political events including the UK’s renewal of the right to individual petition to the Court for 5 years in January 1976. It may also be helped by the affirmation of the CJEU affirming the position of the fundamental importance of European human rights as “an integral part of the general principles of law” in its Nold decision of 1974. Given the pre-Tyrer case law discussed in the first part of this chapter, it could be that the Court already viewed itself as something more than just an international court ruling on an ordinary international treaty and these events emboldened it to express this a little more confidently in the Tyrer case. Alternatively these events may have encouraged the Court to start seeing itself this way with the living instrument doctrine a logical extension of this more vitalized view of the Convention. However, coverage in the media at the time, including opinion pieces, suggest that this was not how the Court’s decision was understood outside Strasbourg circles at the time. This misunderstanding led to some criticism that the Court was illegitimately imposing its own view in place of the democratically elected parliaments of the member States. However, reportage in The Times newspaper the day after the Court’s judgment was communicated indicates a reserved response from the then Home Secretary, Mr Merlyn Rees although in due course the UK failed to renew the right of individual petition for the Isle of Man. Academic reaction to the decision was few and far between, but was again critical not of the living instrument doctrine per se but of the Court’s explanation of its reasoning.

148 E.g. Golder (n100) and Engel and others v. The Netherlands (App.Nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72) (ECtHR 8 June 1976).
149 For an excellent chronological summary of key events in the history of the ECHR between 1948-1998 see Bates (n4) especially at 531-540, especially at 534-536
150 Case 4/73, Nold v. Commission [1974] ECR 491, while the decisions of the CJEU are not binding on the Court, it has been recognised that the Court will consider the approaches of other international judicial bodies in its decision making process. See: R Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, (2006) 55(4) ICLQ 791 at 803.
153 Edge (n113).
The *Tyrer* decision was not unanimous. Sir Gerald Fitzmaurice took a view akin to Mr Mangan’s (before the Commission), that it is for member States to amend the Convention.\(^{155}\) An exploration of the Sir Gerald’s lone dissent follows.

### 3.4.5 A Different View of the Convention? - Sir Gerald Fitzmaurice’s Dissent in *Tyrer v. UK*

As mentioned, the British judge at the Court, Sir Gerald Fitzmaurice, who was well-known for his conservative views, dissented from the majority’s view. He is well-known for his conservative views on the Convention, so this was not a surprise.\(^{156}\) However, His dissent in *Tyrer* is illustrative of a different vision of the Convention, one that is altogether more restrained than the majority’s.

Like the majority, Sir Gerald quickly dismissed the proposition that the applicant had suffered torture or inhuman treatment.\(^{157}\) He then went on to state that his reasoning was specific to the case of juveniles and not adults.\(^{158}\) He then expressed doubts on the absolute nature of the prohibition on torture and inhuman and degrading treatment.\(^{159}\) He stated that this was because it would be impossible to render a static definition of these terms, but also suggested that this does not leave them entirely to judicial determination.\(^{160}\) What can be inferred from this is that Sir Gerald held a more minimalist view of the role of Court in interpreting the Convention than the majority. Sir Gerald’s view may be more akin to interpreting the treaty as an ordinary international treaty and not a quasi-constitutional document. However, this did not amount to a disavowal of the Convention

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\(^{155}\) Dissenting Opinion of Sir Gerald Fitzmaurice in *Tyrer* (n2) at para 14.

\(^{156}\) See e.g. JG Merrills, *The Development of International Law By the European Court of Human Rights*, (Manchester University Press, 1993 2nd Edn) at 244-245.

\(^{157}\) Dissenting Opinion of Sir Gerald Fitzmaurice in *Tyrer* (n2) at para 1.

\(^{158}\) Ibid at para 2. Further discussion of this point will take place later in this section.

\(^{159}\) Ibid at para 3.

\(^{160}\) Ibid.
as a living instrument. Instead it suggests Sir Gerald may have viewed Convention evolution as possible, but with a more limited application.

Sir Gerald’s dissent disagreed with the majority’s use of the living instrument doctrine mainly on the grounds of the classification of the treatment. His opinion did not, in contrast to the majority, make use of living instrument terminology. However, his it suggested a disagreement with the majority’s application of the doctrine by present assertions that are not amenable to it within the context of the Tyrer case. For example, after he finished evaluating the majority’s analysis of the punishment he stated:

“Modern opinion has come to regard corporal punishment as an undesirable form of punishment; and this, whatever the age of the offender. But the fact that a certain form of punishment is an undesirable form of punishment does not automatically turn it into a degrading one.”\(^{161}\)

Sir Gerald had previously opined that:

“As regards torture and inhuman treatment, further reflection on the Irish case\(^ {162}\) has led me to doubt whether it is either practicable or right to regard these notions – (and the same

\(^{161}\) ibid at para 11.

\(^{162}\) Ireland v. The United Kingdom (App.No. 5310/71) (ECtHR 18 January 1978).
would apply to those degrading treatment or punishment) – as having the absolute and monolithic character which, on a literal reading of Article 3 (art. 3), they appear to have”

His previous statement on the desirability of corporal punishment suggested that he was reluctant to view the potential of the living instrument doctrine as being as extensive as the majority seemed to. However, it is possible that his dissent could be read in the context of a simple disagreement about the application of the doctrine in the case at hand. He may instead have been saying that ‘undesirable’ and ‘degrading’ are different, and the mere dislike of something does not make it degrading in a legal sense. He would presumably dismiss the majority’s reliance on modern penological standards as irrelevant. Sir Gerald’s disavowal of ‘modern opinion’, much like Mangan’s views, suggests he considers the role of changing the standards of protection offered by the Convention as primarily for the member States.

Sir Gerald’s dissent was mainly directed to the point that he disagreed that birching carried out on juvenile offenders was degrading, he did give some indications that he did not agree with the Court’s living instrument approach in the facts of the specific case. Most telling of all was when gave his final concluding sentence:

“The fact that a certain practice is felt to be distasteful, undesirable, or morally wrong and such as ought not to be allowed to continue is not sufficient ground in itself for holding it to

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163 Dissenting Opinion of Sir Gerald Fitzmaurice in Tyrer (n2) at para 3.
164 ibid at para 11.
165 The Majority spoke of being influenced “...by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe”- Tyrer (n2) at para 31.
166 It might well be inferred from Sir Gerald’s opinion that had the matter concerned an adult offender that he might have concurred that this constituted degrading treatment pursuant to Article 3 of the Convention.
be contrary to Article 3 (art. 3)... Any other view would mean using the Article as a vehicle of indirect penal reform, for which it was not intended.”  

This warns that if the judges interpret Convention terms differently to their original meanings, they risk indirectly legislating, which is illegitimate for any court, especially an international court. This is an early indication of Fitzmaurice’s misgivings towards the Court’s evolutive interpretation; his later dissents are more scathing and will be considered shortly. Ultimately they show that Sir Gerald may have held a different view on the role status of the Convention which may, to some extent, resonate with some of the previously mentioned backlash against the Court today.

### 3.6 Marckx and Dudgeon: The classic Tyrer follow on cases

Having discussed the important Tyrer litigation in full it would be remiss not to briefly discuss two cases that are often discussed alongside it in academic literature. These are the well-known cases of Marckx v. Belgium and Dudgeon v. UK. Neither of these cases recalled that the Convention is a ‘living instrument’ in the manner the Court did in its Tyrer judgment but both took what is clearly

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167 Dissenting Opinion of Sir Gerald Fitzmaurice in *Tyrer (n2)* at para 14.
168 Hoffmann (n10) at 431
169 E.g. Dissenting Opinion of Sir Gerald Fitzmaurice in *Marckx v. Belgium* (App.No. 6833/74) (ECtHR 13 June 1979) at para 9, see also paras 7-8
170 See above chapter 1.5.
an evolutive approach. Coming within three years of the final *Tyrer* decision they were and still are of great importance in securing evolutive interpretation into Convention law, so much so that it has been said by Egbert Myjer, former ECtHR judge with respect to the Netherlands (2004-2013) that they form part of the ‘acquis’ of the Court’s case law.\(^{174}\)

*Marckx v. Belgium* concerned the maternal affiliation of children born out of wedlock. Coming just over a year after *Tyrer* it has been commented that it provided a power example “…of law reforms prompted by Strasbourg on the basis of evolutive interpretations of the Convention.”\(^{175}\) As stated this case concerned the Belgian laws regulating the legal status of children born out of wedlock and the consequent effects on family law and inheritance rights, resulting in purported discrimination between children borne out of wedlock and those borne in wedlock. As such the key issues at stake were alleged violations of Article 8 both in conjunction with Article 14 of the Convention and on its own (the rights to respect for private and family life and non-discrimination in the enjoyment of Convention rights respectively.)

As previously mentioned, the Court in *Marckx* did not use the words ‘the Convention is a living instrument’, as it did in *Tyrer*, but that does not mean it was not taking an evolutive approach. The Court made reference to the need expressed in *Tyrer* to interpret the Convention “…in the light of present-day conditions”.\(^{176}\) The Court then immediately went on to state:

“In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is

\(^{174}\) *Dudgeon* (Ibid.)

\(^{175}\) *Bates* (n4) at 333.

\(^{176}\) *Marckx* (n169) at para 41
continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim "mater semper certa est".  

While the Court unfortunately gave no further discussion of the evolution of the member States’ domestic law, it went on to cite two international treaties (The Brussels Convention of 12 September 1962 on the Establishment of Maternal Affiliation of Natural Children and The European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock), whilst noting their low levels of ratification. However, negating the relevance of the low level of ratification of these treaties the Court said:

“However, this state of affairs cannot be relied on in opposition to the evolution noted above. Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality between "illegitimate" and legitimate" children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.”

The Court after applying this to the facts of the case went on to find multiple violations of Article 8, and 14 in Conjunction with Article 8. The Court’s use of two international treaties that had low levels of ratification and failure to discuss member States’ domestic laws in this area suggest, perhaps, some kind of un-enunciated motive or reasoning behind the Court’s particular decision.

177 ibid
178 ibid. See also: M Forowicz, The Reception of International Law in the European Court of Human Rights, (Oxford University Press 2010) at 11.
in this case. Unfortunately, the Court’s failure to communicate this reasoning suggests problems in the Court’s dialogue with the member States, something for which will be addressed later in chapter 6. However this case is also known for the well-known dissent of Sir Gerald Fitzmaurice, who one may recall was the dissenting judge in *Tyrer*. Fitzmaurice in a stinging dissent took issue with the majority’s evolutive interpretation of the Contents of Article 8. It is worth quoting parts of his dissent extensively as they reflect some of the sentiment in the vitriol against the Convention discussed in chapter 1.179 A very good example of the approach of Sir Gerald is his statement:

“*It is abundantly clear (at least it is to me) - and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view - that the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the “domiciliary protection” of the individual. He and his family were no longer to be subjected to the four o’clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delaying and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephonetapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another, - in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many*”

179 See above chapter 1.5.
countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life ... home and ... correspondence" were to be respected, and the individual endowed with a right to enjoy that respect – not for the regulation of the civil status of babies.”

This quote reflects the originalist approach of Sir Gerald more clearly than his dissent in *Tyrer*. This quote also shows the split between the two competing approaches to Convention interpretation between a more originalist approach and a more ‘constitutional’ and teleological approach as described in the previous chapter. However, it also is interesting because ultimately it reveals that it is the majority’s evolutive approach that ultimately has had greater effect on Convention case law. This case has also been criticised for its consensus explanation, which will be discussed further in the next chapter.

The second of the two cases mentioned, *Dudgeon v. UK* concerned an infringement of the applicant’s right to respect for his private and family life (Article 8) and also discrimination in his enjoyment of that right (Article 14 in conjunction with Article 8). This was allegedly caused by the criminalisation of certain homosexual activity between consenting adults in Northern Ireland. There was no dispute from the Government that the criminalisation of these acts

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180 Dissenting Opinion of Sir Gerald Fitzmaurice in *Marckx (n169)* at para 9, see also 18.
181 By this I mean interpretation in line with the meaning the words of the treaty would have had in the linguistic and social context when they were drafted. For a succinct explanation of this approach see *Letsas (n5)* at 60.
182 Dissenting Opinion of Sir Gerald Fitzmaurice in *Marckx (n169)*.
183 See above chapter 2.4.
184 See chapter 4.2.2.
185 *Dudgeon (n173).*
constituted an interference with the applicant’s private and family life, however, contested that they were justified under Article 8(2) as ‘in accordance with the law’ for the aim of the protection of public morals in Northern Ireland. While these aspects of the second paragraph of Article 8 were not disputed by the parties, the requirement that they be necessary in a democratic society was at issue. The Court in this case said:

“The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8.”

The Court then went on to note that:

“According to the Court’s case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued.”

In coming to its finding of a violation of the Convention in respect of Article 8, and most relevant to the purposes of this study, the Court reasoned:

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186 Dudgeon (n173) at para 52.
187 Ibid at 53.
“As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States”188 (emphasis added)

With the Court noting that the respondent State had not shown that the prohibited conduct had been injurious to moral standards in Northern Ireland. As such it rejected that there was a pressing social need for the prohibition of homosexual acts between consenting adults over the age of 21 and that arguments in favour of retention of the prohibition were outweighed by the detrimental effects on homosexuals. So the Court ruled that there was a breach of Article 8 of the Convention.189

While the Court did not make an express statement that the Convention is a living instrument, as it did in Tyrer, it is quite clear from the Court’s explanation that these were evolutive interpretation cases. However, like as with Tyrer, the Court’s explanation of consensus methodology with respect to both of these cases has been strongly criticised.190 An account and analysis of the criticisms of these cases will be forthcoming in the chapter 4 which makes up the

188 Ibid at para 60.
189 Ibid at para 63. The Court consequently went on to deduce that the substance of the alleged violation of Article 14 in conjunction with Article 8 amounts to, in effect, the same complaint as the Article 8 complaint and so deemed it unnecessary to examine this issue. (at paras 69-70)
190 See e.g. Letsas (n5) at 79.
first chapter of the second part of this study. However, an important lesson to be gained from these cases, especially in the context of this chapter, is that almost immediately after Tyrer the living instrument doctrine was strongly adopted by the Court. It would seem that Tyrer was not seen as a one off, and that can be borne out in the doctrine’s continuing presence in the Court’s case law.

3.5 Conclusion

It appears that the Court’s judgment in Tyrer is the final crystallization of the living instrument philosophy into an expressly recognised doctrine by the Court. It can be seen as a part of a process of growth of the Court’s authority and Convention understanding, but, as we have seen, it did not mark the sudden creation of the living instrument doctrine. As early as 1975 it was shown that the concept of the Convention as a living instrument was being discussed in Strasbourg circles. It is also evident, as demonstrated by the Court and the Commission’s pre-Tyrer case law, that the Convention was already being interpreted creatively and expansively well before Tyrer. As such Tyrer can be seen as a milestone in a continuum of the Court’s case law explanation of its interpretative approach. It represents a welcome acknowledgment that the Court views the Convention as capable of evolving, but nonetheless was not clear on the nature of the living instrument doctrine itself. Whilst Tyrer may be an important stitch in the fabric of Convention development, the way that stitch was sewn was problematic to the perceived legitimacy of the doctrine.

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191 However, see also Letsas (n5) at 76-79.
192 Sorensen (n13).
193 E.g. Lawless (n15); Wemhoff (n17); Belgian Linguistics case (preliminary Objections) (n23); Belgian Linguistics case (Merits) (n23); Golder (n31) and East African Asians Case (n40).
194 See e.g. Bates (n4) especially at 155.
As has been discussed in this chapter, the Commission’s decision in Tyrer did not utilise living instrument terminology, instead it considered previous inter-state cases on torture and inhuman treatment finding them irrelevant to Tyrer’s situation.\textsuperscript{195} While the Commission’s Report showed indications of Convention evolution (as regards the level of protection of Article 3), it was more akin to distinguishing the circumstances thus giving little notice of the dynamic approach it expressly advocated in its oral pleadings.\textsuperscript{196} Also the Commission’s dismissal of the Article 63(3) point was poorly explained, merely stating that the Isle of Man was similar to the UK.\textsuperscript{197} This might suggest the Commission was taking an approach akin to the adjudication of the Convention as a constitutional document,\textsuperscript{198} but it was far from transparent if this was the case.\textsuperscript{199}

When the case reached the oral pleadings stage before the Court, as noted, the Commission was express in its desire for the Court to take a dynamic approach.\textsuperscript{200} If this was the Commission’s approach previously, it should have clearly said so. More importantly, however, why did the UK Government submissions not attempt to rebut this? If, as discussed in the previous chapter, the member States have a powerful role in legitimating Court decisions, the UK’s acceptance of dynamic interpretation suggests it saw it as substantively legitimate and was accepting a more constitutional-like role for the Court and the Convention. In this context it is perhaps understandable that the Court felt confident to go on and expressly introduce the living instrument doctrine into Convention jurisprudence.

\textsuperscript{195} See text accompanying n85.
\textsuperscript{196} \textit{Tyrer Pleadings} (n76) at 57.
\textsuperscript{197} \textit{Tyrer Commission Report} (n77) at 47.
\textsuperscript{198} I.e. creative, robust or what might possibly be described as activist.
\textsuperscript{199} On transparency as an aspect of process legitimacy see: Dzehtsiarou and Lukashevic (n131) at 276
\textsuperscript{200} \textit{See Tyrer Pleadings} (n76) at 57.
Nonetheless the Court’s Judgment failed to explain the juridical foundations of the living instrument doctrine. This stands in contrast to the CJEU’s approach in *Costa v. ENEL*[^201] and *Van Gend En Loos*,[^202] which, as discussed in chapter 2,[^203] explained that direct effect and supremacy were essential to the functioning of EU law. Because judgments are technically only binding on the parties before the Court, the Strasbourg Court’s lack of justification of the living instrument doctrine might be excused in this situation given the UK Government’s acquiescence to the Commission’s point that the Convention should be interpreted dynamically.[^204] However, as the Court generally follows its previous decisions[^205] so the judgment indirectly bound other member States. More importantly, as the doctrine was of general application to interpretation of the Convention it was likely to, and subsequently as will be shown, has, had effects in future Convention cases. As such the need to fully explain the reasons that the Convention is a living instrument remained[^206].

Indeed such was the lack of explanation in *Tyrer* that some post-judgment newspaper editorials criticised *Tyrer* based on what is arguably the misconception that the Court was imposing its opinions on member States. It should be noted that the decision led to the UK Government not renewing the individual right of petition for the Isle of Man.[^207] However, Jochen Frowein, who had been a member of the Commission at the time, reported that it was generally recognised ten years ago.

[^201]: Case 6/64 *Costa v ENEL* [1964] ECR 588
[^203]: See chapter 2.2
[^204]: See *Tyrer Commission pleadings* (n76).
[^206]: See Letsas (n5) at 76.
later as the right approach. So while the decision was unpopular at the time, with the benefit of hindsight it can be said to be viewed as the right approach in principle.

Tyrer’s living instrument statement taken in the context of the discussion of the previous chapter may be seen as emblematic of the Convention’s evolution towards a constitutional-like status. However, it failed to fully justify why the Convention is a living instrument and also to what extent the Convention might evolve in the future. It also failed to enunciate whether the Convention might evolve ‘downwards’. Overall, however, the main criticism of the Court must be that must be the opacity with which it developed in the annals of Convention law and thus seemed to ‘suddenly emerge in the Tyrer case. The next part of this thesis goes on to consider the Court’s evolutive interpretation methodology and whether there are limits to the living instrument doctrine. On the basis of what appears to be the Court’s rationale for finding an evolution of the Convention i.e. a consensus among the member States with regards to the appropriate substance of a Convention right, the second part of this study will also question whether evolutive interpretation may lead to a reduction in the substance of the Convention.

209 With a few exceptions, the living instrument doctrine has been accepted at some level even by people sceptical of the Strasbourg system. See e.g. J Sumption, ‘The Limits of Law’ (27th Sultan Azlan Shah Lecture, Kuala Lumpur November 2013) at 7 (See also chapter 1.2).
210 By this I mean whether the Convention might evolve in a way that might seem to reduce substantive protection offered by the Convention.
Chapter 4- Evolutive Interpretation and its Limits

“The notion that judges have unlimited discretion to operate as makers and re-makers of social policy at their whim offends the ‘rule of law’, the ideal of ‘law’ as an independent force.”

“Entrusting to Judges a task of evolutive interpretation should not mean that the floodgates are opened, that the judges are given carte blanche to push forward the frontiers of progress according to their own personal notions of justice”

Paul Mahoney, Principal administrator of the European Court of Human Rights

4.1 Introduction

The previous part of this thesis provided an in-depth analysis of both the controversy surrounding the genesis of, and the legitimacy and status of the Convention as a living instrument. We saw that in the Tyrer case, the Court for the first time expressly recognised the Convention is a living instrument in such terms. However, in that case the Court, perhaps understandably, did not lay out a clear working model for the living instrument doctrine, nor did it explain the limits of evolutive interpretation. This chapter addresses concerns about Strasbourg’s use of the living instrument by providing an explanation and critique of the Court’s approach to finding commonality in the legal engagements of the member States, otherwise called its consensus methodology, and how this

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2 Ibid at 68.
3 Paul Mahoney is now the judge in respect of the United Kingdom at the European Court of Human Rights.
5 Ibid at para 31.
impacts on its evolutive interpretation. It also considers the limits to evolutive interpretation both
through the Court’s consensus model (consensus or rather the lack of consensus itself being argued
as one potential limit to evolutive interpretation) and in general. The overall argument will be that
assuming, as concluded in the previous chapter, the living instrument doctrine per se is legitimate,
then consensus is, perhaps, the best model for finding evolution whilst respecting State sovereignty.
However, it shall also be argued that the Court has to date left its consensus methodology
somewhat unclear and risks leaving member States confused as to the rationale behind individual
evolutions of Convention law and thus improvement is needed.

The second part of the chapter then considers the potential limits to evolutive interpretation. It
explains that the Court has already shown that the Convention cannot evolve to encompass wholly
new, free standing rights, even if in theory its upward evolution of existing rights is unlimited. This
does not, however, include interpretation of new and previously unforeseeable situations like the
invention of IVF treatment. It will be shown that, the consensus model the Court uses to identify
and justify evolutive findings also acts as a soft restraint to continued evolution. Finally, Part three of
the chapter considers how the margin of appreciation doctrine may restrain the operation of the
living instrument doctrine. In light of the Court’s A, B and C v. Ireland case the author suggests that
contrary to previously expressed views the living instrument doctrine and margin of appreciation
document, although sharing significant overlap, are in fact wholly independent doctrines. As such,
where sufficient consensus among member States exists for Convention evolution, the margin of
appreciation doctrine may still act to block a finding of a violation in certain circumstances. The
limits to evolutive interpretation then ensure a degree of protection from judicial activism by the

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7 See e.g. DJ Harris, M O’Boyle, EP Bates and CM Buckley, Harris, O’Boyle & Warbrick: Law of the European
8 Evans v. United Kingdom (App.No. 6339/05) (10 April 2007) at para 81.
9 A, B and C v. Ireland (App.No. 25579/05) (ECtHR 16 December 2010) GC. See also S Krishnan, ‘What’s the
Consensus? The Grand Chamber’s Decision on Abortion in A, B and C v. Ireland’, (2011) EHRLR 200. See also
Harris, O’Boyle, Bates and Buckley (n7) at 533.
10 See e.g. Harris, O’Boyle, Bates and Buckley (n7) at 11-12.
Court, reassuring member States and ensuring the Convention conforms to the international law norm of State sovereignty.

4.2 Evolutive interpretation: The Court’s Use of Consensus and the Sources it considers

For the reader’s benefit, in order to give an account of the Court’s consensus methodology, this part of the chapter will be broken down into four constituent sections. The first will concern the consideration of domestic legislation and practice that is common to the member States. The second section will examine the effect of mutual international treaty obligations and their interpretations on the Court finding or not finding consensus. The third part will assess the debates and resolutions of the Council of Europe and how they may or may not demonstrate a common position amongst the member States. Finally the fourth section of this part of the chapter will consider the Court’s examination of changing social norms and perceptions among the member States in assessing the possible evolution of the Convention. However, before launching into an account of the Court’s use of consensus within its case law, the following gives an important introduction to some of the existing literature on Strasbourg’s consensus methodology and its relevance and justification.

In utilising the living instrument doctrine, the Court has from an early stage of its expression adopted a consensus methodology.\textsuperscript{11} \textit{Tyrer v. UK} made it clear that “commonly accepted standards”\textsuperscript{12} would

\begin{footnotesize}
\textsuperscript{11} There is a large literature on the Consensus doctrine, both in relation to its use by the Court’s evolutive interpretation and with respect to the margin of appreciation doctrine. The leading works include: E Benvenisti, ‘Margin of Appreciation, Consensus and Universal Standards’, (1999) 31 \textit{International Law and politics} 843; K Dzhetsiarou, \textit{European Consensus and the Legitimacy of the Strasbourg Court}, (Cambridge University press, 2015); L Helfer, Consensus, Coherence and The European Convention on Human Rights’, (1993) 26 \textit{Cornell International Law Journal} 133; L Helfer, ‘Nonconsensual International Law Making’, (2008) 1 \textit{University of Illinois Law Review} 71; G Letsas, ‘Two Concepts of the Margin of Appreciation’, (2006) 26 \textit{OJLS} 705; Mahoney (n1); Mowbray (n5). See also: Harris, O’Boyle, Bates and Buckley (n7) at 102
\end{footnotesize}
influence the Court’s living instrument approach. This is potentially problematic for an international Court. It has been argued by Dzehtsiarou, a leading commentator on the Court’s use of consensus, that:

“The ‘counter-majoritarian difficulty’ in the context of the ECtHR is complicated by its international character. The Court can produce legitimate rulings only in areas delegated by the States. In newly litigated areas States can claim the ruling was illegitimate and may refrain from executing the ruling.”

So in-line with this thinking, results stemming from the exercise of the living instrument doctrine are inherently contentious. The legitimacy of international law was traditionally considered bound to States’ consent. From this, a problem arises in the ECHR context. This tension is succinctly put by Laurence Helfer who says:

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12 *Tyrer* (n4) at para 31.


14 Prior to this quotation Dzehtsiarou explains the Counter majoritarian difficulty by stating: “This difficulty relates to the fact that, in systems with judicial review of legislation, non-elected judges are able to question a decision made by a democratically elected representative organ.” - Dzehtsiarou (2011) (n13) at 536.

15 Dzehtsiarou (2011) (n13) at 536.

“This commitment to protecting individual rights is, however, in constant tension with
deferece to national decision-makers. Therefore the [Court] must develop persuasive
justifications for intruding into the Contracting States’ sovereignty.”¹⁷

So it is important for the Court to utilise a persuasive methodology to justify the States’ consent to
any evolutive change to the scope of the Convention. Of the consensus method, Judge Ranate Jaeger
has said:

“It is easier for the State to accept the judgment if the judgment is based on good practice of
other States.”¹⁸

So we find a rationale for consensus methodology in convincing member States to follow the Court’s
judgments despite the reported lack of coercive force to enforce its judgments.¹⁹ This view of
consensus’ rationale would fit in with the suggestion in chapter 2 that the Convention benefits from
a form of persuasive constitutional force. This then enables the Court to find a State in violation of
the Convention while still respecting the contours of State sovereignty. In doing so, the Court’s
judgments may benefit from a greater perception of legitimacy from the perspective of the member
States collectively. In further support of the prevalence of the Court’s comparative approach is
Christopher McCrudden who notes:

International Law Journal 133 at 141.
¹⁸ K Dzehtsiarou, Interview with Judge of the ECHR Renate Jaeger (European Court of Human Rights,
Strasbourg, 2010) quoted in Dzehtsiarou (2011) (n13) at 545.
¹⁹ See Dzehtsiarou (2011) (n13) at 534; F De Londras, ‘Dual Functionality and Persistent Frailty of the European
of Human Rights?’, (2002) 23(5) HRLR 161 at 164 and Helfer (n17) at 137.
“Indeed, the comparative method is there explicitly built into the fabric of judicial decision-making.”

However, while the consensus theory as set out above enjoys widespread prominence in Convention literature and case law, commentators such as Professor Eyal Benvenisti and Professor George Letsas have been less persuaded.

Professor Benvenisti, who himself was later relied quoted by Letsas, criticises The Court’s approach to consensus in the following terms:

“Even if we trust judges at the helm, the [consensus] doctrine they use is flawed. It is flawed from a theoretical perspective and harmful from a practical one. From a theoretical perspective, this doctrine can draw its justification only from nineteenth-century theories of State consent. Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of emerging custom, or “consensus.” By resorting to this device, the Court eschews responsibility for its decision. But the Court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of

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sovereignty, and national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities.”

However, as we shall see later in this chapter, this position does not always accord with the Court’s case law. The statement may suggest that, the Court in making evolutive findings is acting illegitimately in all but the rarest of living instrument cases or that the Court’s evolutive interpretation is similar to, but different from the international customary law approach.

Letsas, however, takes a moral reading of the Convention. He summarises the Court’s consensus ideology in the following terms:

“...it is felt that the Court should not rush into finding the majority of states in breach of the Convention whenever there is a new evolving standard. Rather it should first warn them that a new standard is evolving and allow them time to reform their policies gradually, in line with present-day conditions.”

With respect to Convention rights he argues that:

“Legality insists that the benefit of moral principles that justify these rights must be extended equally to all.”

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23 Benvenisti (n11) at 852.
24 Letsas (n22) at 79.
25 ibid at 123.
26 ibid at 124.
It is true that the Convention specifically includes a clause to prohibit discrimination in the enjoyment of Convention rights (Article 14), but the extent of Letsas’ reading seems to conflate this with a reading of Convention rights overall. With regards to the situation of transsexuals Letsas’ suggests that the real moral reasoning behind the victories of the applicant in Christine Goodwin v. UK27 - a case in which the Court seemed to place less reliance on the consensus principle - was the notion that if heterosexual couples should be able to get married according to Article 12 then transsexuals should not be discriminated against because of their socially spurned position.28 Letsas elsewhere has also spoken of the Marckx29 and Dudgeon30 cases as examples where the Court’s approach revealed something other than a consensus methodology as being the primary engine behind its evolutive interpretation. Of the Dudgeon case Letsas cites the following passage from the 1981 case:

“As compared with the era when the legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in

27 Christine Goodwin v. United Kingdom (App. No. 28957/95) (ECtHR 11 July 2002). This will be discussed further in this chapter but for present purposes in this case the Court placed less emphasis on its consensus methodology, given that little had changed among the member States since the previous case on the same issue of recognition in official records of post-operative transgender identity in the case of Rees v. United Kingdom (App.No 9532/81) (ECtHR 17 October 1986).
28 Letsas (n22) at 124.
question as in themselves a matter to which the sanctions of the criminal law should be applied.”

He then states:

“Though there is an apparent effort in the quoted passage to base its reasoning on what is now believed in the great majority of member states, it is equally striking that the Court takes contemporary understanding in member states to be better and not merely different from that at the time when anti-homosexual legislation was enacted.”

Letsas argues that:

“[t]he above cases [of Marcx and Dudgeon] suggest that the Court was primarily interested in evolution towards the moral truth of the ECHR rights, not in evolution towards some commonly accepted standard, regardless of its content.”

So from this brief introduction to consensus it is clear that there are, at least, two opposing schools of thought about evolutive interpretation: the consensus school and the moralist (Letsas) school of thought. Throughout the descriptions of the Court’s consensus methodology it will become clear

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31 Dudgeon v. UK (n30) at para 60.
32 The passage quoted immediately above. See quote to n24.
33 Letsas (n33) at 531.
34 Ibid. It should be noted that Professor Letsas' view is controversial and his subsequent writing that follows the same theme of moral truth has been criticised. See K Dzehtsiarou, ‘Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), Constituting Europe: The European Court of Human Rights in a National, European and Global Context (Book Review)’, (2014) 14(1) HRLR 167-171 at 169-170.
that the author, although noting merits in the latter school of thought in explaining some of the deficiencies in the Court’s case law, broadly speaking favours the former school of thought. Put simply the Court’s emphasis on its consensus methodology both in the operation of its living instrument doctrine and margin of appreciation doctrine suggests that, at least in its explanation, it generally takes a consensus finding approach to the living instrument doctrine. However, the existence of divergence in academic discourse suggests that the way in which the Court has communicated its consensus methodology remains somewhat ambiguous with room for improved dialogue.

In order to quickly illustrate the Court’s general consensus finding approach this part of the chapter itself will be broken down into a number of subsections. These are based on the lines of the Court’s reception of different sources of consensus. This part of the chapter will thus be broken down into the following sections: (1) Common Domestic Legislation and Practice; (2) Mutual international Treaty Commitments and their Interpretations; (3) Debates and Resolutions of Council of Europe Organs and (4) Changing Social Norms and Perceptions in member States. After this the remaining two parts of this chapter describes the criticisms of the Court’s consensus methodology and the limits to evolutive interpretation more generally.

4.2.1 Common Domestic Legislation and Common Practice amongst the Member States

First and foremost the Court has identified the presence of domestic law and practice in the member States as a source for consensus. It did this first in *Tyrer* by mentioning that “…in the great majority of member States of the Council of Europe (CoE), judicial corporal punishment is not, it appears,
used and, indeed, in some of them, has never existed in modern times.” 35 Unfortunately this tells us little other than indicating that commonality of practice must be present in more than 50% of member States. As an example of more modern use of common practice, the post Protocol 11 Court again used this method in Bayatyan v. Armenia,36 a case concerning conscientious objection for religious reasons to compulsory military service with reference to Articles 4(3)(b)37 and 9(1) (Right to freedom of thought, conscience and religion) of the Convention. In this case the Grand Chamber concluded that Article 9(1) had come to include the right to conscientious objection from the performance of military service, despite the specific acceptance of non-recognition of such objection in Article 4(3)(b). To reach such a conclusion it put a greater emphasis on the numbers of States that made provision for conscientious objection in their domestic legal systems. For instance the Court noted there was a clear trend in the late 1980s and 90s among both members and future members of the Council of Europe towards recognising the right to conscientious objection.38 It then also went noted that subsequently to the occurrence of the facts of Bayatyan more States, including Armenia itself, had recognised the right to conscientious objection leaving only 2 member States having not done so.39 However what is perhaps most striking about this case is that the Grand Chamber differed from the approach previously adopted by the Commission in this area in Grandrath v. the Federal Republic of Germany40 and assessed the situation before it solely under Article 9 of the Convention, and not in conjunction with Article 4(3)(b), a provision which expressly allows for compulsory military service or alternative service for conscientious objectors in countries where they are recognised. The Court did so stating:

35 Tyrer (n4) at para 38.
37 The relevant parts of Article 4(3):
   “3. For the purposes of this Article “forced or compulsory labour” shall not include:
   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;”
38 Bayatyan v. Armenia (n36) at para 103.
39 Bayatyan v. Armenia (n36) at para 104.
“...in line with the ‘living instrument approach’, the Court therefore takes the view that it is not possible to confirm the case-law established by the Commission, and that Article 9 should no longer be read in conjunction with Article 4 § 3 (b). Consequently, the applicant’s complaint is to be assessed solely under Article 9.”

Thus in the context of the aforementioned ‘legislative’ consensus among member States, the Court was prepared to read into Article 9 a right to conscientious objection. What is most notable about this is that, the Court in effect evolutively interpreted the Convention to render an expressly allowed exception to the right to freedom from slavery and forced labour as redundant. However, importantly it did not choose to do this of its own initiative, but because the consensus indicated by the changes in State practice since the Convention was first instigated, confirmed that the Convention has evolved accordingly. In other words, this change was caused by the actions of the member States and not the Court’s declaration of Convention law in the case.

The Court in looking to conditions common in member States also considers their general practice. Good examples of this exist in: Soering v. UK; Ocalan v. Turkey and Al-Saadoon and Mufdhi v. UK. These, alongside the Loizidou case will now be considered in this context.

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41 Bayatyan v. Armenia (n36) at para 109.
42 Soering v. the United Kingdom (App.No.14038/88) (ECtHR 07 July 1989). See also Harris, O’Boyle, Bates and Buckley (n7) at 225.
44 Al-Saadoon and Mufdhi v. the United Kingdom (App.No. 61498/08) (ECtHR 02 March 2010). See also Harris, O’Boyle, Bates and Buckley (n7) at 225-226.
In Loizidou concerning Turkey’s purported ‘reservation’ to the optional jurisdiction of the Court by which it sought to exclude the applicability of the Convention to Northern Cyprus, the Court for the first time demonstrated that the living instrument doctrine could apply to the procedural clauses of the Convention (i.e. it was ‘not confined to the substantive provisions of the Convention’). In doing so it said:

“That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court’s case-law ... Such an approach, in the Court’s view, is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46..., which govern the operation of the Convention’s enforcement machinery. It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.”

The Court noted the practice of the member States when accepting the so-called ‘optional clauses’ after the entry into force of the Convention was not to attach ‘reservations’, and so suggested that the use of reservations on the optional jurisdiction of the Court was prohibited. The Court then noted that the only other ‘reservation’ of this nature had been withdrawn by the UK. It then stated:

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47 Loizidou (n46) at para 79-82.

48 Loizidou (n46) at para 79.
“The existence of such uniform and consistent State practice clearly rebuts the respondent Government’s arguments that restrictions attaching to Article 25 and Article 46 declarations must have been envisaged by the drafters of the Convention in the light of practice under Article 36 of the Statute of the International Court of Justice.”

What we see here is not only that the Court is willing to consider the practice of member States in its evolutive interpretation, but also that such an interpretation is able to apply to the Convention’s procedural clauses. In this case the Court was willing to effectively extend the scope of its jurisdiction by severing Turkey’s purported reservation to its optional grant of jurisdiction. This is particularly controversial as it is likely that Turkey accepted the jurisdiction of the Court on the basis that it did not apply outside its metropolitan territory and may not have done so otherwise.

Other cases where the Court has clearly shown a propensity to consider the practice of member States of the CoE occur in the death penalty cases. Soering v. UK concerned a real risk that should the applicant be extradited to the USA to stand trial for capital murder, there was a real risk of him suffering inhuman or degrading treatment contrary to Article 3 of the Convention. This potential violation would arise by virtue of what is known as ‘death row phenomenon’ (the length of time incarcerated pending execution of the death penalty, which can lead to severe psychological harm.)

49 Loizidou (n46) at para 82.
50 Heribert Golsong has argued in:
   “While a so-called ‘objective’ interpretation of the provisions of the Convention enshrining fundamental rights may be justified under the Vienna Principles of ‘object and purpose’..., the situation is fundamentally different with respect to the provisions enshrining the procedural and structural sections of the Convention. In this area, only the clear meaning of the words as they were understood at the time of the drafting should remain the overriding interpretative principle.” (H Golsong, ‘Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention on the Law of Treaties’ in R.St.J Macdonald, F Matscher and H Petzold (Eds), The European System for the Protection of Human Rights (Martinus Nijhoff Publishers, 1993) 147-161 at 150.
51 Bates (n45) at 443.
52 Soering v UK (n42).
However, the problem with respect to the applicant’s argument was that Article 2(1) (right to life) expressly allows for the passing of a death sentence by a court. The ECtHR in this case noted:

“De facto the death penalty no longer exists in time of peace in the Contracting States to the Convention. In the few Contracting States which retain the death penalty in law for some peacetime offences, death sentences, if ever imposed, are nowadays, not carried out.”  

The Court went on to note three points in sequence. Firstly:

“The Convention is to be read as a whole and Article 3 (art. 3) Should therefore be construed in harmony with the provisions of Article 2 (art. 2)... On this basis Article 3 (art.3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art. 2-1).”

This would imply that evolutive interpretation would not be possible where it would lead to a conflict with another Convention clause. However, the Court then stated:

“Subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting

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53 Ibid at para 102.
54 Ibid at para 103.
States to abrogate the exception provided for Under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3).\(^{55}\)

So the Court had gone on to suggest that even though the Convention should be read as a whole, and the Court is not technically capable of interpreting Convention clauses to conflict with one another, through evolutive interpretation subsequent acts of the member States may, in effect, impliedly amend the Convention. The significance of this statement has broader implications in our study of the living instrument, then simply the effective abrogation of Conflicting Convention clauses. The Court’s statement that subsequent, general practice of the member States may establish an agreement of the member States, enlightens our understanding of how evolutive interpretation works. It suggests that what the Court’s, by interpreting the Convention evolutively, is doing is interpreting an implied amendment of the Convention by the member States themselves. This casts a new light on the criticisms of discussed in chapter 1, of the Court taking upon itself to legislate on the behalf of the member States.\(^{56}\) It would suggest that the actions and omissions of the member States, being interpreted as consensus, are a form of implicit communication to the Court that it should evolutively interpret the Convention to have been amended by the member States by. Having set out the possibility of abrogating Convention clauses the Court noted:

“However, Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment.”

\(^{55}\) Ibid.

\(^{56}\) See chapter 1.7.1 especially the text to n133.
punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention... Article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty."  

So it seems that two things can be learnt about evolutive interpretation from the three quotes above. Firstly, this case further illustrates the Court’s use of State practice by indicating that it may be considered in order to rebut the presence of domestic legislation as suggesting a lack of consensus in a given area of Convention law. Secondly this case suggests that even express Convention allowances may effectively be abrogated by the evolution of other Convention clauses. However, as noted, in this situation the Court eventually decided that the presence of Optional Protocol 6 meant that the member States had communicated their choice to channel the evolution of the Convention through this means and not through evolutive interpretation.  

The Court was again seized of the issue of whether the death penalty itself violates Article 3 of the Convention, despite the express text of Article 2(1), in the subsequent case of Ocalan v. Turkey. Again it made recourse to State practice in regards to the death penalty, noting that the situation with regards to the prohibition and abandonment of the death penalty in Europe had significantly progressed since the Soering judgment with the First Section chamber Court noting:

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57 Soering v UK (n42) at para 103.
58 Soering v UK (n42) at para 103.
59 Ocalan v. Turkey (n43) and its subsequent referral to the Grand Chamber: Ocalan v. Turkey (2005) (n43) respectively. See also Harris, O’Boyle, Bates and Buckley (n7) at 225.
“... the Court observes that the legal position with regards the death penalty has undergone a considerable evolution since the Soering case was decided. The *de facto* abolition noted in that case in respect of twenty-two Contracting States in 1989 has developed into a *de jure* abolition in forty-three of the forty-four Contracting States – most recently in the respondent State – and a moratorium in the remaining State which has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the Contracting States have signed Protocol No. 6 and forty-one States have ratified it., that is to say all except Turkey, Armenia and Russia.”\(^{60}\)

Contrary to the position adopted in *Soering* the First Section Chamber, with the Grand Chamber subsequently concurring and quoting it at length,\(^ {61}\) then went on to state:

“Such a marked development [towards the abolition of the death penalty in times of peace] could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1, particularly when regard is has to the fact that *all* Contracting States have now signed Protocol No. 6 and it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No.6 by the three remaining states before concluding that the death penalty exception to Article 2 § 1 has been significantly modified.”\(^ {62}\) (emphasis added)

\(^{60}\) *Ocalan v. Turkey* (n43) at para 195.

\(^{61}\) *Ocalan v. Turkey* (2005) (n43) at para 163.

\(^{62}\) *Ocalan v. Turkey* (n43) at para 196.
Unfortunately for our investigation, the Court, on the facts of the case, found a violation of Article 3 on the basis that a death penalty had been imposed following an unfair trial, meaning that the imposition of the death penalty would be unlawful in this case regardless.\textsuperscript{63} Regardless, the Court’s statements above further evidence the Court’s acceptance of State practice in its consensus methodology. It also crucially suggests that the presence of optional protocols to the Convention need not be an absolute bar to evolutive interpretation when overwhelming State practice exists to fill in the last remaining gaps in the ratification of a relevant protocol (in this case Protocol no. 6.) This suggestion has now been confirmed by the Court in \textit{Al-Saadoon and Mufdhi v. UK,}\textsuperscript{64} which will be discussed further in this chapter,\textsuperscript{65} where the Court again noted the “consistent practice in observing the moratorium on capital punishment”.\textsuperscript{66} However, this seems inconsistent with the idea in international law that “[o]nly rarely do treaties ‘permit a supermajority to adopt changes that are subject neither to ratification nor to objection by an individual party’.”\textsuperscript{67} The tenor of this statement by Professor Laurence Helfer’s is a recognition that ordinarily a State would have to consent to a change and if it did not, then it could not be imposed upon them. Applied to the context in \textit{Al-Saadoon and Mufdhi} that is precisely what could be said to be occurring by the Court’s evolutive interpretation of Article 3 to cover death penalty phenomena. This may suggest there is something different about the status of Convention law to ordinary international law situation, and this would fit in with the idea that the Convention enjoys some form of constitutional status suggested in chapter 2. However, for present purposes what we can learn from the above section is that the Court has indicated that it considers both common domestic legislation and practice as relevant and persuasive to its consensus assessments.

\textsuperscript{63} \textit{Ocalan v. Turkey} (2005) (n43) at para 165.
\textsuperscript{64} \textit{Al-Saadoon and Mufdhi} (n44).
\textsuperscript{65} See below section 4.4.5.
\textsuperscript{66} \textit{Al-Saadoon and Mufdhi} (n44) at para 120.
4.2.2 Mutual International Treaty Commitments and their Interpretation

The Court in assessing consensus has shown from its early living instrument case law that the common international treaty obligations of member States and their interpretation by relevant tribunals can be relevant to assessing consensus and consequently an evolved understanding of a Convention right. In the second case where the Court expressly stated the Convention is a living instrument, *Van Der Mussele v. Belgium*\(^{68}\) concerning the compulsory pro bono case work of a junior advocate, the Court had recourse to the International Labour Organisation (ILO) Convention No 29\(^{69}\) in order to help define the term ‘forced labour’ (within the meaning of Article 4(2) of the Convention).\(^{70}\) It made this recourse in order to come to an evolved understanding of the meaning of the term ‘labour’ enabling it to depart from the Commission’s (1963) case law in *Iversen v. Norway*.\(^{71}\) Later on, in *Sigurdar a. Sigurjonson v. Iceland*,\(^{72}\) the Court utilised the jurisprudence of the Freedom of Association Committee of the Governing Body of the ILO when dealing with a case of the Icelandic State law requiring taxi drivers to join a specific trade union in order to obtain the required taxi license, contrary to the right to freedom of association (Article 11). It was argued before the Court that the Convention travaux preparatoires indicated that a negative aspect to the right to freedom of association had been deliberately omitted.\(^{73}\) Here the Court utilised this jurisprudence in order to evolutively progress on from its previous decision in *Young, James and Webster*.\(^{74}\) If the

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\(^{69}\) Ibid at para 37.

\(^{70}\) Article 4(1) reads: ‘No one shall be required to perform forced or compulsory labour’.

\(^{71}\) *Van der Mussele* (n68) at para 37.

\(^{72}\) *Sigurdar a. Sigurjonsson v. Iceland* (App.No. 16130/90) (ECtHR 30 June 1993) at para 35. This negative aspect of freedom of expression found by the Court in this case was later extended in *Sørensen and Rasmussen v. Denmark* GC (App.Nos. 52562/99 and 52620/99) (ECtHR 11 January 2006) by the Grand Chamber to include both pre-entry and post-entry closed-shop agreements (at para 58.)

\(^{73}\) *Sigurdar a Sigurjonsson* (n72) at para 33.

\(^{74}\) *Young, James and Webster v. the United Kingdom* (App.Nos. 7601/76 and 7806/77) (ECtHR 13 August 1981). In this case the Court was concerned with a ‘closed shop agreement’ between an employer and a trade union with political affiliations. The Court noted from the Convention’s travaux preparatoires that a negative right not to associate had been deliberately omitted from the Convention text. However, due to the sanction of the applicants potentially losing their job if they did not join the relevant trade union, the Court in this case found a violation of Article 11. However, the Court was careful to limit the negative aspect of Article 11, noting that there is no general right to freedom not to associate. Arguably, in finding a violation of Article 11 of the
Court is willing to consider the mutual treaty obligations in its consensus adjudication than this was a logical next step, as their jurisprudence represents the authoritative interpretation of the meaning of those relevant treaty clauses. However this still leaves open the question of why would the Court consider the mutual treaty obligations of member States?

The Court suggested its rationale for considering member States treaty obligations in *Loizidou* when it said:

“It is a well established principle in international treaty law that an expression use in one treaty will bear the same meaning if used in another”\(^75\)

So it seems the Court regards itself as following a common international approach in general international law. It has further said in the Grand Chamber’s decision in *Bayatyan v. Armenia*\(^76\):

“...in defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention and the interpretation of such elements by competent organs. The consensus emerging from specialist international instruments may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.”\(^77\)

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\(^75\) *Loizidou* (n46) at para 67.

\(^76\) *Bayatyan v. Armenia* (n36).

\(^77\) *Bayatyan v. Armenia* (n36)ibid at para 102 [Citations omitted].
Unfortunately, this latter statement does not explain why the Court should follow consensus in other international treaty bodies, but it does at least further enunciate the Court’s imperative to consider such sources of consensus, when relevant. An argument that may address this by professor Brems is that: “…if a state has underwritten certain detailed obligations in one text. The interpretation of a more general text can be oriented in that sense.” This perhaps is because States are required to act in good faith when carrying out their treaty obligations and thus the Court should assume that when they negotiate new international law commitments, they do so consistently and in conformity with their existing international law commitments. Indeed the Court in Demir and Baykara v. Turkey elaborated on this point saying:

“…When it considers the objective and purposes of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the Common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.”

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79 See generally e.g. M Shaw, International Law (Cambridge University Press, 2014, 7th Edn at 74.
80 This is in-line with the strong presumption in international law against normative conflict between legal sources. See e.g. M Shaw, International Law (Cambridge University Press 2014) at 47.
However, the Court’s consideration of international treaties and their interpretation potentially poses a real issue as to their specific relevance for the interpretation of the Convention itself. While it is reasonably obvious that domestic legislation and practice helps to evidence a common approach among member States, this may not be the case for all international treaties. For example if an international treaty has a low proportion of Convention member States signing and ratifying it then its relevance to the Court’s consensus is likely to be more limited.\(^2\) While State practice is arguably more legitimate on the basis that it directly represents the legal systems of the member States, there is a risk that by the Court basing its evolutive decisions on common international treaty obligations, the Court may be imposing new obligations on member States that they did not properly agree to. This would especially be the case where the Court considered the obligations of international treaties that few member States have ratified. An example of this may be said to have arisen in *Marckx v. Belgium*\(^3\) where, in dealing with an issue of maternal affiliation to children born out of wedlock pursuant to Articles 8 (respect for family and private life) and 14 (non-discrimination in enjoyment of Convention rights) the Court cited the Brussels Convention of 1962 and the European Convention on the Legal Status of Children Borne out of Wedlock.\(^4\) While relevant to the subject matter of the case, the two treaties had gained low levels of signature and ratification at the time the Court heard *Marckx.*\(^5\) In fact in an article co-authored by a former President of the Court, Luzius Wildhaber, with respect to *Marckx*, has been commented “In effect, [the Court] relied on the mere paper existence of treaties, rather than on the reality of their status as instruments binding in international law.”\(^6\) This might suggest that giving emphasis on these sources of international law in

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\(^3\) *Marckx v. Belgium* (n29).

\(^4\) *Ibid* at para 41.

\(^5\) *Ibid*. In citing the two conventions the Court admitted the Brussels Convention had only been signed by 8 out of the 10 States that had drawn it up and only 4 of these had ratified it, whilst the European Convention on the Legal Status of Children Borne out of Wedlock has only been signed by ten States and ratified by just 4 members of the Council of Europe. No mention of whether Belgium had ratified these treaties or not was made by the Court.

\(^6\) *Wildhaber, Hjartson and Donnelly* (n82) at 254. A similar argument has been made with regards this case by George Letsas in support of his argument for a moral reading of the Convention, see: Letsas (n22) at 77.
the Court’s consensus adjudication was impulsive. This premature reliance on such sources casts some doubt on the real reason the Court had chosen to cite these treaties. It may suggest ‘cherry picking’ of sources by the Court in order to artificially manufacture consensus where it did not exist. Such a selection of sources has been criticised in the US Supreme Court context by Justice Scalia who of the *Roper v. Simmons* juvenile death penalty case described the majority’s decision as trying “…to turn its remarkable minority consensus into a faux majority”. However, unlike the US Supreme Court, the ECtHR is not a domestic constitutional court interpreting an entrenched documentary constitution, but instead is an international treaty, albeit with some constitutional-like qualities. As such it is arguably even less legitimate for the ECtHR to ‘cherry pick’ sources of consensus to support its interpretations.

The new, Post Protocol 11, Grand Chamber continued and, in fact, re-affirmed its trend from *Marckx* in *Demir & Baykara v. Turkey*. At stake in this case was the right to collective bargaining as an aspect of the right to freedom of association under Article 11. The applicant trade union had entered into a collective bargaining arrangement with a municipal council but this was in breach of Article 11 of the Convention and was annulled retrospectively by a judicial decision ruling that the Union was not competent to enter into such agreements. Here the Grand chamber stated:

“...The Court observes in [connection to collective bargaining agreements] that in searching for common ground among the norms of international law it has never distinguished

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87 *Roper v. Simmons* 543 U.S. 551 at 611 (Scalia J Dissenting).
89 See Harris, O’Boyle, Bates and Buckley (n7) at 749.
between sources of law according to whether or not they have been signed and ratified by the respondent State.”

Wildhaber et al have challenged what they see as this unclear phraseology. They pose that the Court’s above statement may have conflated treaties that do not enjoy universal adherence or ratification by the member States to “norms of international law” further noting that “…the fact that a treaty does not attract a significant number of ratifications would be considered as an expression of consensus, although it may in reality demonstrate a lack of consensus?” However, it is likely that the Court’s words were merely poor expression within its judgment and instead it meant that the non-assent of a respondent State is insufficient to negate the presence of consensus if it exists sufficiently amongst the other member States. This is seemingly confirmed by the Court when it says:

“It is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.”

90 Demir & Baykara v. Turkey (n81) at 78.  
91 Wildhaber, Hjartson and Donnelly (n82) at 254.  
92 Ibid.  
93 Demir & Baykara v. Turkey (n81) at 86. (citations omitted)
So what can be learnt from this case is that where international trends which apply to the member States are clear and continuous the Court will consider them in its consensus adjudication. It will not be a pre-condition that the respondent State is bound by these international obligations, otherwise this could act as a restriction on the Court’s evolutive interpretation and would be inconsistent with its consensus approach elsewhere. A natural assertion to be drawn from this is that it is the Court that has the position to validate a continuous international trend by declaring (through evolutive interpretation) that that relevant standard has become part of the acquis of Convention law. Although it seems logical that the Court when put in the role of a dispute adjudicator would have to make such a decision, it nevertheless posits the Court as having some level of status above the member States to do so. Again such a perspective supports the idea of the Convention’s constitutional-like properties previously discussed in chapter 2.

4.2.3 Debates and Resolutions of Council of Europe Organs

The inclusion of the inner workings of the CoE has played a limited role in the Court’s expressed consensus method. However, it has been called upon as further justification for a finding of Convention evolution. An example of this lies in the previously mentioned Ocalan case where the First Section Chamber noted that it was the policy of the CoE to require new member States to abolish the death penalty. In Bayatyan v. Armenia, also previously discussed, the Court noted that both the Parliamentary Assembly (PACE) and the Committee of Ministers (CoM) had repeatedly called on member States that had not recognised the right to conscientious objection within their

95 Ocalan v. Turkey (n43).  
96 Ocalan v. Turkey (n43) at para 195.  
97 Bayatyan v. Armenia (n36).
domestic legal systems to do so.\textsuperscript{98} The Court also noted that such recognition was a pre-requisite to joining the CoE.\textsuperscript{99} Perhaps more importantly, the Court noted that the PACE in 2001 had stated “...that the right to conscientious objection was a fundamental aspect of the right to freedom of thought, conscience and religion enshrined in the Convention” and that the CoM had confirmed this in 2010.\textsuperscript{100} It is worth pausing for a moment to briefly describe the make-up of these respective bodies. The PACE is the democratic forum for the 47 member States of the CoE and the CoM is composed of the Foreign Ministers of each member State.\textsuperscript{101} As such the collective views expressed as an outcome of their discussions can reasonably be said to represent something of a consensus among the member States.

In both of these cases the Court also cited other strong evidence of consensus. In \textit{Ocalan} this was the high level of domestic legislation and practice, as well as the high level of ratification of Protocols 6 and 13 abolishing the death penalty and in \textit{Bayatyan} again this was the high level of recognition of the right to conscientious objection in member States’ domestic law. Unfortunately, then, for the purposes of this study it is difficult to know, given the presence of these other sources of consensus, how the Court’s overall consensus assessment was affected by the acts and statements of the CoE. The Court failed to make clear how this weighed upon its decision making process, but it is reasonable to speculate that it was at least a form of supplementary support for the Court’s eventual consensus adjudication.

\textsuperscript{98} \textit{Bayatyan v. Armenia} (n36) at para 107.
\textsuperscript{99} \textit{Bayatyan v. Armenia} (n36) at para 107.
\textsuperscript{100} \textit{Bayatyan v. Armenia} (n36) at para 107.
\textsuperscript{101} Or their delegates.
4.2.4 Changing Social Norms and Perceptions in member States

Unlike the previously discussed sources of consensus that the Court considers, this last area for analysis is potentially much more controversial as it carries the risk of the Court stepping into the role of policy decider for the member States. As we shall see, this is also not an area that the Court holds particular expertise in and so its lack of skill in this area may warrant greater judicial self-restraint on the part of the Court, by way of the margin of appreciation doctrine.102 The Court in Kozak v. Poland103 relied on an assessment of changing societal understanding of the homosexuality, in relation to a claim that a homosexual applicant had been discriminated against in succeeding the tenancy of his same-sex partner. Here it stated that it must:

“...necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one’s family or private life.”104

102 This would be consistent with the Court’s recognition in Handyside v. the United Kingdom (App.No. 5493/72) (ECtHR 7 December 1976) at para 48:
“The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.”

103 Kozak v. Poland (App.No. 13102/02) (ECtHR 02 June 2010).

104 Kozak v. Poland (n103) at para 98. As yet there is limited commentary on the Court’s approach in this case, save for noting the outcome of the case in the broader context of LGBT rights jurisprudence. However, for mention of the Court’s inconsistency in this case with its previous case law see: M Cartabia, ‘The European Court of Human Rights Judging nondiscrimination’ (2011) 9(3-4) international Journal of Constitutional Law 808 at 811. See also C Danisi, ‘How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence’, (2011) 9(3-4) international Journal of Constitutional Law 793 at 803-804.
This would have been more defensible had the statement been made by an organisation with the authority and expertise to evaluate what the common ‘perception of social, civil-status and relational issues’ was across all 47 member States. However, aside from the difficulty in accurately and objectively coming to such a conclusion the Court is neither expert in this area nor charged with the authority to do make social policy decisions. The issue here relates to a broader issue identified by Professor Waldron concerning the role of courts more generally (though not specifically about Strasbourg.) He has stated:

“Some claims of right have the character of the sort of binary issue that courts might be competent to address; others have multifaceted character that has usually been regarded as inappropriate for decision in a judicial structure.”\textsuperscript{105}

Thus arguably the Court should avoid engagement with defining consensual answers to complicated sociological questions in member States. Indeed the role the Court is charged with by the Convention text is one of law, placing upon it responsibility for "all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it".\textsuperscript{106} While it could be argued that considering the researching and analysing of the social norms of the member States could come under the wording ‘all matters concerning’ this would seem a strained reading of the Convention. While there is a judge with respect to each of the 47 member States,\textsuperscript{107} even when composed as the Grand Chamber only comprises 17 of the judges\textsuperscript{108} and so it is unlikely that the Court would be able to benefit from the understanding the judges have of their own countries and even if they were, this certainly wouldn’t equate to a representative sample. The

\textsuperscript{106} Article 32, ECHR
\textsuperscript{107} Article 20, ECHR
\textsuperscript{108} Article 26(5), ECHR
Court is supported by the Registry (and by rapporteurs when sitting in a single judge formation) and a research division, but given the well-known case overload of the Court it is unlikely that it would have the resources to carry out a study into the prevailing social situations. And as such, while such concerns would be relevant to Convention evolution it would be institutionally inappropriate for the Court to answer what the prevailing consensus in Europe is through this method. Indeed such an approach is inconsistent with the Court’s margin of appreciation jurisprudence in *Handyside* where the Court stated:

“The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.”

109 Article 24, *ECHR*


113 *Handyside* (n102) at para 48
If the Court in *Kozak* had followed its previous jurisprudence in *Handyside* (quoted above) it would seem more appropriate for it to leave the decision to the member States unless some other, more appropriate, forms of consensus demonstrated a common European approach. Indeed former ECtHR President Wildhaber (1998-2007) et al has stated generally:

“In our opinion, to claim that the Court should be entitled to express views about values and morality in the various member States on its own, without comprehensive research or evidence, yet equipped with the binding effect of its judgments, would have to be considered as eminently political and therefore as an overextension of the notion of consensus analysis.”

He even noted in the same article of 2013 (some 2 years after the *Kozak* judgment):

“...the [European Court of Human Rights] has never seriously tried to research the state of values, morality and public feelings on any given issue in the various member States of the Council of Europe”

If this is so, then it is grossly inappropriate for the Court to make evolutive decisions on the basis of its perception of common sociological understandings in Europe. However, it has also been commented by Petkova that:

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114 Wildhaber, Hjartson and Donnelly (n82) at 253.
115 Ibid.
“It may be argued that references to extra-legal factors makes Courts look like ill-equipped fact-finding legislatures, yet on the other hand it is precisely the job of a judiciary to solve cases, and this includes difficult, politically embroiled ones”\textsuperscript{116}

As such, considering Petkova’s argument and the institutional appropriateness of the Court making social adjudication, it seems that some minor consideration of the social situation in member States may be relevant to an issue concerning the breadth of the margin of appreciation\textsuperscript{117} granted to respondent States. However, it is inappropriate for the Court to base a finding of consensus on sociological considerations, which would become authoritative by virtue of the Court’s status. Perhaps, what distinguishes this form of consensus from the other evidences of consensus, is that it does not rely on the member States to have acted or specifically chosen not to act. As such there is no indication or communication of the member States to the Court but instead the Court takes upon itself the role of adjudicating the views of the European polity. Chapter 2 noted that this could be appropriate for a domestic supreme court like the USSC, however, it seems inappropriate for an international court with a culturally and legally diverse membership. Unfortunately as little has been discussed of this issue, it is fertile ground for further study, but this lies outside the scope of this investigation into the living instrument doctrine. However, for now it should be noted that the Court has considered changing social perceptions in the member States as a potential part of its evolutive interpretation methodology.

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\textsuperscript{116} B Petkova, ‘The Notion of Consensus as a Route to Democratic Adjudication’ (2011-12) 14 Cambridge Journal of European Legal Studies 663 at 689.
\textsuperscript{117} As it did in the A, B and C v. Ireland (n9).
\end{flushright}
4.3 Criticisms of the Court’s Consensus Methodology

Section 4.2 briefly explained how the Court has utilised consensus as a means for justifying its evolutive interpretation. In contrast this part explores some of the criticisms that may be levelled towards the Court’s general methodology. In doing so the section may help to clarify the position of the Court and dispel some of the misconceptions discussed in part one of the study. However, this section of the chapter is not a defence of the Court. Instead it will show that the Court is still overall deficient in the clarity and sometimes the quantity of its reasoning for finding an evolution of the Convention.118

4.3.1 Lack of or unclear consensus reasoning by the Court

Chapter 3 noted that the Court in Tyrer failed to justify its living instrument approach.119 Where this may be reasonable in the context of this being the very first case where the Court had expressly stated that the Convention is a living instrument, this issue has not been sufficiently resolved. This has been commented on in multiple academic writings,120 however, for the benefit of the reader an illustrative sample of this problem will be described.

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119 See above chapter 3.5.

120 E.g. K Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights, (Cambridge University Press 2015) at 79; Helfer (n67) at 85; A Mowbray, “The Creativity of the European Court
As we have seen in the first part of this chapter, the Court has overtime further enunciated a consensus methodology thus improving the transparency of its living instrument reasoning.

However, as we shall see the Court in some cases has failed to give a proper or detailed explanation of the approach. In other cases where it has given reasons for its evolutive finding, it has been unclear as to how the various sources of evolution it cited built up to a finding of Convention evolution. One such criticism along these lines, made in 2008 by former Chief Justice of Ireland, John L Murray, states:

“Indeed, the vagueness of the standard applied in Marckx revealed the elasticity of the consensus doctrine, a laxity which, it might be said, has become ever more marked in the jurisprudence of the Court in the three decades since that decision.” (emphasis added)

It seems self-evident that, whether the Court is utilising terminology such as ‘living instrument’, ‘evolutive interpretation’, etc., it must be clear about the reasons for its decisions in order to persuade member States of the correctness of its decision.

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121 The Marckx case concerned the maternal affiliation of children borne out of wedlock. In this case as part of its evolutive interpretation the Court made heavy reliance on two international treaties which had been ratified by relatively few Convention member States. This decision has also been the subject of criticism elsewhere (see e.g. Wildhaber, Hjartson and Donnelly (n82) at 253-254). For previous discussion of the Marckx case see above chapter 3.6.

122 Chief Justice JL Murray, ‘Consensus: concordance, or hegemony of the majority’ (Dialogue between Judges, Strasbourg, 2008) <www.echr.coe.int/Documents/Discussion_2008_ENG.pdf> pages 25-48 at 37. Chief Justice Murray was the Chief Justice of Ireland from 2004-11 having also previously served as a judge of the European Court of Justice from 1992-1999 and most recently was an adjunct Professor at the University of Limerick and is currently Chairman of the Panel of Experts on the Election of Judges to the European Court of Human Rights. See also above chapter 3.6.

123 Dzehtsiarou (2011) (n13) at 536.
Firstly, let us consider the situations in which the Court has failed to properly explain the consensus justification for its living instrument approach.\textsuperscript{124} It can be noted that in cases where the Court has stated that the Convention is a living instrument, but has not needed to expressly ‘overrule’ previous case law in order to come to its conclusion, it has generally been more lax in demonstrating the presence of consensus in its approach. An example of this is \textit{Selmouni} where the Grand Chamber in finding a violation of Article 3\textsuperscript{125} adopted an evolutive interpretation of the Convention to the contents of the term ‘torture’. The Court here noted that it had previously examined cases including treating that could only be described as torture before recanting its living instrument statement from \textit{Tyrer}. The Court then simply stated, without giving an analysis of consensus, that an “increasingly high standard” was required but failed to give any analysis of consensus amongst States in this regard.\textsuperscript{126}

An even better example of the Court’s lack of justification for its living instrument approach in occurred in \textit{Societe Colas Est and Others v. France}\textsuperscript{127} and in the case law that followed it. In these cases the Court failed to clearly and promptly explain its consensus methodology and this will be examined presently.

\textsuperscript{124} This does not necessarily mean that the Court did not have justification for its approach, but simply that it failed to explain it in its communicated decision. 
\textsuperscript{125} As to Strasbourg’s interpretation of Article 3 of the Convention see: Harris, O’Boyle, Bates and Buckley (n7) at 235-278. 
\textsuperscript{127} \textit{Societe Colas Est and others v. France} (App.No. 37971/97) (ECtHR 16 July 2002).
Societe Colas Est concerned the searching of the applicant’s business offices by the French National Investigations Office, and so raised issues under Article 8 of the Convention. Whilst the Court reiterated its ‘living instrument statement’ from Tyrer it then simply went on to say:

“Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right of respect for a company’s registered office, branches or other business premises.”

Apart from brief reference to Chappel v. UK and Funke, Crémieux and Miailhe (no; 1), this was the full extent of the Court’s living instrument reasoning in this case. The fact that the Court felt it unnecessary to have to elaborate on this position is striking, and seems to suggest that it takes much for granted. It is submitted that it would be very difficult for commentators without specialist inside knowledge to understand the Court’s reasoning for finding an evolution of the Convention.

Societe Colas Est was followed by the case of Demades v. Turkey where the Court had the opportunity to elaborate on its reasoning in Societe Colas Est but failed to do so. In issue here was an abandoned family home in Northern Cyprus following the historic Turkish invasion. After a recollection of its living instrument doctrine, the Strasbourg Court noted “…it notes that in its

128 On Strasbourg’s approach to Article 8 of the Convention and the notion of ‘home’ see Harris, O’Boyle, Bates and Buckley (n7) at 528-530.
129 Tyrer (n4) at para 31.
130 Societe Colas Est (n127) at para 41.
131 Chappell v. the United Kingdom (App.No. 10461/83) (ECtHR 30 March 1989). This Court in this case ruled a search in a private individual’s home that was also his company’s office registered office interfered with Article 8.
133 Demades v. Turkey (App.No. 16219/90) (ECtHR 31/10/2003).
relevant case-law it has adopted an extensive interpretation of the notion of “home”.\textsuperscript{134} It recalled the living instrument doctrine before going on to find that the applicants unoccupied house qualified under Article 8 as a home.\textsuperscript{135} It was only some ten years later, in \textit{Saint-Paul Luxembourg S.A. v. Luxembourg},\textsuperscript{136} that Judge Jaderblom (in a partly dissenting opinion) suggested that in reaching the conclusion it did in \textit{Societe Colas Est} the Court had been persuaded by its citation of the jurisprudence of the CJEU in \textit{Hoechst v. Commission}\textsuperscript{137} to adopt its expansive interpretation of the term ‘home’ which he asserted had previously only seemed to cover natural person’s ‘home’ and ‘correspondence’\textsuperscript{138}. If this is correct, coming ten years after the decision in \textit{Societe Colas Est} and in a partly dissenting opinion, it represents a clear and problematic failure of the Court at the time of its judgment to fully explain and justify its approach in that case. Even if Judge Jaderblom’s insight does not accurately reflect the Court’s deliberations in \textit{Societe Colas Est}, the point remains that the Court’s lack of transparency about its decision was very poor, especially considering that its decision purported to make a significant expansion of the scope of protection of Article 8.

\textsuperscript{134} \textit{Ibid} at para 33.
\textsuperscript{135} \textit{Ibid}.
\textsuperscript{136} \textit{Saint-Paul S.A. Luxembourg v. Luxembourg} (App.No. 26419/10) (ECtHR 18 July 2013).
\textsuperscript{137} See Partly Dissenting Opinion of Judge Jaderblom in \textit{Saint-Paul S.A. Luxembourg} (n136) at para 2. This suggested influence of the CJEU’s decision is itself problematic given the EU has only 28 of the ECHR member States and thus constituting only a very small majority of the ECHR’s 47 member States. Given the potential for the EU acceding to the ECHR at some stage in the future, it would be prudent to revisit the influence of the EU on the Strasbourg Court’s evolutive interpretation however, this unfortunately falls outside the scope of the present study.
\textsuperscript{138} The relationship between EU and ECHR law appears in various commentaries and authorities. A prime example is the Bosphorus doctrine of Equivalent protection, whereby a presumption exists that EU measures has equivalent protection to that of the ECHR and as such when Convention member States who are also members of the EU acting in compliance with their EU law obligations will not violate the Convention. See \textit{Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland GC} (App.No. 45036/98) (ECtHR 30 June 2005) at para 165. For more general information on the relationship between the Convention and the European Union see: Harris, O’Boyle, Bates and Buckley (n7) at 31-33 and Rainey, Wicks and Ovey (n45) at 17-19, S Greer, \textit{The European Convention on Human Rights: Achievements, problems and prospects}, (Cambridge University Press 2006) at 47-54. See also V Kosta, N Skoutaris and VP Tzevelekos (Eds), \textit{The EU Accession to the ECHR} (Hart Publishing 2014) at 1-3 (especially 2-3).
It can be said, however, that where a decision is likely to be particularly controversial, as we saw in *Loizidou v. Turkey*\(^ {139}\) the Court has been more prone to give more by way of justification for the result. Unfortunately in these cases the Court has been unclear about how the various sources of consensus it has cited by way of justification for its finding have resulted in its eventual conclusion. In *Loizidou* for instance, the Court observed the established practice of the International Court of Justice;\(^ {140}\) the meaning of ‘good faith’ under Article 31 of the Vienna Convention on the Law of Treaties\(^ {141}\) and common subsequent treaty practice.\(^ {142}\) Importantly, the Court made several references to the object and purpose of the Convention.\(^ {143}\) This strengthened its reasoning in a similar way to the CJEU’s seminal judgments in *Van Gend en Loos*\(^ {144}\) and *Costa v. ENEL*\(^ {145}\) which were discussed in Chapter 2.\(^ {146}\) However, the Court was unclear about the weighting it attached to each form of consensus, so while it may have been reasonable for the Court to find a sufficient consensus in that case, it tells us little about how consensus will work in other cases.

Another example where the Court similarly cited multiple sources of consensus but failed to explain how important in relation to its decision each source was is *Bayatyan v. Armenia*.\(^ {147}\) Again the Court made reference to “…the overwhelming majority” of member States recognising the right to conscientious objection in their law and practice,\(^ {148}\) interpretations of international fora\(^ {149}\) and statements and practice of the PACE.\(^ {150}\) As such it could be suggested that overall the case for a sufficient consensus in favour of a right to conscientious objection being included into Article 9 of

\(^{139}\) *Loizidou* (n46).

\(^{140}\) *Ibid* at para 67.

\(^{141}\) *Ibid* at para 67.

\(^{142}\) *Ibid* at paras 67 and 79.

\(^{143}\) *Ibid* at paras 62, 72, 73, 75, 88 and 89.

\(^{144}\) *Case 26/62 Van Gend en Loos v. Nederlandse Administratie Der Belastingen* [1963] ECR 3 at 12

\(^{145}\) *Case 6/64 Costa v ENEL* [1964] ECR 588 at 593 at 594

\(^{146}\) See above chapter 2.2.

\(^{147}\) *Bayatyan v. Armenia* (n36).

\(^{148}\) *Bayatyan v. Armenia* (n36) at para 103.

\(^{149}\) *Ibid* at para 104.

\(^{150}\) *Ibid* at para 107.
the Convention was reasonably compelling. However, as it did in Loizidou the Court failed to explain
the importance and weight to be given to each form of consensus. Given that this was a Grand
Chamber decision one would have expected a greater explanation of the Court’s reasoning in order
to avoid ambiguity and confusion of the Court’s evolutive method.

In conclusion, the Court has not employed a coherent and uniform approach to justifying a finding of
sufficient consensus for Convention evolution. On this level the Court is to be and has been criticised
for what risks being seen as the relatively arbitrary decisions in granting greater justification of the
presence of consensus in some cases than in others. However, it may also be noted that both in
Loizidou and in Bayatyan it was likely that the decisions would be particularly controversial. In
Loizidou for instance the Court was making a decision that would in effect, extend the scope of its
jurisdiction and thus have the potential for a significant incursion into the State sovereignty of
Turkey. In Bayatyan the Court was making a decision that would in effect render nugatory the
express allowance contained in Article 4(3)(b). As such, the Court may be congratulated on
recognising the need to provide a particularly convincing account of consensus compared to other
cases. However, whenever the Court is adopting an evolutive interpretation, and thus expanding the
Convention’s substantive guarantee, given that it has a potentially ‘legislative effect’, one could
argue that it will ‘always’ be potentially controversial, even where there is an overwhelming
consensus. A good example of this might be in A, B and C v. Ireland which will be discussed in
more detail later in this chapter. Here, the Court found a “substantial” level of consensus in favour of
allowing abortion in member States, but also was aware of how controversial a topic abortion was
in Ireland and accorded the State a wide margin of appreciation in the matter. So it could be

151 See e.g. Mowbray (n6) at 71; K Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights, (Cambridge University Press 2015) at 79.
152 For discussion of the potential legislative effect see chapter 1.2.
153 A, B and C v. Ireland (n9).
154 Ibid at para 235.
155 Ibid at para 233.
argued that the Court should always attempt to give as much clear justification by way of consensus when making a finding of evolution of the substantive content of the Convention.

4.3.2 Unclear Quantum of Consensus Required for Evolution

One problem, partially described in the previous section is the difficulty in understanding how much consensus is required in order for the Court to find that the substantive content of the Convention has evolved and alter the scope of Convention rights accordingly. It has been said that: “‘Consensus’ means more than a simple majority. It expresses the general agreement of a group of persons or States. The consent may be so clear or even overwhelming that the Court may assume that it can impose the majority view on the remaining minority.”\(^\text{156}\) Assuming that the ideas in this view are, broadly speaking, in-line with the Court’s approach to consensus, the problem is then raised as to how much consensus is needed?

In *Tyrer* the Court noted that:

> “it is noteworthy that, in the great majority of the member states of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times.”\(^\text{157}\)

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\(^{156}\) *Wildhaber, Hjartson and Donnelly* (n82) at 257.

\(^{157}\) *Tyrer* (n4) at para 38.
This would suggest that a figure that is significantly higher than 50% of the member States at the time is needed. However, what proportion of States would equate to ‘the great majority’ is open to interpretation. Even in cases where the Court has demonstrated a clear presence of consensus via multiple and various forms, it is difficult to decipher precisely at which point the consensus crosses the finishing line and an evolution of the Convention may be found. For example in *Loizidou v. Turkey* the Court noted that the only other member States having submitted a reservation concerning the area of its grant of jurisdiction to the Court (the UK) had withdrawn it previously. As such this would suggest there was a near unanimity of States towards evolution in finding such a reservation contrary to the object and purpose of the Convention. However, the Court did not say this and instead considered multiple other Sources of consensus. The Court’s reticence to identify the point at which consensus will cross the Rubicon into facilitating Convention evolution. The Court in other cases regarding the relevance of international treaty law has not indicated the level of common adherence to it with the exception of the *Marckx Case* where the levels of ratification were low.

It is not necessarily surprising that the Court has not indicated the level of consensus required for it to make an evolutive finding of the Convention, given the number of sources/ types of consensus the Court considers. To create a concrete and fixed criteria for evolution belies the complexity of the areas of law the Court must consider across over 40 jurisdictions and independent legal systems, including, for example, in relation to such controversial and sensitive issues as adoption and euthanasia arrangements in member States. As such it might be inappropriate for the Court in every case to crudely equate each action or omission of a member State to the overall consensus in

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158 *Loizidou* (n46).
159 *Marckx v. Belgium* (n29) at para 41.
the area of Convention law in question. It may well be that the position in favour of a finding of consensus in one State may be fairly weak (or unclear) while in another State it might be much stronger. To simply say that both States hold a common position might lead to the Court manufacturing consensus where it doesn’t sufficiently exist. In this light it has sensibly been commented by Wildhaber et al in a section of their article on consensus entitled ‘Among how many countries does the Court require similarity to establish consensus’, that “It would be accurate to say about consensus what the Court affirmed about the margin of appreciation: that the meaning of consensus ‘is not identical in each case but will vary according to the context.’ However, this comment must be taken with an element of caution, lest the margin of appreciation doctrine, which will be discussed more specifically later in this chapter, and the living instrument doctrine risk being conflated as opposing ends of a singular analytical method of the Court. It is important that the context mentioned, when related to the Court’s evolutive method, should correspond to the nature of the consensus itself and not external political considerations in the member States. Even so, at a general level one can still suggest that there needs to be a majority of States that demonstrate a consensus towards a certain approach to implementing the Convention, in order for a substantive evolution of the Convention to take place. But, as noted, quite how ‘great’ that majority needs to be remains unclear, and will be dependent on the context of the case itself. This unhelpfully, from the perspective of providing re-assurance to Convention stakeholders, damages certainty in Convention law and so the Court needs to provide greater, or at least clearer, explanation of its decisions to make clear the legitimacy of its approach in each decision.


163 To some extent Paul Mahoney (now a Judge in respect of the UK at the ECHR) did just this in his seminal article of 1990 ‘Judicial Activism and Judicial Self Restraint in the European Court of Human Rights: Two Sides of the Same Coin’, (1990) 11(1-2) HRLR 57 at 84.

164 It will be argued later in this chapter that such alternative political considerations should more appropriately be considered by the Court in its exercise of the margin of appreciation doctrine.
It has been suggested by one recent, authoritative study that “The EurCourtHR frequently, but not consistently opts against the existence of consensus, as long as some 6 to 10 States adhere to solutions which differ from the majority view.” However, the same study found that of the post-1998 judgments (i.e. those of the so-called new Court) that discuss consensus only about 56% of them consider a representative sample of member States, defined as when about 60-70% of States are included. This is despite the Court setting up a special research division in order to investigate issues of European consensus relevant to cases coming before the Court. If these statistics are true this casts doubt on the validity and consistency of the Court’s consensus methodology and may bring the living instrument doctrine in for criticism on this basis. Put simply, on the basis of the study just presented one cannot be sure if the Court’s consensus analysis is reflective of the general conditions prevailing in the CoE regardless of its failure to express a necessary quantum of consensus. However, it is unlikely, in the absence of greater resource provision or cooperation by member States, that the Court will be able to improve the extent that it utilises its research division. The point remains though that this would help greater foster the impression that the Court was cognisant of conditions within the member States, thus improving the impression of legitimacy of its consensus reasoning in evolutive decisions.

165 Wildhaber, Hjartson and Donnelly (n82) at 258.
166 Ibid.
167 The research division is referenced in the article by Wildhaber et al being discussed presently which suggests that the statistics cited bare this in mind. It is also important to note that in an Kanstantzín Dzehtsiarou has said: “In an interview with the author, Judge Sikuta pointed out to that the Research Division prepared a comparative law report in all Grand Chamber cases where he sat as a judge." (See K Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’, (2011) PL 534 at 546.
4.3.3 Inconsistent use of the living instrument terminology

One problem with the Court’s use of the living instrument doctrine is that it doesn’t always make it clear when it relies upon the doctrine. It can be accused of confusing the readers of its decisions in this regard in two ways. Sometimes the Court simply fails to indicate it is considering or taking a living instrument approach, meaning that without specialist knowledge of the Court’s previous jurisprudence in the relevant area of Convention law, it is unclear that an evolution of the law of the Convention has occurred. To be clear, this does not mean that the Court must state that the ‘Convention is a living instrument’ as it did in Tyrer, but in some cases it is unclear from the Court’s explanation that it is taking an evolutive approach. However, conversely on other occasions the Court has expressly recalled the living instrument doctrine, yet failed to give any further consideration or explanation of its relevance in the instant case. This ambiguous dialogue on the part of the Court leaves stakeholders confused whether or not the Court has in fact employed an evolutive interpretation of the Convention and if it has, on what basis it has made that interpretation. It also brings into doubt whether or not the living instrument doctrine has any particular value sui generis other than simply increasing the transparency of the Court’s approach. These issues are now considered in turn.

Firstly, let us consider a few cases where the Court has omitted to use the language of the living instrument doctrine, but has arguably adopted an evolutive interpretation in the case. Given the huge corpus of Convention law, this section will necessarily be impressionistic but should serve to demonstrate the Court’s disregard for procedural clarity in its living instrument approach. In the first part of the previous chapter we considered pre-Tyrer case law. One may recall from this that, based
on the quotation immediately below, Dr Bates argued that *The Belgian Linguistics Case* was an early example of evolutive interpretation\(^{168}\) (in that case with respect to the right to education under Article 3 of Protocol 1) on the basis of the Court’s statement in that case that:

“The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between protection of general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.”\(^{169}\)

If Bates is correct then, while the statement by the Court just quoted purports to justify an evolutive approach in the instant case, it does not make it sufficiently clear that this was precisely what the Court was doing. In individuals cases one may find the Court’s reasoning convincing. However, because the Court may be departing from previous understanding of Convention law (the one that the Convention drafters might have expected, back in the early 1950s) it is appropriate to expect it to not only justify the answer it gives in the case before it, but also why this answer differs to the previous Convention understanding.

\(^{168}\) Bates (n45) at 235.

We also noted in the last chapter that the Commission in *The East African Asians cases* in noting that “[t]he Convention was manifestly adopted for a purely humanitarian and civilising purpose...”\(^{170}\) may have been taking an evolutive approach with respect to Article 3 of the Convention. It did not say that it was doing this but it was taking an approach which can be said to differ from its previous approach in *the Indian Residents Case*\(^ {171}\) enabling it to interpret the discrimination faced by the applicants (who were British overseas citizens) in entering the UK on the bases of their race as inhuman treatment contrary to Article 3 of the Convention. This was regardless of the existence and non-ratification of Protocol 4 of the Convention, which among other rights included the right to enter a country of which one is a national (Prot 4 Art. 3(2)), thus suggesting it may have been taking an evolutive approach.

*Tyre* itself, as we saw from the previous chapter, is another case where the old Commission on Human Rights gave what we might now, with the benefit of hindsight, and the discussion in the previous chapter, describe as evolutive interpretation. However, as we commented the Commission’s communicated decision gave very few indicators that the decision might have been an evolutive decision until it gave its pleadings before the Court itself.

The cases just discussed were all prior to the Court’s first express statement that the Convention is a living instrument in *Tyre*.\(^{172}\) For this reason it is probably understandable that the Court failed to

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\(^{171}\) Here a comparison between the Commission’s admissibility decision in the *Indian Residents Case* suggests the outcome of *East African Asians* would have been different had the Commission followed its previous approach. See PJ Duffy, ‘Article 3 of the Convention on Human Rights’, (1983) 32(2) ICLQ 316 at 341 and 344. See also E Bates, ‘British Sovereignty and the European Court of Human Rights’, (2012) 128 LQR 382 at 392.

\(^{172}\) *Tyre* (n4) at para 31.
enunciate a clear methodology for its evolutive interpretation or utilise language that might indicate this was the approach it was taking.

However, more recently the Grand Chamber appears to have non-expressly taken an evolutive approach in *S and Marper v. UK*. This case challenged the UK’s blanket retention of DNA information on the so-called ‘DNA Database’ from those not convicted of an offence as contrary to an individual’s Article 8 rights (respect for family and private life.) As in *Dudgeon*, the Court did not utilise of living instrument terminology. However, it did give some evidence that it was taking an evolutive approach. Firstly, the Court noted the Commission’s previous decisions in *McVeigh, O’Neil and Evans and Kinnunen v Finland*. In these cases the Commission expressed doubt that retaining finger print data interfered with Article 8 rights. The Court then discussed its later case law where either a breach of Article 8 was found or it was distinguishable from the case at hand. In *Friedl v Austria* the Court had considered that retention of anonymous photographs could not interfere with Article 8 so long as they were not entered into a data processing system, which was the case in *S and Marper*. In *P.G. and JH v. United Kingdom* the recording and systematic and permanent retention of data, in this case voice data, could amount to an interference with Article 8. The Court in *S & Marper* then found that the retention of finger prints identified to an individual could affect his right to respect for his private and family life and thus could not be considered neutral or insignificant.

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174 *Dudgeon Dudgeon v. UK* (n30).
175 *S and Marper v. The United Kingdom* (App.Nos. 30562/04 and 30566/04) (ECtHR 4 December 2008) at para 79-81
176 See: Beattie n166 at 233.
177 *S and Marper v. UK* (n173) at para 82-83.
180 *S and Marper v. UK* (n173) at para 84.
proper explanation of the gaps between the cases and why the Court chose to come to the conclusion it did. In fact, it has been noted that “At that time Strasbourg case law didn’t support the argument that there had been a violation of art. 8 in this case.”\textsuperscript{181} This might suggest something of an evolutive approach when read with the Court’s later statements regarding proportionality that it would:

“...consider the issue with due regard to the relevant instruments of the Council of Europe and the law and practice of the other Contracting States.”\textsuperscript{182}

It then, reminiscently of \textit{Tyrer}\textsuperscript{183} noted that:

“In the great majority of Contracting States with functioning DNA databases, samples and DNA samples derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle are allowed by some Contracting States.”\textsuperscript{184}

The Court also noted the practice in Scotland stating that this was in-line with the recommendation of the CoMs’ Recommendation R(92)1.\textsuperscript{185} All this suggests something of a living instrument approach, albeit without the Court expressly stating this.

\begin{footnotes}
\textsuperscript{182} S and Marper v. UK (n173) at para 107.
\textsuperscript{183} \textit{Tyrer (n4) at para 38.}
\textsuperscript{184} S and Marper v. UK (n173) at para 108.
\textsuperscript{185} Ibid at para 103 and 105.
\end{footnotes}
However, it is not just the cases where the Court omits to make it clear that it is making an evolutive interpretation in their decisions that damages the consistency and thus transparency of its approach. There are some cases like A v. Croatia\textsuperscript{186} where the Court expressly recalls that the Convention is a living instrument\textsuperscript{187} but then, nevertheless, seemingly goes on to give no consideration of the doctrine in coming to its overall decision.

In A v. Croatia, in reaching a finding of violation of Article 8 in relation to the national authorities’ failure to implement measures designed to protect the applicant from B’s (her husband) violent psychiatric condition. In this case the Court stated:

“The Court stresses that the Convention is a living instrument which must be interpreted in the light of present-day conditions and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies... Bringing to justice perpetrators of violent acts serves mainly to ensure that such acts do not remain ignored by the relevant authorities and to provide effective protection against them.”\textsuperscript{188}

Apart from general factual background to the case the only other explanations of the Court’s conclusion after the Court’s above living instrument recollection were that it said:

\begin{footnotesize}
\textsuperscript{186} A v. Croatia (App.No. 55164/08) (ECtHR 14 January 2011).
\textsuperscript{187} Ibid at para 67.
\textsuperscript{188} Ibid at para 67.
\end{footnotesize}
“...it appears that the requirement of effective protection of the applicant's right to respect for her private life would have been better satisfied had the authorities been in a position to view the situation as a whole.”

So with the Court’s case law explanation it is difficult to tell whether the Court was interpreting the Article 8 evolutively to include in the States obligations, an obligation to protect the applicant from her husband’s violent psychiatric condition. As such, if the Court was indeed swayed in its decision making by the living instrument doctrine it would be impossible to ascertain on what precise basis it did so without insider information. As such, it is possible that the Court’s casual reference to the living instrument doctrine, without justification for its employment, risks harming the Court’s authority.

Overall the impression that has been illustrated is that the Court’s use of living instrument terminology in its adjudications is inconsistent, leading to doubts whether or not it has been employed in a given case. This is clearly unsatisfactory from the point of view of transparency and dialogue. However, what may also, perhaps, be inferred from this, is that the living instrument terminology of itself is neither required nor sufficient of itself to facilitate Convention evolution. It appears more so that whether an evolution of the Convention has occurred, this terminology is merely highly beneficial in making such an occurrence clear to Convention stakeholders. A clarity that should be increased whenever possible to enable a more constructive relationship between the Court and the member States based on a healthy dialogical model.

189 *Ibid* at para 76.
4.3.4 Article 3 and the Failure of the Court’s Consensus Methodology

One aspect of the Court’s jurisprudence that poses particular problems for advocates of consensus as the Court’s primary method of finding evolution of the Convention is Article 3 (Prohibition of torture, inhuman and degrading treatment and punishment.) We have already identified that the Court in *Tyrer* can be criticised for its vague reference to ‘the great majority of member states of the Council of Europe’\(^{190}\) without then giving a comparative analysis of the relevant provisions of member States’ laws in the area.\(^{191}\) However, with the exception of *Soering,\(^{192}\) Ocalan\(^{193}\) and Al-Saadoon and Mufdi,\(^{194}\) which all concerned the abrogation of express allowance of the death penalty under Article 2 of the Convention by declaring the death penalty *per se* a violation of Article 3, the Court’s later case law has been even less satisfactory.

In *Selmouni v. France\(^{195}\)* the Court made the following statement:

“It takes the view that the increasingly high standard being required in the area of protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches in fundamental values of democratic societies.”\(^{196}\)

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\(^{190}\) *Tyrer (n4)* at para 31.


\(^{192}\) *Soering v UK (n42)*.

\(^{193}\) *Ocalan v. Turkey (n43)* and its subsequent referral to the Grand Chamber: *Ocalan v. Turkey (2005) (n43)* respectively.

\(^{194}\) *Al-Saadoon and Mufdi (n44).*

\(^{195}\) *Selmouni v. France (n126).*

\(^{196}\) *Ibid* at para 101.
This statement other than utterly failing to quantify or give comparative analysis of the situations in the member States is troubling. The Court’s use of the phrase “It takes the view” and its failure to give comparative analysis, may give the impression that it was just imposing its own opinion as to what constitute torture, on the member States as is consistent with some of the anti-Convention sentiments described in the first chapter of this study.\(^{197}\) The Court might have been forgiven for the neglect of its explanation of consensus in this case, but this marked a continuing trend in Article 3 jurisprudence. In \textit{Beganovic,} \(^{198}\) \textit{Henaf} \(^{199}\) and \textit{Mubilanzila Mayeka and Kaniki Mutunga} \(^{200}\) the Court cited the above quote in the operative part of its judgment before going on to find a violation of the Convention.\(^{201}\) In fact, of these three cases, only in \textit{Mubilanzilla Mayeka and Kaniki Mutunga} \(^{202}\) did the Court at least make fleeting reference to Article 10 of the Convention on the Rights of the Child\(^ {203}\) as a basis for its evolutive interpretation of Article 3, but this was brief and failed to fully explain its effect on any relevant evolution of Convention law or the Court’s judgment. As such it may have implied some legitimacy of approach on the Court’s part, but this was uncertain. These cases represent a dangerous lack of explanation which leave the Court open to the criticism that the judges simply rule based on their own personal morality.\(^ {204}\) At this point it must quickly be noted that the ambiguity of the \textit{Selmouni} explanation may well play into the previously discussed argument of George Letsas, that the Court is more concerned to evolution of what it considers to be the ‘moral truth’ of the Convention than commonly accepted standards in the member States.\(^ {205}\)

However, given our discussion of the Court’s consensus methodology it appears that this is more of

\(^{197}\) See e.g. above chapter 1 footnotes 1, 35 and 46.


\(^{201}\) In fact a search through the Court’s case law will reveal the citation of the phrase “increasingly high standard being required” in 28 cases (including \textit{Selmouni} itself.) Although these cases concern different Convention rights, what is striking is that they all concern treatment which would be taken to impact on the very essence of human dignity through treatment that was argued to include torture or inhuman and degrading treatment, slavery or forced labour or unlawful detention.

\(^{202}\) \textit{Mubilanzila Mayeka and Kaniki Mutunga} (n200).

\(^{203}\) \textit{Ibid} at para 57.


\(^{205}\) See above section 4.2
an anomalous area of Convention law. The Court’s general approach has been the discussion of
European Consensus and so this may be considered a failing in an individual area of law rather than
a broad and general justification of a moral truth thesis for evolutive interpretation.

4.4 Limitations on Evolutive Interpretation

The previous section painted a relatively negative view of the Court’s consensus methodology, and,
by extension, of the Court’s overall approach to the living instrument doctrine. However, this section
somewhat redresses the balance and heeds concerns that the doctrine can be used as a limitless
sources of judicial activism for the judges to re-write the substance of the Convention at will. There
are limits both hard and soft on the Court’s evolutive interpretation which should give the member
States comfort in knowing that their Convention obligations cannot extend endlessly and completely
arbitrarily. However, contrary to the view expressed by Baroness Hale, this section will not argue
that there are absolute limits to the extent of evolution for existing Convention Rights.206 It will
instead argue that there are limiting factors on the living instrument doctrine and the further
Convention rights are extended, the more difficult it will be to find the relevant level of consensus to
justify further evolution of the Convention.

4.4.1 Limits on Evolving 'New' Convention Rights

Judges of the Court have expressed in a dissenting judgment, which included the former President
Sir Nicolas Bratza:

“...no judicial interpretation, however creative, can be entirely free of constraints. Most importantly it is necessary to keep within the limits set by the Convention provisions.”

Evolutive interpretation may be considered both in terms of vertical evolution (evolution of established Convention rights to a higher standard of protection that existed before) and horizontal evolution (evolution of rights not previously thought to be contained in the Convention text, or ‘new’ rights as we shall refer to them). The former we have already shown in this chapter to be possible through the Court’s canon of living instrument case law, but so far we have not considered the latter.

With regards to the evolution of ‘new’ convention rights the Court has stated that this is not possible as a matter of principle. The ‘old’ (Pre-Protocol 11) Court in Johnston and Others v. Ireland stated:

“It is true that the Convention and its Protocols must be interpreted in light of present-day conditions. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so where the omission was deliberate.”

207 Separate Partially dissenting opinion of Judges Bratza, Lorenzon, Jočiené, Villiger and Sajó in Scoppola v. Italy (No.2) (App.No. 10249/03) (EctHR 17 September 2009) at 49.
208 See above Section 4.2 generally.
209 Johnston and Others v. Ireland (App.No. 9697/82) (ECTHR 18 December 1986) at para 53. (citations omitted)
This case concerned whether the Convention included under Articles 8 (Right to respect for private and family life) and Article 12 (Rights to Marry) a right to divorce. The Court in finding that a failure to allow for a mechanism for divorce did not violate the Convention noted that the founders of the Convention had only incorporated a right to marry and had purposefully omitted allowance for marital dissolution (at para 52).
So this clearly suggests that evolution of new rights is impossible. This is the general rule that has been followed time and again and adopted by the new post Protocol 11 Court in cases such as *Austin v. UK* where the Grand Chamber in relation to the legality of the police practice of ‘kettling’ said:

“This does not, however, mean that to respond to present-day needs, conditions, views or standards the Court can create a new right apart from those recognised by the Convention or that it can whittle down an existing right or create a new ‘exception’ or ‘justification’ which is not expressly recognised in the Convention.”\(^{210}\)

However, while these statements present a clear cut picture of limits to the Convention’s valid interpretation, they do not fully reflect the body of Convention law. It is true that the Court has resisted the urge to evolve wholly new Convention rights, but this does not mean that the Court has not extended established Convention rights in novel ways that were expressly intended not to be included in the Convention at the time of its negotiation. An example of this might be the negative aspect of the right to freedom of association under Article 11 of the Convention. In *Sigurjonson v. Iceland*\(^{211}\) the Court considered whether a requirement to join a trade association in order to obtain a taxi license breached Convention Article 11.\(^{212}\) It extended on from its previous decision in *Young, James and Webster v. UK*\(^{213}\) in finding that Article 11 included a negative aspect, namely the right not to be forced to join an association as a requirement of employment. While it could be argued that this a widening of existing Convention rights and not the creation of wholly

\(^{210}\) *Austin and others v. The United Kingdom* GC (App.Nos. 39692/09, 40713/09 and 41008/09) (ECtHR 15 March 2012) at para 53 (citations omitted).

\(^{211}\) *Sigurjonson a Sigurjonsson* (n72).

\(^{212}\) The right to freedom of assembly and association. Previously, as will be recalled from earlier in this chapter, the Court had been reluctant to interpret the Convention to include a negative right not to associate on the same footing as the positive right to associate, as this had been purposefully omitted from the Convention during its drafting. See above section 4.2.2.

\(^{213}\) *Young, James and Webster* (n74).
new right, it may nevertheless show that the Court can, to a limited extent, evolutively interpret rights into the Convention’s substantive guarantee that were deliberately not included in the original negotiation of the Convention. This should be considered distinct from the interpretation of existing Convention clauses to cover areas that were simply not considered at the negotiation of the Convention, for instance, whether IVF treatment would fall under Article 8 of the Convention.

So it seems the Court has identified a restriction on the creation of wholly new rights via the living instrument doctrine. However, it is nevertheless capable of expanding existing Convention clauses to contain rights that were unintended or even deliberately excluded when the Convention was negotiated in the 1950. So to some extent member States are right to be concerned about the unpredictable growth of their Convention obligations and the Court should seek to further reassure them in its jurisprudence in such areas.

4.4.2. Specific Convention Language of the Convention Text

It has been said that “The wording of the legal rule concerned provides for boundaries which may not be overstepped.” This puts succinctly the idea that within reason the Court should assume that the Convention’s founders included within the Convention the rights for which they intended and not other rights. However, de Blois goes on to state:

\[214\] For more information on the Freedom of Association see Harris, O’Boyle, Bates and Buckley (n7) at 724-753. See also further developments to the right to Freedom of Association in Sorenson and Rasmussen v. Denmark (App.Nos. 52562/99 and 52620/99) [ECtHR 11 January 2006] where the Court elaborated that the freedom of choice of the individual is inherent in Article 11 (at para 58).

\[215\] See e.g. Evans (n8).

“The delimitation of these boundaries is up to the judge in question.”

Herein lies the problem. While the Court’s evolutive method enables the Convention to grow and incorporate aspects of rights which would not have been included in the 1950’s when the Convention was drafted the role of adopting evolutive interpretations falls to the judges of an international Court. As a corollary of this responsibility, it is fundamentally for the Strasbourg judges to decide when they have reached the boundaries of substantive rights. If then the member States distrust the judges to interpret the Convention without creating new s they did not agree to, then essentially they see the Courts as is akin to the ‘fox guarding the henhouse’.

We have already identified, in the earlier parts of this chapter, many cases in which the Court has revised its interpretations of the boundaries of what is included in rights that clearly do fall within the Convention. However, an example of a case where the Court was cognisant of the linguistic barrier of the Convention text occurred in Schalk and Kopf v. Austria. This case concerned the scope of Article 12 of the Convention (right to marry), in particular whether this right included the right for same sex couples to marry. The case hinged on the Court’s interpretation of the wording “Men and Women” within Article 12. Noting the language and historical origins of the Convention the Court said:

“However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to ‘everyone’ or state that ‘no one’ is to be subjected to certain types of

\[\text{Footnotes:}\]

217 Ibid pages 35-59 at 42.
219 Article 12 of the Convention states: “Men and women of marriageable age have the right to marry and found a family, according to national laws governing the exercise of this right.”
prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex.”

As a result of the Court’s noting of the linguistic barrier, and the lack of consensus in the area, it made a finding of no violation of Article 12 of the Convention. This decision thus shows the Court’s reluctance to depart from the specific language of the Convention, when that language was adopted with a specific and clear intention not to be interpreted to include new scenarios and meanings, and where there is no evolution of the domestic laws of most Convention States. Professor Mowbray has thus surmised that this decision may be an example of the Court respecting the will of the member States rather than the applicant’s submission that contemporary standards require States to permit civil marriage for same-sex couples. However, whether the above quoted statement of the Court can be taken as the decisive reason for it not finding a violation in Schalk and Kopf is unclear. This is because the Court had also noted “...that there is no European consensus regarding same –sex marriage. At present no more than six out of forty-seven Convention states allow same-sex marriage.” So this case could be considered a decision where the Court simply did not find enough consensus to justify a finding that the Convention had evolved at the time of the case. Thus whether this statement will remain the approach of the Court if consensus should evolve in favour of

220 Schalk and Kopf v. Austria (n218) at para 55.
221 Only 6 member States had allowed for same sex marriage in their domestic legal systems. See below text to n217.
222 See A Mowbray, ‘Between the Will of Contracting Parties and the needs of today: Extending the scope of Convention rights and freedoms beyond what could have been foreseen by the drafters of the ECHR’, in E Brems and J Gerrards (Eds), Shaping Rights in the ECHR (Cambridge University Press, 2014) pages 17-37 at 28-29.
223 Ibid at pages 17-37 at 29. Mowbray’s suggestion would seem to contradict George Letsas’ proposed moral reading of the Convention, instead placing it more on a State centred grounding where consensus methodology might be said to take a prominent role in attaining State consent to evolutive rulings.
224 Schalk and Kopf v. Austria (n218) at para 58.
same-sex marriage is unclear.\(^{225}\) Indeed it has been noted in a leading textbook on ECHR law that “The phrase ‘as matters stand’ allows for the possibility that, in accordance with the Convention’s character as a ‘living instrument’, Article 12 might be re-interpreted as requiring states to provide for same-sex marriages should there emerge the ‘European consensus’ that was lacking when the \textit{Schalk & Kopf} case was decided.”\(^{226}\) The text book went on to note the progressive trend in favour of same sex marriage with 10 member States providing for same sex marriage by 2014 and a further 11 providing for some form of civil partnership.\(^{227}\) Moreover the Grand Chamber, citing the living instrument doctrine, has now ruled that civil partnerships should be open to both heterosexual and same-sex couples in \textit{Vallianatos and others v. Greece}.\(^{228}\)

4.4.3 Evolutive Interpretation and the Margin of Appreciation Doctrine

Lord Hoffmann, a notable critic of the Court and former senior member of the UK Judiciary has contended that human rights are universal in substance but national in application.\(^{229}\) One of the Court’s doctrines that most enables Hoffmann’s contention to occur is the margin of appreciation doctrine. This doctrine first arose in \textit{Greece v. UK}\(^{230}\) where the Commission said that the UK

\(^{225}\) For instance, since the case decision the United Kingdom in 2013 enacted the Marriage (Same Sex Couples) Act 2013 enabling for both same sex marriage and the conversion of civil partnerships into marriages. It should also be noted that the issue relating to discrimination (Article 14) in relation to the enjoyment of a private and family life (Article 8) resulted in 3 Judges (Rozakis, Spielman and Jebens) which was based on the growing protection of same-sex relationships as family units.

\(^{226}\) Harris, O’Boyle, Bates and Buckley \(n7\) at 759

\(^{227}\) Ibid \(n49\).


\(^{230}\) There is a vast literature on the margin of appreciation doctrine. See e.g. Y Arai-Takahasi, \textit{The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR}, (Intersentia, 2002) at 5; HC Yourow, \textit{The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence}, (Martinus Nijhoff Publishers 1996); \textit{Benvenisti} \(n11\); O Gross and F Ni Aolain, ‘From Discretion
authorities “should be able to exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation”. However, it was not until *Handyside v. UK* where the Court gave its most famous statement on the doctrine. With respect to the limits that could be placed in freedom of expression, under Article 10(2), it famously stated:

“...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”

The Court then importantly went on to state:

“The Court, which, with the Commission, is responsible for ensuring the observance of those States’ engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a

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233 *Handyside v. UK (n232)* at para 48.
"restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision."234

What we see here is the recognition by the Court of the division in the roles played by itself and the member States in holding authority over the legal space of Europe. In fact the first Vice President of the Court in his authoritative work on the principle of subsidiarity notes:

“… [the Court] has recognized the existence of a ‘margin of appreciation’, occasionally referred to as a ‘power of appreciation,’ ‘discretion’ or latitude,’ to be left to the Contracting States. Where positive action or different treatment in law is required from the State, that latitude means that the States have a ‘choice of [the] means’ to be used for making the exercise of the right concerned possible and effective or to avoid arbitrary discrimination.”235

Petzold also notes that:

“Under the Court’s case-law the scope of the discretion [granted by the margin of appreciation] varies according to the circumstances, the subject-matter and its background. It is ‘wide’ notably in cases which involve important issues of political organisation, of

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234 Ibid at para 49.
economic or social policy and of moral conceptions prevailing in the democratic society of the State concerned.”

Indeed it has also been noted by Judge Mahoney\(^\text{237}\) that:

“An international Court is in principle the appropriate or qualified forum for performing the function of deciding individual cases about the concrete application of human rights in different countries - democratic countries at any rate. Only national courts are. On this approach universality of human rights is located in, and limited to, the purely aspirational value of abstract declarations laying down general standards.”\(^\text{238}\)

So essentially the margin of appreciation doctrine recognises the division of competences between the member State and the Court. In doing so this is likely to have implications for the implementation of evolutive interpretation of the Convention, as a matter falling within the State’s margin of appreciation would be unlikely to be the subject of a finding of violation of the Convention brought on by an evolutive interpretation of a substantive provision by the Court. However, like the living instrument doctrine, the margin of appreciation doctrine is affected by the presence or absence of European Consensus. In contrast to the living instrument doctrine, the margin of appreciation is active where there is an absence of European consensus.\(^\text{239}\) There are multiple examples of the margin of appreciation’s operation whether that is in emergency situations.

\(^{236}\) Ibid at 57.
\(^{237}\) At the time of writing, Judge Mahoney was President of the European Union Civil Service Tribunal.
\(^{239}\) See. Wildhaber, Hjartson and Donnelly (n82) at 250.
surrounding terrorism, marriage, adoption, etc. A line of case law notable for the interface between the margin of appreciation and the evolutive interpretation of the Convention, is what might be referred to as ‘the transsexual’ cases which concern the legal recognition of the gender identity of transsexuals. It has been said that “The case of Christine Goodwin marked the end of a line of cases in which, for over a decade, transsexuals has tried to obtain the right of legal recognition of their change of gender.” In the previous cases the Court had not been satisfied that a common new European standard requiring the full recognition of post-operative transsexuals had emerged, with the Court in Cossey v. UK noting that “... this is still, having regard to the existence of little common ground between the Contracting States, an area in which they enjoy a wide margin of appreciation (see the Rees Judgment. P. 15, para. 37.)” However, when the Court came to deliver its judgment in Christine Goodwin v. UK while recognising that there was still no ‘common European approach’ it was persuaded by a ‘clear and uncontested evidence of a continuing international trend towards full legal recognition of post-operative transsexuals’ new sexual identities. What this line of case law may illustrate is that the margin of appreciation may limit the progression of evolution of substantive Convention rights.

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241 E.g. Schalk and Kopf v. Austria (n162) at para 58.
243 J Gerards and H Senden, ‘The Structure of fundamental rights and the European Court of Human Rights’, (2009) 7 International Journal of Constitutional Law 619 at 634. In this quotation the authors made footnote citations to the cases of Rees v. United Kingdom, Cossey v. United Kingdom, B v. France and Sheffield & Horsham v. United Kingdom Respectively.
244 See the cases detailed in the previous footnote.
245 See Harris, O’Boyle, Bates and Buckley (n7) at 10.
247 Christine Goodwin v. the United Kingdom GC (App.No. 28957/95) (ECtHR 11 July 2002).
248 Ibid at para 84.
249 Ibid.
250 See also Harris, O’Boyle, Bates and Buckley (n7) at 10.
251 In this case the evolution of Article 8 of the Convention to include the legal recognition of new sexual identities of individuals after gender re-assignment surgery has taken place. However, it is should be noted that the Court’s approach in the Christine Goodwin decision has been criticised. See e.g. T Zwart, ‘More Human Rights than Court: Why the legitimacy of the legitimacy of the European Court of Human Rights is in need of Repair and how it can be done’, in T Zwart and J Fraser (Eds), The European Court of Human Rights and its Discontents, Turning Criticism into Strength (Edward Elgar, 2013) 71-95 at 91-92.
However, this margin of appreciation approach may in rare cases, lead to the Court deferring to member States even when it might otherwise have found sufficient consensus for an evolution of the Convention to have taken place. As mentioned previously A, B and C v. Ireland\textsuperscript{252} is a prime, but rare, example of this phenomenon.\textsuperscript{253} Here with reference to State practice on abortion the Court noted that with respect to the first applicant, she could have received an abortion in 40 of the member States, 35 member States would have permitted an abortion for the second applicant and that only 3 States had abortion laws more restrictive than Ireland.\textsuperscript{254} The Court stated:

\begin{quote}
“Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.”\textsuperscript{255}
\end{quote}

So one would have assumed from this that a finding that the Convention had evolved in the field of Article 8 would be forthcoming in the Court’s decision making. Indeed Professor De Londras and Dr Dzehtsiarou’s evaluation of the case argued in favour of this\textsuperscript{256} and six judges, including two former vice presidents of the Court, jointly dissented stating the majority had erred in not following the strong European consensus.\textsuperscript{257} Yet, this was not the case and the majority instead went on to state:

\begin{quote}
252 A, B and C v. Ireland (n9).
253 To some extent the case may be considered an exceptional case. However, Wildhaber et al have likened this case to a political question doctrine. (Wildhaber, Hjartson and Donnelly (n82) at 259.) Whether this case marks a departure, albeit in cases of acute political sensitivity, or it marks an exceptional case, it marks the interface between the real politic and legal adjudication which calls into question the legitimate scope of the Court in interpreting the Convention.
254 A, B and C v. Ireland (n9) at para 235.
255 Ibid 235.
\end{quote}
“However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the state.”\textsuperscript{258}

If one sees the doctrines as opposite ends of the same consensus-based interpretative method then this decision of the Court contradicts its consensus methodology as set out in the vast majority of its preceding jurisprudence. The Court cannot on the one hand affirm the presence of a European consensus and on the other hand find in favour of the State’s margin of appreciation \textit{if} the margin of appreciation doctrine operates \textit{solely} on the basis of the absence of a European consensus. However, if one views the matter such that the margin of appreciation doctrine and the living instrument doctrine are separate and distinct, but sharing a significant overlap by virtue of their both being heavily influenced by European consensus, then it is possible to reconcile situations like that in \textit{A, B and C} with Court’s overall approach on the basis of the facts and context of the issue arising in \textit{A, B and C v. Ireland}. Indeed, Wildhaber et al have liked this to a “\textit{de facto} ‘political question’- doctrine” meaning that when an issue raises acute sensitivities in a member State, the Court will grant a wide margin of appreciation to them.\textsuperscript{259} This is because the Court recognises that the relevant authorities in the member States are better placed to decide on complex and often acutely sensitive issues about morals and other subjective issues in their societies. The Court recognised this in the aforementioned \textit{Handyside} case when the Court noted the temporal and geographic variability of moral requirements noting that “…it is not possible to find in the domestic law of the various contracting States a uniform European conception of morals.”\textsuperscript{260} This can further be seen in the \textit{A, B and C} case when the Court noted:

\begin{itemize}
\item \textsuperscript{258} \textit{A, B and C v. Ireland} (n9) at para 236.
\item \textsuperscript{259} See above n229.
\item \textsuperscript{260} \textit{Handyside v. United Kingdom} (App.No. 5493/72) (ECtHR 7 December 1976) at para 48.
\end{itemize}
“There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish state in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under the Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.”261

As such it could be speculated that while the Court might have adopted an evolutive finding in A, B and C, the position it adopted was that because of the acute sensitivity of the abortion issue in the Republic of Ireland the margin of appreciation doctrine intervened. This may be concurrent with the idea of a strong internal consensus (i.e. internal to the State concerned) trumping the external European consensus among most of the other member States, but only in the context of acutely sensitive moral and ethical issues. However, De Londras and Dzehtsiarou note:

“[Tyrer and Dudgeon suggest] that even in an area of moral sensitivity an alleged internal trumping consensus required hefty supporting materials in order to succeed. The same proved not, however, to be the case in A, B and C v. Ireland.”262

While De Londras and Dzehtsiarou have a point, with respect, the A, B and C v. Ireland case differs from the Tyrer and Dudgeon cases on the exceptional level of sensitivity surrounding abortion in Ireland. In both Tyrer and Dudgeon the respondent State itself had largely outlawed the Convention

261 A, B and C v. Ireland (n9) at para 233.
262 De Londras and Dzehtsiarou (n256) at 255.
violating legislation, and it was only present in relatively small and autonomous parts of their territory. Viewing the margin of appreciation from the above perspective—i.e. that the margin of appreciation may arise when a strong internal consensus arises—depicts the doctrine as a potential limitation on the effects of evolutive interpretation, albeit one that will only apply in exceptional and acutely sensitive cases. However, this is the exception not the norm, for it is much more likely that, as commented by Baroness Hale (in her speech at the opening of the Strasbourg judicial year in 2011) “[t]he evolutive approach to interpreting the Convention tends to lead to a narrowing of the margin of appreciation.” Hale’s statement when viewed in the context of the majority’s decision in A, B and C v. Ireland indicates that the presence of a high level of consensus may entail the Court requiring greater proof of a strong internal consensus or acute sensitivity of the issue at stake to justify the margin of appreciation’s operation. In practice this would likely result in the Court deeming fewer situations as sensitive enough to fall under the margin of appreciation. Indeed, Andreas Follesdal argues:

“[t]he principle of subsidiarity cannot on its own provide legitimacy or contribute to a defensible allocation of authority between the national and international institutions, e.g., regarding human rights law. Appeals to subsidiarity are too vague, and require attention to more items—including the standing of states, whether centre action is prohibited or required, and who should decide such issues.”

If his argument is followed then recourse to subsidiarity through the margin of appreciation will not automatically benefit the Court’s legitimacy and may in fact have the potential to bring it into

\[263\] i.e. the Isle of Mann (a crown dependency) in Tyrer v. UK and Northern Ireland in Dudgeon v. UK.
\[264\] Baroness Hale (n206) at 542.
disrepute in some circumstances. However, what will be clear to readers is that the margin of appreciation doctrine may potentially act as a break on Convention evolution.

4.4.4 Consensus itself as a Limitation on Evolutive Interpretation

So far we have identified that, when it exists, consensus acts as a primary catalyst for evolution of Convention standards. However, it may also act as a form of limitation on Convention evolution, when the Court is unable to find sufficient consensus amongst the member States. This much is clear. However, at the general level consensus may provide a soft limit to the potential evolution of the Convention. This is because the further the Convention evolves, overall the more extensive the obligations required of the member States are and so substantive evolution of the Convention may reach a natural plateau as it will become less likely that States will be willing to advance to even higher levels of protection. Such a position has been expressed at the Court’s 2011 seminar series that marked the opening of the judicial year for the ECtHR by Professor Hegelsen about general Convention reform but in the context of describing natural limits to evolutive interpretation.\textsuperscript{266} Hegelsen, the former President of the Venice Commission,\textsuperscript{267} in describing how general expansion of Convention protection, and especially by the Court’s initiative centred on the evolutive interpretation, might lead to its limits stated:

\textsuperscript{266} The thrust of Hegelsen’s argument was that the more expansive the Convention rights become and thus the more onerous they are for member States to fulfil, the more member States will resist Convention expansion through all mediums, including evolutive interpretation. This is likely to include through not reforming their domestic legal systems in a way that will advance European consensus towards a more expansive approach to the Convention rights.

\textsuperscript{267} Now the first Vice President of the Venice Commission.
“In conclusion, this expansive dynamism has created some kind of backfire effect. There is a
lack of trust between many governments and the international supervisory bodies. There is
thus an urgent need to restore trust.”\textsuperscript{268}

Effectively what Hegelsen was saying is that as the Convention grows to encompass ever more
cumbersome obligations on the member States the more likely they are to resist this movement
through the Convention checks and balance mechanisms, discussed in chapter 6. His emphasis was
particularly on resistance to evolutive interpretation, especially given the title of the conference was
“What are the limits to the evolutive interpretation of the Convention?” Hegelsen’s view on
potential State resistance to the extensive expansion of Convention obligations may be to some
extent supported by former Vice President of the Court, Francoise Tulkens, who in the same
conference stated:

“The notion of a ‘European Consensus’ has long played an important role in regulating the
pace of Convention development. Faced with certain concepts used in the Convention, the
Court determines the meaning they have acquired over time, such evolution being accepted
however only if sufficient number of States parties to the Convention adhered to it. In many
cases it is thus a question of identifying the ‘common denominator’ among States.”\textsuperscript{269}

(emphasis added)

\textsuperscript{268} JE Hegelsen, (Dialogue between Judges, Strasbourg, 2011)
\textsuperscript{269} JF Tulkens, (Dialogue between Judges, Strasbourg, 2011)
<www.echr.coe.int/Documents/DIALOGUE_2011_ENG.pdf> accessed on 15\textsuperscript{th} February 2011 at 9. It is
suggested by the author here, that in the wake of resistance from member States to increased Convention
obligations via evolutive interpretation, they are less likely to liberalise their legal systems and practice and so
further consensus is unlikely to emerge. This at a general level will then act as a break on evolutive
interpretation.
The general proposition emitted from Hegelsen’s and Tulken’s statements when taken together are that the further and more extensively the Court interprets the Convention rights, the more difficult it will be for it to divine European consensus, seems sensible. Although not susceptible to objective standards of proof, previously mentioned recent hostility on the part of the UK towards the Court’s prisoner voting case law may anecdotally suggest that this is beginning to be experienced by the Court. This may to some extent be evidenced by the growing pressure on the Court to give greater emphasis to the principle of subsidiarity and the margin of appreciation.

Another form of evidence that consensus itself may limit the evolutive expansion of substantive rights is that the Strasbourg judiciary have shown awareness of this limitation. In this connection, reference may be made to statements in the Strasbourg jurisprudence such as:

“In other words the point of evolutive interpretation, as conceived by the Court is to accompany and even channel change; it is not to anticipate change, still less to try and impose it.”


272 This is likely to have led to the conclusion of Protocol 15 of the Convention for which Article 1 of Protocol 15 when it enters into force will add the following recital to the Convention Preamble which specifically emphasises the principle of subsidiarity and the margin of appreciation:

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

In the case of *X and Others v. Belgium* which concerned discrimination against same-sex couples as same-sex second parent adoption was impossible (violating their rights to respect for a private and family life (Article 8) in conjunction with the right to non-discrimination in the enjoyment of Convention rights (Article 14), from which the latter quotation comes, the dissenting judges went on to note of the case:

“Without in any way ruling out the possibility that the situation in Europe in the future will evolve in the direction apparently wished for by the majority, this does not seem to be the case, as we have seen, at present. We therefore believe that the majority went beyond the usual limits of the evolutive method of interpretation.”

So what the above two quotes suggest is that it is merely the role of the judges to reflect European consensus and not to artificially coerce evolution. The latter quotation in the context of *X and others* suggests the majority had gone too far, but more importantly, that the limit of evolutive interpretation is the extent to which an interpretation of the substantive content of the Convention reflects European consensus. Where an evolutive interpretation goes beyond reflecting the consensus standards of the member States, by extension, the minority dissent suggests that it is acting illegitimately. This suggests that while consensus may play a significant role in enabling Convention evolution, it nevertheless represents a limit to it as well. Although there may be disagreements on the facts of cases, as a general principle Judges remain cognisant of the natural corollary of consensus as being required and enabling the Convention to evolve, that where there is insufficient consensus to be found, they may not *legitimately* find an evolution of the Convention. As

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274 Ibid at para 23.
a follow on lesson from this discussion, where the Court shows awareness of a lack of consensus and so is unable to find a Convention evolution, it may be indicating that it has taken note of the tacit will of the member States through their lack of action. Although tacit this may form an important aspect of the Convention’s dialogical model of growth and control.

4.4.5. Presence of Convention Protocols and Evolutive Interpretation

Optional protocols to the Convention have been used to add extra rights to the Convention and to reform the procedural aspects of the Convention. While they are capable of having a profound effect on the protection offered by the Convention and the Court to those in its jurisdiction they may also have a limiting effect on the Convention’s substantive evolution. As we saw earlier, the Court in Soering noted the almost overwhelming practice of the member States in abolishing the death penalty, but nevertheless felt unable to find an evolution of Article 3 of the Convention because:

“...Protocol No. 6 (P6), as a subsequent written agreement, shows that the intentions of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an agreement.”

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275 See Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing certain rights and freedoms other than those already included in the Convention and in the first protocol thereto CETS: 046 (Opened for Signature 16 September 1963, entry into force 2 May 1968); Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing certain rights and freedoms other than those already included in the Convention and in the first protocol thereto CETS: 117 (opened for signature 22 November 1984, entry into force 1 November 1988); Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing certain rights and freedoms other than those already included in the Convention and in the first protocol thereto CETS: 177 (opened for signature 4 November 2000, entry into force 1 April 2005).

276 Soering v UK (n42) at para 103. (emphasis added)
So, it may be suggested that optional protocols are capable of limiting the scope of Convention evolution and the Court will respect State’s reserving to themselves the right to choose when to adopt a new Convention obligation. As such the Court may interpret optional protocols as removing from its remit, evolutive interpretation where the member States have chosen to reform the relevant areas of the Convention with an optional protocol. However, dependent on State ratification of the Protocols, the length of that limiting effect may only be temporary as we saw suggested in the Court’s communicated decision in *Ocalan* and then confirmed by the Court’s statement in *Al-Saadoon and Mufdhi*. In *Al-Saadoon and Mufdhi* the UK was faced with the novel situation where it was bound in public international law to transfer the applicants to the Iraqi High Tribunal, even though this would result in a real risk of the death penalty. The Court in this case went further than it had previously done in *Ocalan* stating that:

“...the Grand Chamber in Ocalan did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to interpreting the words

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277 *Ocalan v. Turkey (n43)* at para 196.
278 *Al-Saadoon and Mufdhi (n44).*
This was despite the presence of optional Protocol 6 which had previously blocked an evolutive finding of the Court in *Soering v. UK* but by virtue of the virtually unanimous ratification of protocol 6 (abolition of the death penalty in times of peace) and Protocol 13 (abolition of the death penalty in all circumstances) the Convention could still evolve, to in effect ban the death penalty as per se inhuman and degrading contrary to Article 3. What this suggests is that the effect of concluding an optional protocol may only be the temporary blocking of the living instrument effect on the relevant Convention clause. Perhaps what is important to garner from the situations discussed, is that the Court is cognisant of the intentions of the member States in seeking to justify Convention evolution and where a present intention to amend the Convention through a textual route is shown the Court will delay finding evolution. However, the Court will look to re-assess the situation, when both the level of ratification of that Protocol and another evidence of consensus is very high (as it was in *Ocalan* and *Al-Saadoon and Mufdhi*) and may no longer be estopped from making an evolutive finding of the relevant Convention clause (in this case to include the death penalty as inhuman and degrading treatment *per se* under Article 3 of the Convention because death row phenomenon). However, the legitimacy of this approach may still be called into question with respect to the member States who have yet to ratify the relevant protocol. Ordinarily these States would not be bound by the obligation in international law until they had ratified it, but by evolutively interpreting the Convention on the basis of a high level of ratification, the Court is effectively binding that State to the obligation whether they would consent or not. This approach is inconsistent with

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279 Ibid at para 120.
280 *Soering v UK* (n42) at para 103.
281 *Ocalan v. Turkey* (n43).
282 *Al-Saadoon and Mufdhi* (n44).
the Court’s earlier recognition in Soering that the subsequent agreement of an optional protocol shows that the intentions of the Contracting Parties... was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an agreement.”

As such the Court’s evolutive interpretation of Convention rights under these circumstances may be open to criticism for being legislative in respect of the non-ratifying member States.

4.4.6. Precedent in the European Court of Human Rights

While it has been commented that the Court does not have a system of binding precedent it is also well known that the Court will generally seek to follow its previous jurisprudence in deciding cases. In Cossey v. UK the Court stated:

“It is true, as [the applicant] submitted, the Court is not bound by its previous judgments; indeed, this is borne out in rule 51 para. 1 of the Rules of the Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law.”

This important statement of the Court makes clear that the Court self-limits its evolutive interpretation. This ensures that living instrument decisions do not become entirely arbitrary and

283 Soering v UK (n42) at para 103.
284 See e.g. M Balcerzak, The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights’, (2004-5) 27 Polish Yearbook of International Law 131 at 139.
285 Cossey v. UK (n246) at para 35. See also Helfer (n17) at 141 and A Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling Its Previous Case law’, (2009) 9(2) HRLR 179 at 182.
286 Cossey v. UK (n246) at para 35.
protects from the risk that a sudden change in the direction of Convention law will occur, catching member States off-guard. This statement of the Court has been confirmed by legal commentators, at least for major decisions of the Court.\(^{287}\) Perhaps both a good example of this and an arguable example of the Court’s consensus method shrouding a unilateral shift in the Court’s approach to the area may be said to occur in the case of transsexualism. In *Christine Goodwin v. UK*\(^{288}\) the Court found a violation of Article 8 (right to respect for family and private life) in conjunction with Article 14 (right to non-discrimination in the enjoyment of Convention rights) in regards to the UK’s recognition of her new post-operative gender identity. What is interesting about this case is that the Court had previously found in favour of the United Kingdom only some 4 years previously.\(^{289}\) In the Court’s previous case decision in *Rees v. UK*\(^{290}\) the Court warned the UK Government that “[t]he need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”\(^{291}\) So when the Court made a finding of violation in *Goodwin* it can be said to have been reasonably foreseeable from an interpretation of *Rees* where the Court may have been on the cusp of finding a violation. However, as the Court itself noted in *Goodwin* that there was a lack of a common approach among the then 43 member States of the Convention.\(^{292}\) So from this perspective one might reasonably argue that the Court had manufactured a consensus in order to bring about the evolution of the Convention. This then paints the picture of the Court’s approach to an ‘orderly development of the Convention case law’\(^{293}\) as being inaccurate. Perhaps what might best be suggested is that whilst the Court is not bound to follow its previous case decisions, it will generally do so resulting in a restraining factor on the Court’s evolutive interpretation through a system of persuasive precedent.\(^{294}\)

\(^{287}\) See e.g. *Mowbray* (n285) at 183.

\(^{288}\) *Christine Goodwin v. UK* (n27).


\(^{290}\) *Rees v. The United Kingdom* (App.No. 9532/81) (ECtHR 17 October 1986).

\(^{291}\) Ibid at para 47.

\(^{292}\) *Christine Goodwin v. UK* (n27) at para 85.

\(^{293}\) As the Court suggested in *Cossey v. UK* (n246) at para 35.

\(^{294}\) See e.g. *Mowbray* (n285) at 182.
4.5 Conclusions

The Court has overtime shown that in utilising the living instrument doctrine, it will look to justify its evolutive findings through the medium of European consensus. This medium enables the Court to show that it is cognisant of the present intentions of the member States and provides some level of predictability and certainty in its evolutive method. These reasons may suggest that it is an appropriate for striking a balance between interpreting the Convention as an evolving, living instrument of contemporary human rights law and the interests of member States. However, it is also evident that the Court’s evolutive methodology remains far from clear. Having expressed a number of sources of consensus the Court will consider, it has failed to explain either the necessary quantum of consensus or weighting and interaction of the various sources of consensus. This means that it is not objectively clear if the Court will find an evolution of the Convention in any given case where there is an arguable case for the presence of sufficient consensus to find an evolution of the Convention. While the Court can generally be censured for its lack of coherence in evolutive interpretation, one area stands out clear as a particularly problematic area in need of clarification. This being the Court’s Article 3 jurisprudence, which save for the cases in which the Court has had to consider evolution in the presence of an optional protocol, has relied on the vague statement of ‘increasingly high standards’ expected in contemporary society from its Selmouni decision.

However, while there is some cause for concern at the Court’s explanation of evolutive interpretation and, member States should be reassured by the limiting factor of Consensus. The Court has already made clear that wholly new rights cannot evolve and that the existence of recently concluded Protocols to the Convention will temporarily restrain the Court’s living instrument

295 Wildhaber, Hjartson and Donnelly (n82) at 249.
296 Soering v UK (n42); Ocalan v. Turkey (n43) and its subsequent referral to the Grand Chamber: Ocalan v. Turkey (2005) (n43) respectively and Al-Saadoon and Mufdhi (n44).
297 Selmouni v. France (n126) at para 101.
approach. So to the nature of consensus creates a ‘soft ceiling’ effect whereby the further and more extensively the Convention is evolutively interpreted, the less likely that sufficient European Consensus will be present and so the less likely a Convention evolution will occur. The Court has also shown sensitivity to both specific Convention language, particularly in the context of Article 12 of the Convention298 and where an issue is particularly controversial in a member State.299 The latter sensitivity is accorded through the margin of appreciation doctrine and denotes a divergence between the approaches of the margin of appreciation doctrine and the living instrument doctrine allowing the Court to develop the Convention in a principled way without automatically risking its credibility with member States.

Overall, while the Court’s living instrument tenured on European Consensus is not without its problems, it appears to provide a reasonable level of predictability and foreseeability to member States. However, the controversy surrounding the doctrine300 may have in part arisen from both the anomalous evolutive cases, particularly those relating to Article 3 of the Convention, and the Court’s failure to provide a clear working method for interpreting the Convention as a living instrument, which may in part have led to some of the hostility towards the Court today.301 The Court thus needs to be all too aware that its evolutive interpretation lies on the fault lines of establishing effective protection of human rights and illegitimately making ‘legislative’ incursions into the member States’ sovereignty. Finally, although a general trend towards consensus finding is clear, the way the Court may find a substantive evolution of the Convention is essentially based on the Court’s finding of implied consent from the member States. The Court’s evolutive reasoning, then reciprocates this by being less than clear about precisely what factors led to its evolutive decision. In effect suggesting the reasons are implicit. If the living instrument doctrine is tenured on implicit dialogue, given

298 Schalk and Kopf v. Austria (n218) at para 55.
299 A, B and C v. Ireland (n9) at para 236.
300 See chapter 1.5 for more on the controversy surrounding the living instrument doctrine.
301 Hoffmann (n229) at 428.
confusion and perhaps anger surrounding the Convention today, this might suggest a need for more express dialogue between the Court and the member States to diffuse this situation
Chapter 5: Judicial Retreat, ‘(D)evolution’ and its Limits

“This fact is, I believe, indisputable: it is that the circumstances of human life change constantly and along with them, change our beliefs regarding how to understand important things about ourselves and the world we live in. What was yesterday’s pride often becomes today’s shame and what was yesterday’s crazy claim often becomes today’s widely shared paradigm.”

(Professor George Letsas, Professor of the Philosophy of Law, UCL Laws) \(^1\)

5.1 Introduction

Previously in chapters 3 and 4 it was described how the Court declares that Convention law has evolved when it finds sufficient consensus amongst member States. However, the main discussion of this in academic literature focuses on how the living instrument doctrine creates greater levels of human rights protection. \(^2\) The main focus of this chapter is an examination of the possibility that the living instrument doctrine can lead to a relative reduction in substantive Convention protection and how this can occur and what this says about evolutive interpretation as a whole. This situation is henceforth referred to as (d)evolution for convenience.

The main contention of this chapter is that, at the very least, the theoretical possibility of (d)evolution is necessary in order for the Court’s exercise of evolutive interpretation to remain

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\(^2\) See e.g. A Mowbray, ‘The Creativity of the European Court of Human Rights’, (2005) 5(1) HRLR 57 at 64.
legitimate. This is because in the previous chapter it was described how consensus analysis is used by the Court to legitimate its evolutive findings. As a naturally corollary to that, where consensus does not exist, the Court cannot use it to legitimize (or continue to legitimize the maintenance of) a particular Convention standard and so where the Court has previously ruled on an issue of Convention law but Convention has subsequently eroded then the Court cannot artificially lock that standard in place. This would cast doubt on the idea of consensus standards as some implied agreement of the member States to amend the Convention. It would also cast doubt on the Court’s real reason for relying on consensus in its evolutive interpretation and leave the Court open to the accusation that it is using consensus reasoning as a cover for judicial legislation. However, the author acknowledges from the outset a number of challenges and assertions made in support of the counter proposition that evolutive interpretation cannot result in a relative reduction of Convention standards. These arguments will be discussed and evaluated throughout this chapter. However, for now, those arguments might be summarised as the implication that paragraph four of the Convention preamble creates an impetus for continued growth of Convention rights and as a related issue, the so-called ‘ratchet principle’ where legislators should refrain from passing laws that effectively reduce the level of social protection already offered in its jurisdiction. It will also be suggested that while the Court has yet to admit to having made a (d)evolutive interpretation of the Convention, it can be speculated that various instances of reduction in Convention standards relative to previously understood Convention standards in that area have occurred. This raises the spectre of potential Convention (d)evolution already having occurred, and some of these will be discussed.

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4 See e.g. Partly Dissenting Opinion of Judge Casadevall in Gorou v. Greece (No.2) (App.No. 12686/03) (ECtHR 20 March 2009) at para 9 and Chirdaris (n3) at 89.

5 E.G Vassilis Chirdaris suggests that the Court’s landmark case of Bankovich v Belgium is an example of a judicial regression from the Court’s previous evolutive case law in Loizidou v. Turkey. See Chirdaris (n3) at 94.
during the course of this chapter, with regards to the territorial reach of the Convention and the abuse clause under Convention Article 17.6

5.2 Distinguishing (D)evolution from Judicial Retreat

Elsewhere in this thesis a brief working definition of (d)evolution has been offered, for the purposes of this chapter greater precision is required. In particular it is necessary to make a distinction between a substantive (d)evolution of the Convention and what might be described as ‘judicial retreat’. The former concept marks a potentially permanent re-evaluation/ ‘lowering’ of a given Convention standard, while the latter denotes only a recourse of the Court to judicial deference in the instant case, by not finding a violation of the Convention where it might previously have done so. It is likely that this will occur through resort to the Court’s margin of appreciation doctrine in a given case decision. It would be equally possible for the Court to simply not find a violation of the Convention in a case before it, but for the purposes of clarity of the Court’s judgment it would be advantageous for it to make its reasoning clear.

Judicial retreat might be argued to stem from judicial deference to the principle of subsidiarity, whereby the Court is willing to leave an issue to member States to allow them to develop and inculcate a culture of respect for Convention rights.8 Such a possibility can be seen in the Court’s

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6 Article 17 states that: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

7 By this I mean that the effect of the Court’s jurisprudence is ongoing and not time-limited but may be subject to future change.

operation of the margin of appreciation doctrine. A potential example of this occurred in the Grand Chamber’s decision in A, B and C v. Ireland. As one may recall from the previous chapter, the A, B and C case concerned the Republic of Ireland’s strict criminal laws on abortion severely restricting the availability of abortion services and information concerning abortion services. The applicants alleged that the Irish abortion laws constituted a violation of several of their Convention rights, but of greatest importance to the Court was the alleged violation of their Article 8 right to a respect for their private and family life. As noted in the previous chapter the Court considered the high level of consensus amongst the member States towards a more permissive approach to abortion. However, ultimately, the Court did not find a violation of Article 8 as it found the matter fell within the State’s margin of appreciation. This decision is at odds with the usual approach the Court takes towards consensus, which was demonstrated throughout the previous chapter. As such it might be suggested as an example of deference towards the member State/s in question.

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10 A, B and C v. Ireland (App.No. 25579/05) (ECtHR 16 December 2010).

11 See above chapter 4.4.3.

12 A, B and C v. Ireland (n10) at para 235.

13 ibid at para 236.

5.3 The Possibility of (D)evolution?

It is firstly important to outline the real possibility of (d)evolution of Convention protection. While little has been said of the possibility of (d)evolution of Convention standards the general objection\textsuperscript{15} to its possibility is based upon the fourth paragraph of the Convention’s preamble which pronounces:

“Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;”

(Emphasis added)\textsuperscript{16}

It is true that a reading of the words “maintenance and further realisation of Human Rights and Fundamental Freedoms” can be interpreted as providing a conceptual bar to possible reduction of Convention standards through evolutive interpretation. However, a few important observations must be made about this passage of the preamble. Firstly, it concerns the broader institutional aims of the Council of Europe (the Convention’s and the Court’s parent body). As such it is not directly instructive of the aims of the Convention. However, it is reasonable to give it some interpretative weight with regards the general aims of the Convention and ensuring its interpretation does not conflict with those aims. Secondly, it is capable of baring more than one meaning. This second point

\textsuperscript{15}See e.g. P Mahoney, ‘Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin’, (1990) 11(1-2) \textit{HRLJ} 57 at 67.

\textsuperscript{16}Preamble to the ECHR para 4.
is particularly important as the alternative interpretation of the word ‘realisation’ that I shall now propose, is more consonant with the Court’s consensus methodology described in the previous chapter.

Such a simplistic reading of this passage of the preamble is flawed. It ignores or negates other possible meanings of the word ‘realisation’ which may also mean: “The action of apprehending in the mind.”17 This second meaning casts the Convention in the light of a more philosophical pursuit. Such an endeavour may to some extent be supported by the writing of Professor George Letsas, who, as previously mentioned, takes a moral reading of the Convention.18 Letsas though seemingly places the task of what might be termed ‘moral discovery’ upon the Court. However, we must ask how this fits with the Court’s general approach to evolutive interpretation? It is arguable that in areas of Convention law, that the Court upholds certain Convention standards based upon the existence of European consensus, that where such consensus changes to a lower minimum level of protection, the Court should reflect this in its case law. In other words, it is not the Court that is imposing its own independent view on whether a certain standard should be included in Convention law, but it is declaring if the member States have indicated, via consensus, that it is a part of Convention law. In this way we can see through the process of evolutive interpretation is the Court simply following the new settlement of European human rights by the member States. In this way evolution/ (d)evolution may entail the morale judgement of the member States, but for the purposes of this study, (d)evolution need only mark an interpreted reduction in Convention standards from those which are tacitly agreed now by member States’ consensus. To date the Court has not stated this is its approach, however, there is some recent indication that this is possible. When faced with an issue of

the disenfranchisement of incarcerated offenders in alleged violation of Article 3 of Protocol No 1, the Court in *Scoppola v. Italy (No.3)* said:

“It does not appear, however, that anything has occurred or changed at the European and Convention levels since the *Hirst (no. 2)* judgment that might lend support to the suggestion that the principles set forth in that case should be re-examined. On the contrary, analysis of the relevant international and European documents (see paragraphs 40-44 above) and comparative-law information (see paragraphs 45-60 above) reveals the opposite trend, if anything – towards fewer restrictions on convicted prisoners’ voting rights.”

Although the Court here is not directly stating that it would consider (d)evolving the Convention, that would seem to be a natural conclusion of what it was saying should European conditions have changed in favour of the argument presented by the respondent and intervening States. However, the implication of what the Court said in *Scoppola (no.3)* is something of an aberration when compared to the Court’s other statements, those of its personnel (both judicially and extra-judicially.)

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19 Scoppola v. Italy (No.3) (App.No. 126/05) (ECtHR 22 May 2012) at para 95.
20 E.g. In an interview conducted with Dr Konstantzin Dzehtsiarou Christos Rozakis has said: “We do not need European Consensus if there is already established case law of the Court.” (Dzehtsiarou, interview with Judge Rozakis in K Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, (Cambridge University Press 2015) at page 189 and Partly Dissenting Opinion of Judge Casadevall in *Gorou v. Greece (n3)* at para 9.
In Gorou v Greece (no.2), a case concerning the Greek prosecutors lack of reasoning for refusing to prosecute pursuant to Article 6 of the Convention (Right to a fair hearing), the Court majority of the Grand Chamber found no violation. However, while the decision of the majority of itself gave no indication of a (d)evolution of the Convention two of the dissenting judgments in this case are of particular interest with regards to the possibility of Convention (d)evolution. Judge Casadevall in his partly dissenting opinion cited then recent cases of the Court which answered the same question as Gorou, affirming the need for the prosecutor to give reasons for an appeal on points of law. He then noted that Gorou in contrast to those cases answered the question in the negative. In exposing the majority’s alleged contradiction of the Court’s previous case law, Judge Casadevall remonstrated that:

“Acquired rights in the cause of human rights are at least as precious as acquired rights in other branches of the law and therefore the principle of non-regression must prevail.”

Such a statement suggests not only that Judge Casadevall disagreed with the majority in this case but also that he himself envisaged a ‘principle’ whereby Convention law cannot reduce in scope. Of course the view of one lone dissenting judge cannot fairly be generalised to represent the overall opinion of the Strasbourg Judiciary. However Casadevall’s assertion may gain mild support from Judges Malinverni and Sajo in the same case in their joint partly dissenting opinion. They point out:

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21 Gorou v. Greece (n3).
22 Ibid at para 42.
23 Gorou v. Greece (n3) Partially dissenting opinion of Judge Casadevall at paras 6-7.
24 Ibid at paras 8.
“The present judgment thus constitutes a step backwards in the protection of fundamental rights that I find both difficult to understand and regrettable.”

However, this clearly does not go so far as affirming the ‘principle of non-regression’ espoused by Judge Casadevall, but may indicate resistance or unease with the possibility of (d)evolution. Importantly from the discussion on consensus in the previous chapter, this would mean that the judges were, in effect, stopping the ability of member States to collectively come to a different conclusion on Convention standards where this would result in a perceived ‘(d)evolution’ of the Convention. This might be described as an inappropriate erosion of their sovereignty to change their minds.

Further support for the opposition to (d)evolution comes extrajudicially from Judge Garlicki. In an interview with Kanstantsin Dzehtsiarou, he has said:

“[e]ven if there was a consensus among States that terrorists should be tortured... we should still say no. There is something about torture in the text of the Convention and we must not accept any compromises.”

Such thinking is in-line with the idea that rights have an irreducible core beyond which the right would lose its essential meaning, proposed by Esin Örüçü which will be discussed later in this

25 Gorou v. Greece (n3) Partially dissenting opinion of Judge Malinverni joined by Judge Sajo at para 3.
26 Dzehtsiarou, Interview with Judge Garlicki, cited in Dzehtsiarou (n32) at 203.
chapter. It may be, however, that in making reference to torture, judge Garlicki was referring to a ‘core’ or ‘fundamental’ aspect of the Convention to which (d)evolution should not apply. The Court has made clear that the Convention’s Article 3 prohibition on torture included is an absolute right that cannot be qualified. As such it is possible that Judge Garlicki was seeking to keep his views consistent with this, and so may not be so dismissive of the idea of (d)evolution altogether. However, general indications from the Court, both judicially and extra-judicially, have tended to lend themselves towards the view that (d)evolution is illegitimate. Such a view is supported by the limited discussion of its possibility in academic commentary. Mahoney stated:

“...it would not be legitimate to interpret or apply the Convention so as to be an active force for countering progress in a democratic society. The short-term disadvantage for the Contracting States in forward-looking evolutive interpretation is that, as one American writer has put it, progress is a lobster pot: you can go into it but you cannot back out.”

In coming to this conclusion Mahoney cited Walter Ganshof van der Meersch, the former Vice-President of the Court, who as Mahoney suggests, believed that: “upward progress in the level of protection afforded [by the Convention] as being an essential, and thus irreversible, characteristic of [it].” Mahoney’s article, published in 1990 in a period immediately after he was working as a lawyer in the registry of the Court when he was an administrator and so would have inside knowledge of the Court, is even more relevant now that, as previously noted he is a Judge in the Court. So it seems that while there has been minimal discussion of the possibility of (d)evolution,

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28 Mahoney (n3) at 67.
29 Ibid.
30 Ibid.
31 Judge Mahoney has been the Judge with respect for the United Kingdom since 1 November 2012.
the general sentiment is that it is not possible. However, is it unthinkable to suggest that (d)evolution is possible, or even necessary, within the model of legitimation that has been suggested in the previous chapter? If, as the previous chapter suggested, consensus is a leading source of legitimation of Convention evolution, then the view that the Convention cannot (d)evolve seems at odds with this model of legitimation. The reason behind this stems from what consensus represents, which may be described as the inferred consent of the member States to reform the Convention’s substance. As Kanstanstin Dzehtsiarou points out, the definition of consensus is an “agreement in opinion; the collective, unanimous opinion of a number of persons.”32 While Dzehtsiarou notes that in ECHR case law consensus is used to denote a legislative ‘trend’,33 the Court’s use of the word ‘consensus’ in its case law is important. The aspect of the cited dictionary definition suggests an ‘agreement’ which would therefore suggest that the Court in making an evolutive interpretation is simply interpreting the Convention in line with the generally agreed intentions of the member States as they are now. However, on a deeper level, rather than a static agreement that from time to time may change this represents a snapshot of a fluid process of change in the settlement between the States about the appropriate content of rights in the Council of Europe. If this is indeed the case, then the almost heretical possibility of (d)evolution further enables the Court to respect and apply the present intentions of the member States. Although the author acknowledges this possibility may be controversial, it renders the meaning of evolution as more synonymous with the value neutral term ‘change’. This then enables the Court to escape the position of being some form of moral arbiter and instead leaves that role, perhaps more appropriately, to the member States themselves.

In order to further consider the possibility of (d)evolution the converse proposition, that it is not possible, must be critically analysed. If consensus does provide a measure of legitimacy to the

33 Ibid.
standard announced by the Court in making an evolutive interpretation, then is that standard legitimate if European consensus changes to a lower minimum level of substantive protection? In a model where consensus appears to be the primary indicator of consent by the member States to the new standard, one might reasonably imply that the member States might passively wish Convention standards to fall. As such if Convention case law were not to (d)evolve to reflect that, then the judges might be accused of judicial legislation. This point is well put, albeit in another jurisdictional context, by former US President, Abraham Lincoln. Lincoln said of the US Supreme Court:

“[The] candid citizen must confess that if the policy of the Government, upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”³⁴

In essence then the possibility of (d)evolution rests largely on the appropriate constitutional placement of responsibility for societal reform. The impetus behind Lincoln’s statement is that while the Courts must rule on legal questions it should not stand in the way of social discourse and progress by creating immovable legal standards. While this argument is given in the context of the United States Supreme Court, it is relevant to the issue of (d)evolution because a refusal, by the ECtHR, to allow (d)evolution where consensus had changed to a different, albeit relatively lower, standard might signal a denial of the States’ sovereignty to collectively choose the direction of human rights reform in Europe. Put simply the Court here would be overriding the commonly understood Convention rights settlement of the member States. This would be overstepping its

position in the Convention constitutional order. As may be recalled from the discussion in chapter 2, the precise degree of ‘constitutionality’ of the Court is open to individual interpretation. However, it is generally accepted that the ultimate sovereignty lies with the member States. This being the case it would be reasonable for the Court to yield when the States reach a new settlement as to the appropriate level of substantive protection of the Convention.

5.4 The Practical Problem with (D)evolution

If one agrees that (d)evolution is at least in theory possible, this does not open the floodgates to a wholesale erosion of Convention standards. This is because the Convention merely sets minimum standards of protection member States are required to ensure in their jurisdiction and States are free to exceed these. However, member States falling short of Convention standards are liable to be challenged before the Court and found in violation of the relevant Convention provision, although the Court is not formally bound to follow its previous case decisions. In practice this represents a powerful restraint to (d)evolution. Where the Consensus on the relevant issue is still weak, the impact on the overall consensus may be proportionately stronger than if the consensus is an established one. This would mean that it would be more possible for an individual State to engineer a (d)evolution of the Convention. However, where consensus is well-established amongst the member States it may be difficult for a State, acting unilaterally, to orchestrate sufficient change in consensus to successfully argue to the Court for a (d)evolutive interpretation of the Convention.

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35 See above chapter 2.1.
36 Rule 51(1) of the Court. However, the Court has stated in Cossey v. the United Kingdom that: “...it usually follows and applies its own precedents, such a course being in the interests of legal certainty and orderly development of the Convention case-law.” (See Cossey v. The United Kingdom (App. No. 10843/84) (ECtHR 27 September 1990) at para 35.) This means that the Court may not necessarily find a violation in a given situation of potential (d)evolution, but it would be difficult for a member State to know whether or not this will happen for them.
Discussion of how a protagonist State may seek support to lower Convention standards is beyond the Scope of this chapter (this will be discussed in part in the final substantive part of this thesis). However, this section will consider two theoretical possibilities for the where a Convention (d)evelopment may take place. The first example for discussion concerns where through evolutive interpretation may lead to the reinvention of the content of a Convention right or the balance of Convention rights. An example of this might be an evolution of the right to life towards including the right to die which may from another perspective culminate in the diminution of the protections to an individual’s life. The second situation occurs for example in the modern terrorist context. Here the Court is confronted with a phenomenon or situation that it has previously ruled on but the nature of that phenomenon is such that a different approach is needed which may conflict with Convention rights as they were previously understood.

5.5. Changing Perspective of Rights

It is quite possible and healthy that as time progresses societies in Europe may come to different moral settlements with regards to the appropriate treatment of individuals in different circumstances. There are multiple examples of this in Convention case law, for example Dudgeon and Marckx, but what if this new settlement reduces Convention protection relative to the relevant standard in either the Court’s previous case law or the previous understanding of Convention rights? A good example of this might be the debate about appropriate end of life options for those with progressive and degenerative care. To highlight one possible example of this scenario I will outline the case of Pretty v. UK as a case study. From the outset it is important to

37 For a comprehensive account on the Court’s previous jurisprudence on terrorism see generally: S Sottiaux, Terrorism and the Limitation of Rights: The ECHR and the US Constitution, (Hart publishing, 2008).

38 Dudgeon v. The United Kingdom (App.No. 7525/76) (ECtHR 22 October 1981).


40 Pretty v. the United Kingdom (App.No. 2346/02) (ECtHR 29 July 2002).
note that the Court did not find a violation of the Convention. Dianne Pretty was a woman from Luton suffering from Motor Neuron Disease, a disease which results in progressive deterioration of the sufferer’s mobility, communication and general quality of life, eventually resulting in death.

Although suicide is lawful in the United Kingdom, because of her condition Mrs Pretty was unable to end her life without assistance. However, assisting someone in committing suicide is prohibited by the Suicide Act 1971 section 2(1). After exhausting her domestic remedies, Pretty brought a case to Strasbourg alleging a violation of her Convention rights under Articles 2, 3, 8, 9 and 14. The main arguments of the case concerned the Articles 2 and 3 issues. These were that the right to life under Article 2 of the Convention should contain a negative aspect, namely a right to the end one’s life, and that the UK is under an obligation to allow for assisted suicide to avoid a distressing death.

As previously noted, in Pretty the Court found no violation of the Convention by the UK’s prohibition on assisted suicide. However, the Court did mention the living instrument doctrine in its consideration of the Article 3 issue. Here the Court stated:

“While the Court must take a dynamic and flexible approach to the interpretation of the Convention, which is a living instrument, any interpretation must also accord with the fundamental objectives of the Convention and its coherence as a system of human rights protection.”

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41 Ibid at para 42.
42 The applicant subsequently died on 11 May 2002, two weeks after the communication of the Court’s decision in her case.
43 Suicide Act 1961 s1.
44 Much as Article 11 of the Convention (the right to freedom of association). See e.g. Young, James and Webster v. the United Kingdom (App.Nos. 7601/76 and 7806/77) (ECtHR 13 August 1981).
45 See further Harris, O’Boyle, Bates and Buckley (n9) at 205 and 275.
46 Pretty v. UK (n40) at para 54.
Given that the Court later in its judgment affirmed, in the context of its discussion of the Article 8 issue, that “The very essence of the Convention is respect for human dignity and human freedom.”\(^\text{47}\) It is conceivable that should consensus in the future alter towards a more liberal approach to assisted suicide that the Court might enable a growth of either Article 2 or Article 3 to encompass some aspect of assisted suicide. Whether or not this is the case in reality, if it were to occur this increase in the scope of Convention protection may also be viewed by some as a diminution of the protection of the sanctity of life contained in Article 2.

An example of how this might occur from outside Convention law has been described by Joel P Trachtman. He cites the example of exceptions being made to the rule of sovereign immunity, reducing it from an absolute rule in international law to a general rule.\(^\text{48}\) Trachtman calls this process “revision theory”\(^\text{49}\) stating:

> “Thus, although [Customary International Law] rules may arise despite the existence of a persistent objector, they may only be revised (downward to be less restrictive) based on a practice of violation, including opinion juris.”\(^\text{50}\)

In Trachtman’s example of sovereign immunity, this can be seen as an increase in human rights protection by granting judicial scrutiny and oversight for all in-line with the a Diceyan understanding

\(^{47}\) Ibid at para 65.  
\(^{49}\) Ibid.  
\(^{50}\) Ibid.
of the rule of law.\textsuperscript{51} However, taken to a raw extraction a practice of violation of the provision and 
\textit{opinio juris} could be taken as sufficient to create devolutionary consensus. The creation of 
customary international law (CIL) is relevant to the operation of the Convention as a living 
instrument as the two operate on a similar basis. CIL requires the presence of both \textit{opinio juris} (the 
\textit{sense of legal obligation}) that the law has changed and adherence to that new standard, whilst for 
the Convention to evolve the presence of consensus which is similar to States practice is required. 
The main difference between the two occurrences is that in customary international law if a State 
persistently objects to the new rule, then they may be an exception to the rule. This is rarely the 
case for States that object to a particular approach to the Convention, although one should note the 
previous chapter’s discussion of the \textit{A, B and C v. Ireland} Case.\textsuperscript{52} However, this might be because 
States are free to denounce the Convention\textsuperscript{53} but not CIL.

\section*{5.6 Evolving Exceptions to Rights}

Another possibility (d)evolution may occur with regards to evolutive interpretation of the 
prescribed exceptions to Convention rights. In this regard the Court’s case decision in \textit{Witold 
Litwa v. Poland}\textsuperscript{54} is arguably of relevance. Here the Court was faced with the case of a nearly 
blind man detained in a ‘sobering-up centre’ in Krakow, Poland after appearing to be under the 
influence of alcohol when visiting Krakow Post Office. After an initial medical examination, the 
applicant was detained for a period of six hours and thirty minutes, after which he was released 
without charge as he had not committed a criminal offence. The applicant complained that the 
detention was an arbitrary deprivation of his liberty contrary to Article 5 of the Convention.

\begin{footnotes}
\item[51] AV Dicey, \textit{Introduction to the Study of the Law of the Constitution}, (MacMillan an Company Ltd, London 10\textsuperscript{th} 
Edn 1959) at page 193
\item[52] See above chapter 4.4.3.
\item[53] Article 58(1) ECHR.
\item[54] \textit{Witold Litwa v. Poland} (App.No. 26629/95) (ECtHR 4 April 2000). See also: Harris, O’Boyle, Bates and Buckley (n9) at 322.
\end{footnotes}
large part consideration of the case hinged on the meaning of Article 5(1)(e) which creates an exception to the right to liberty for:

“the lawful detention of persons for the prevention of the spreading of infectious diseases, or persons of unsound mind, alcoholics or drug addicts or vagrants;”

The majority noted that both the medical and lay definition of the term ‘alcoholic’ refers to a person who suffers from addiction to alcohol. Nevertheless, the majority of the Court based on their reading of the ratio legis of Article 5(1)(e) stated:

“The Court considers that, under Article 5 § 1 (e) of the Convention, persons who are not medically diagnosed as “alcoholics”, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.”

Given that the majority of the Court made no mention of living instrument doctrine terminology or European consensus it is likely that they did not see this as an evolutive interpretation. However, Judge Bonello in his separate concurring opinion disagreed with the majority on the Article 5(1)(e) aspect of the decision. He argued that the approach of the majority was at odds with the ejusdem

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56 Witold Litwa v. Poland (n54) at para 61.
57 The majority of the Court found a violation of Article 5 on the basis that the detention was disproportionate.
generis tool of interpretation which would have meant that given the specific classes of exception to the right to liberty, the Court should have interpreted the class of alcoholics restrictively as the other exceptions in Article 5(1)(e) refer to continuing circumstances.  

Discussing the majority’s decision as “a quantum leap backwards” in augmenting the supposedly exhaustive list of exceptions where deprivation of liberty is permitted Judge Bonello made reference to the living instrument doctrine stating:

“This is a far cry from “interpreting the Convention as a living instrument”. I am all for expanding the horizons of the Convention, so long as this dilation pursues the purposes of strengthening the Convention's aims: that of promoting and reinforcing the rule of human rights law. In the present instance, the result achieved was manifestly the opposite. It appears to me as judicial activism to restrict the compass of the enjoyment of human rights. The majority has now vested additional powers in governments to deny persons their freedom. It has substantially abridged the protection of the individual. This hardly squares, in my view, with “interpreting the Convention as a living instrument”.

A few points for the purposes of this chapter can be derived. Firstly, that Judge Bonello seemingly supports the view that the Convention is not capable of (d)evolving, but also, and importantly, that the Court is capable of interpreting the Convention in a restrictive way in favour of member States.

Given that a part of the majority’s reasoning for including temporary intoxication in the meaning of alcoholic was the impracticability of the police in most cases to be able to ascertain if an individual is

58 Separate concurring opinion of Judge Bonello in Witold Litwa v. Poland (n54) at para 4.
59 Ibid at para 12.
a diagnosed alcoholic. As such Bonello’s separate opinion serves both to support the proposition that the Convention cannot (d)evolve, albeit with very limited reasoning, and also underlines the position that the Court can and has read the Convention restrictively in favour of the member States’ ability to run their domestic affairs. In essence then, the enlarged scope of the exceptions to the Convention can be seen to (d)evolve the substantive protection of Article 5 of the Convention.

Bonello’s approach was seemingly endorsed by the Judges Rozakis (former Vice-President of the Court), Spielman (former President of the Court) and Jebens in their dissenting opinion in Kharin v. Russia.60 This case holds very similar facts to Witold Litwa61 in that it involved the detention of the applicant in a sobering up centre of the Arkhangelsk Town Police Department following police attending a call to a disturbance at a local shop in the Oktyabrskiy District. While the majority found no violation in the case,62 the minority dissenting opinion did. In doing so they noted that in Witold Litwa the Court had set two requirements not met in the Kharin case.63 Those requirements were that the person posed a threat to himself or others and that the measure must be one of last resort after the authorities demonstrated that other measures would prove insufficient. However, the minority argued that the member State had not achieved either of these requirements and so found a violation of Article 5 of the Convention. This by itself does not reveal much about the possibility of (d)evolution, as it can be explained away as a simple disagreement on the implementation of the Court’s existing case law from Witold Litwa. However, what is curious is that the minority opinion quotes extensively, the opinion of Judge Bonello in Witold Litwa including his discussion of the Convention as a living instrument.64 This suggests that the minority disagreed with the majority approach in Witold Litwa some ten years previously, and further disagree with what they see as a

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60 Kharin v. Russia (App. No. 37345/03) (EctHR 03 May 2011).
61 Witold Litwa v. Poland (n54).
62 Kharin v. Russia (n60) at para 47.
63 Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens in Kharin v. Russia (n60) at para 5.
64 Ibid at footnote 2.
loosening of the exception yet further by the majority decision in this case. While this is a minority decision, it is nevertheless important to note a continuation of the view that *Witold Litwa* created a broadening of the exceptions to Article 5 of the Convention. It is also important as it indicates the views of a former President and former Vice President of the Court, lending further weight to the proposition that the Convention *had* (d)evolved. From the broader perspective of what this tells us about the Convention both as a living instrument and a sort of bill of rights for Europe, we can see that the Court has yet to make its approach clear to (d)evolution. On one hand the Court seems capable of unintentionnaly allowing a less cumbersome Convention standard, thus enabling it to be more practicable for member States. On the other hand the Court appears uneasy with reducing the protection of individuals from interference from the State. This would depict that the Court is struggling between two goals of ensuring respect for the practical issues faced by the member States in fulfilling their Convention obligations, and with ensuring a robust protection of individuals’ Convention rights in the face of State actions to the Contrary. It is important that in doing so, that the Court takes into account the Convention’s human rights values *and* the general approach of member States in this area in coming. Most importantly it gives a clear explanation of the reasoning for its decisions and whether or not it see them to include ‘(d)evolutive interpretation’.

5.7 New Circumstances Necessitating New Legal Approaches

As is well-known the Convention was concluded on 4th November 1950 and entered into force on the 3rd September 1953. Since then, despite the Convention and its judicial machinery undergoing reform, the main substantive rights contained remain unchanged. However, the circumstances surrounding the Convention have changed considerably with new technological discoveries and new understanding of the world and morality. In general this has led to an increase in the declared
content of the Convention, often through evolutive interpretation. This section asks what happens when a circumstance arises which the previous case law settlement of the Convention is ill-equipped to deal with. The example used here is the context of terrorism and security. Terrorism is not a new concept and the Court has been seized of the matter from the earliest days of the Convention such as in the very first case to come before the old Court: *Lawless v. Ireland*. However, while it has been said that “[t]he Strasbourg jurisprudence reveals that the States have some leeway within the Convention itself before having to contemplate invoking Article 15 in the context of there being a ‘public emergency threatening the life of the nation’” the new threat of global terrorism from so-called ‘Islamic extremists’ however is arguably different to that which was faced previously. In fact the nature of the terrorist threat, or as the response is sometimes referred to, ‘the war on terror’ has been described as:

“No one-in any country, big or small- has figured out how to successfully respond to terrorism. This is due in part to the elusive nature of ‘terrorism’ as enemy. What does one attack and how does one know when victory (or defeat) happens? Those who launch a ‘war on terror’ promptly encounter such difficulties.”

As such the ordinary mechanism of Article 15 for derogating from certain Convention clauses and existing allowances mentioned may not be enough to counter this new form of terrorism. One possible example of this is with regards to the ability of a member State to deport the national of another State where they face a real risk of torture or inhuman and degrading treatment. This

65 *Lawless v. Ireland* (No.3) (App.No. 332/57) (ECtHR 1 July 1961).
66 Harris, O’Boyle, Bates and Buckley (n9) at 205 and at 825.
68 Article 15 expressly does not allow for derogation from Article 2 (Right to life) except in with respect to deaths occurring as a result of lawful acts of war, or from Article 3, 4(1) and 7.
principle was established in *Chahal v. UK* and has posed problems for member States wishing to deport terror suspects. In the face of the new threat of terrorism the Court has arguably ‘watered down’ Convention standards. One such way of doing this with regard to *Chahal’s ‘real risk’ test* occurred in the case of *Saadi v. Italy*. In this case the Italian government wanted to deport a Tunisian arrested on suspicion of involvement in international terrorism contrary to Article 270 bis of the Italian Criminal Code among other offences. The Milan Assize Court found that his activities did not constitute terror offences but nevertheless constituted conspiracy and sentenced him to 4 years and 6 months imprisonment, after which he would be deported. However, because he was a Tunisian national he argued that he would suffer a real risk of torture if he was sent back, as it was common knowledge that those suspected of terror activities were subject to torture, contrary to the *Chahal* test. The Italian Government submitted that it had sought and received diplomatic assurances regarding the prohibition and punishment of torture. The Court accepted the general risk of torture that the applicant may be subject to and rejected the Government’s assertion of the diplomatic assurances as to the prohibition of torture in Tunisia as it was only given in a note verbale restating the Tunisian laws which the Court had already noted that were insufficient of themselves to assuage the real risk of torture. However, it can be argued that the Court altered its previously absolute view of Article 3 by saying:

“Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the

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70 *Saadi v. Italy* (App.No. 37201/06) (EctHR 28 February 2008).
72 *Ibid* at para 98-100.
applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal*, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”

This could be argued as an evolutive interpretation of the Convention in order to fit the needs of European society in the midst of contemporary terrorism. However, as this ostensibly reduces the protection of the individual with respect to Article 3 of the Convention, if it was indeed an evolutive interpretation, then it would amount a (d)evolution. While as previously reported, the possibility of (d)evolution has been presented as an illegitimate evil to Convention interpretation, here the (d)evolution can be seen as more of a grey area. While it is true that the individual’s protection is lessened, this (d)evolution would allow for deporting people who pose a threat to the relevant member State, while ensuring the appropriate protection of the applicant’s Article 3 rights immediately post deportation. This approach seems to be in keeping with the important concept that the Convention should be ‘practical and effective’. If this is so then the ability for States to effectively manage threats within their jurisdictions enables them to protect the rights and freedoms of other people within their jurisdictions while ensuring the protection of individuals.

The Court’s approach in *Othman (Abu Qatada) v. UK* with regards to diplomatic assurances mimics that of its approach in *Saadi*. In this case a Jordanian national resident in the UK and well-known for his outspoken advocacy of extremist views was the subject of attempted deportation to his home State. However, he argued that he had been tried in his absence on terror charges and would be at

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74 Ibid at para 148.
75 e.g. Mahoney (n15) at 67.
77 *Othman (Abu Qatada) v. the United Kingdom* (App.No. 8139/09) (ECtHR 17 January 2012).
both a real risk of torture and inhuman and degrading treatment and an unfair trial contrary to

Articles 3 and 6 of the Convention. The UK Government had sought diplomatic assurances that he

would not be subject of such treatment and thus argued that the assurances they had received

would act to remove the risk of such occurrences. The Court here cemented the possibility

suggested in Saadi that diplomatic assurances could remove the real risk of breaches of Article 3 and

6 by stating:

“In a case where assurances have been provided by the receiving State, those

assurances constitute a further relevant factor which the Court will consider. However,

assurances are not in themselves sufficient to ensure adequate protection against the

risk of ill-treatment. There is an obligation to examine whether assurances provide, in

their practical application, a sufficient guarantee that the applicant will be protected

against the risk of ill-treatment. The weight to be given to assurances from the receiving

State depends, in each case, on the circumstances prevailing at the material time”78

However in Othman, after considering all of the relevant factors the Court ruled that the

diplomatic assurances would remove the risk of ill treatment and as such found no violation of

Article 3 of the Convention.79 Ultimately this did not lead to Othman’s deportation as the Court

found a breach of Article 6 of the Convention.80 What this demonstrates is that while the Court

will exercise scrutiny of the diplomatic assurances. The mere paper existence of diplomatic

assurances will not remove the applicant’s complaints under the Convention but the Court

effectively removed the bar from deportation in this case, thus weakening the absolute

78 Othman (Abu Qatada) v. UK (n77) at para 187.
79 Ibid at paras 205 and 207.
protection of the Convention in this regards. This may suggest that the Court is taking a deeper view of Convention rights by supervising the suitability of special arrangements between member States and recipient States. In doing so it is enabling an effective protection of the rights of the individual and or wider society in the member States. This may be seen as a diminution of Convention protection or an underlining of the Court’s Constitutional supervisory role of the member States compliance with the Convention.

5.8 What are the Limits to (D)evolution?

If one accepts that (d)evolution is possible in Convention law, then it is important to consider what are the limits to this function? This section cannot provide an absolute answer to this question as this would be a task for the Court to achieve in individual cases coming before it. However, what this section will set out to do is to provide some guidelines as to where such limits might lie, before which it would be for the member States to negotiate and conclude a formal amendment to the Convention.

As noted, the precise nature of the Convention’s aims are unclear, and the appropriate level of protection depends on the degree to which one sees the Convention as a type of human rights constitution for Europe.\(^81\) The more one sees the Convention as encapsulating the human rights basic law of Europe then the greater the degree of standard setting the Court may wield to resist a (d)evolutionary consensus. Unfortunately, as the Court has largely followed a consensus model of evolutive interpretation\(^82\) this suggests the Court has tacitly accepted that its supervisory role over

\(^{81}\) See above chapter 2.6.4.

the member States adherence to the Convention, is not absolute in the sense of placing it above the
member States in the international constitutional hierarchy of the Council of Europe.\textsuperscript{83} This too is
also borne out by the fact that the Court itself does not have the power to enforce its judgments and
instead relies on the goodwill of the member States,\textsuperscript{84} both individually and collectively within the
Committee of Ministers. As such it was theorised in chapter 2 that the Court holds a form of
persuasive constitutional authority.\textsuperscript{85} Herein lies a point of contention with the Court’s rulings, that
it is not always clear to what extent the Court is legitimately free to control the actions of the
member States through its rulings. This may necessitate a constructive dialogue between the Court
and the various Council of Europe institutions to ensure mutual cooperation on Convention matters.

Chapter 2 of this study considered the broader nature of the Convention and some of the original
aims of its founders.\textsuperscript{86} While it was not possible to objectively define a singular, comprehensive and
over-arching aim for the Convention.\textsuperscript{87} However, what was clear is that from the inception of the
Convention it was unambiguous that an over-arching aim was to prevent a return to the occurrences
similar to atrocities experienced during World War 2.\textsuperscript{88} If the Court were to validate a decline in the
consensus standards to sufficiently facilitate atrocities such as those carried out in Nazi Germany,
then this would go against this fundamental aim of the Convention. In this sense Esin Örücü’s
concept of an irreducible core of a right is relevant.\textsuperscript{89} Where either the substance of the right is
reduced too far or it is made all but impossible to benefit from the right then this would render the
right an effective nullity. As such it would not be possible for the Court to (d)evolutively interpret a

\begin{itemize}
  \item \textsuperscript{83} For discussion on the relationship of the Court and the member States see Dzehtsiarou (n32) at 209-210.
  \item \textsuperscript{84} Ibid at 210.
  \item \textsuperscript{85} See chapter 2.3.
  \item \textsuperscript{86} See above chapter 2.4.
  \item \textsuperscript{87} Ibid.
  \item \textsuperscript{88} See above chapter 2.2. See also E Bates, The Evolution of the European Convention on Human Rights: From
its Inception to the Creation of a Permanent Court of Human Rights’, (Oxford University Press, 2010) at 6 and
AWB Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention,
(Oxford University Press, 2001) at 157.
  \item \textsuperscript{89} Örücü (n27)at 46.
\end{itemize}
Convention clause this way. This proposition is supported in Convention case law. One example is that the Court in its landmark *Golder v UK* case\(^90\) affirmed the relevance of the Vienna Convention on the Law of Treaties (VCLT)\(^91\) to the interpretation of the Convention,\(^92\) such a (d)evolution would seem to break with its canons of treaty interpretation. This is because Article 31 of the VCLT states that:

“(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”\(^93\)

The VCLT’s explicit mention of treaty context to some extent affirms evolutive interpretation and is silent on the point of (d)evolution. However, the VCLT’s explicit inclusion of the object and purpose of a treaty supports the proposition that there is a floor below which the Court cannot permit the Convention to (d)evolve. Further the Court has previously stated that “…[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”\(^94\) as such if the rights were made illusory this would infringe on the core right and the Court should, at least in theory, reject such a (d)evolution. One might speculate that given the Convention’s post-war genesis discussed in chapter 2, that this minimum would at least be the atrocities experienced and leading to the conditions in Nazi Germany. In this sense one can distinguish, as Professor Letsas does, between the abstract intentions of the founders to promote human rights and the concrete intentions to safeguard Europe from human rights violations.

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\(^92\) *Golder v. UK* (n90) at para 29.


experienced in the Second World War. An purposefully exaggerated example of a (d)evolution that would not thus fall foul of the ‘concrete intention’ test would be the blanket internment of all Muslims due to a European backlash against perceived terror threats from radical Islamist groups. This would be akin to the internment of Jews and other groups regime during the second world war and would thus be a (d)evolution too far of Article 5 of the Convention.

However, as noted, the precise nature of the Convention’s aims are unclear, and the appropriate level of protection depends on the degree to which one sees the Convention as a type of human rights constitution for Europe. The more one sees the Convention as encapsulating the human rights basic law of Europe then the greater the degree of standard setting the Court may wield to resist a (d)evolutionary consensus. Unfortunately, as the Court has largely followed a consensus model of evolutive interpretation, this suggested the Court has tacitly accepted that its supervisory role over the member States adherence to the Convention, is not absolute in the sense of placing it above the member States in the international constitutional hierarchy of the Council of Europe. This too is also borne out by the fact that the Court itself does not have the power to enforce its judgments and instead relies on the goodwill of the member States, both individually and collectively within the Committee of Ministers. As a result if the Court is to resist finding a (d)evolution of the Convention then it must give clear explanation of why it is doing so, grounded in the original aims of the Convention and consensus methodology to persuade the member States and the Committee of Ministers of the legitimacy of its decision.

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95 See Letsas (n1) at 268.
96 See above chapter 2.7.
97 Ibid.
98 Dzehtsiarou (n32) at 210.
99 As per Convention Article 46(2) gives responsibility for supervision of the execution of the Court’s judgments to the Committee of Ministers.
100 Dzehtsiarou (n32) at 210.
5.9 Conclusion

In principle, if the Court is to continue to maintain its approach that utilises European consensus to legitimate its evolutive interpretation, then the reduction of that consensus must, at least in theory raise the potential for the Convention evolution to relatively reduce Convention standards. Objections based upon the meaning of the words “maintenance and further realisation” in the preamble fail\textsuperscript{101} to consider that firstly this is mentioned as the aim of the Council of Europe and not the Convention itself. While it is reasonable to assume that the Convention was created to further the aims of the Council of Europe this falls short of emplacing responsibility for their fulfilment of them upon the Convention and its enforcement machinery. They also negate the possibility that the term ‘further realisation’ does not necessarily mean an increase but can be taken in a more philosophical pursuit of coming to a more optimal settlement in the relevant areas of human rights.\textsuperscript{102} This latter conception of human rights, which is more akin to the Letsas’ moral reading of human rights.\textsuperscript{103} However, unlike Letsas what seems clear from the Court’s approach and the general value State sovereignty is given in international law is that it is the member States who come to this conclusion and this is then declared by the Court. Therefore where the States together come to a different settlement it whether that entails a higher (ordinary evolution of the Convention) or lower (D)evolution of the Convention the principle rationale behind the Court’s interpretation remains the same. That rationale being that the Court’s interpretation seeks to find the meaning of the Convention according with the consensus within the member States. However, in coming to such an interpretation the Court must guarantee that any interpretation meets or exceeds the minimum content of the Convention text. Any (d)evolutive interpretation must not allow for reduction ad

\textsuperscript{101} “Maintenance and further realization” of human rights are detailed in Paragraph 4 of the Convention preamble.

\textsuperscript{102} As noted previously realization is capable of bearing the meaning “The action of apprehending in the mind” see: Oxford English Dictionary, ‘realization.’

\textsuperscript{103} Letsas (n18) at 79.
absurdum to occur by over-pandering to an inference of the member States intentions over the concrete intention in creating the Convention and the core meaning of the right below which it becomes an empty shell.¹⁰⁴ To do so would create the perverse situation where a human rights treaty created to protect from a recurrence of the horrors of World War 2 not only allows for them to happen but also legally validates them in Convention law. Additionally to this textual limit to (d)evolution, before this safeguard is needed, the Convention’s substance is also protected by the practical difficulty of engineering a sufficient shift in consensus before being found in violation of the Convention. As such the Convention’s ‘collective pact against totalitarianism’ nature¹⁰⁵ is likely to continue to safeguard Convention standards in the face of so-called ‘(d)evolution’.

¹⁰⁴ Örüçü (n27) at 46.
¹⁰⁵ Bates (n88) at 8.
Chapter 6: Checking the Convention: A Balanced system of Controls on the Court?

“A Criticism that people tend to make about Strasbourg is that there is a ‘democratic deficit’: they say that decisions made by state’s elected legislators, or by its constitution or constitutional court, can in effect be overturned by a court which is an unelected body and whose decisions cannot be appealed to any other body.”¹

(Mary Arden LJ, Head of Judicial Relations for England and Wales)

The above quote highlights both the risks of the Court overstepping its appropriate place in the Convention separation of powers, but also what can be described as a dialogical deficit in the Convention system. Amidst criticism that the Court has overreached its assigned role in the interpretation and application of the Convention and stepped into the role of a ‘quasi-legislator’, this chapter asks what checks and balances there are on the Court. The reader may then make their own informed assessment on the sufficiency of checks and balances on the actions of the Court. However, overall it is suggested that the existing system of checks and balances is unreliable as many of its facets are discretionary in nature and cumbersome in practice. This lack of reliability means that within the current system of checks and balances exists the potential to constrain a ‘wayward Court’, it is unlikely to garner the confidence of the member States in the legitimacy of the Court and the Convention system.² Such a proposition may be speculated to have led to the current hostility in the UK to the Convention system as mentioned previously in this thesis. Furthermore the present

² This can be seen in the opening quote of this chapter and also reference to the UK’s present lack of faith in the Convention system is discussed in chapter 1. Bill Bowring has also written of the negative relationship between Russia and the Court: See B Bowring, ‘The Russian Federation, Protocol No. 14 (and 14 bis), and the Battle for the Soul of the ECHR’, (2010) 2(2) Göttingen Journal of International Law 589 at 274.
system of checks and balances does little to ensure the effective and timely dialogue between the Court and the member States. It may therefore seem that some reform is useful potentially avoid misconceptions and diffuse existing tensions previously discussed in chapter 1.

This chapter describes the Convention’s enforcement machinery and system of checks and balances, discussing the overall sufficiency of the collective package of checks and balances. In doing so where flaws in the individual aspects of the Convention system of checks and balances are identified, suggestions for improvement will be made, such as a system of provisional judgments. In the latter section of this chapter more general suggestions for reform of the Convention system of checks and balances will be critically assessed as to their effectiveness and appropriateness in the Convention system. Overall it will be posited that the precise package of reforms will be down to the member States to decide and the views on the best mixture of reform methods is open to interpretation. However, the most effective reforms are likely to be commensurate and complimentary to the nature of the Convention and the Court’s role in interpreting it, and lead to clear communication between the arms of Convention law.

6.1. The Convention System: Setting out the Basics

This section, unashamedly but briefly, sets out the basics of the Convention enforcement machinery. While it is recognised that for many readers this will come as something of a statement of the obvious, it is nevertheless necessary to set the scene for the ensuing analysis of the problems with the Convention’s system of checks and balances. The original Convention, prior to its various
amendments and especially optional protocol 11\textsuperscript{3} set out that there would be a Commission of Human Rights and later a Court of Human Rights. However, neither of these would have the power to order all member States to make changes to their domestic legislation.\textsuperscript{4} Instead the Old Commission would prepare a report with recommendations to be considered by the Committee of Ministers (CoM.) Crucially at this stage, the reports of the Commission were not binding and instead the CoM would vote whether or not to accept the recommendations of the Commission. Decisions of the Court of Human Rights at the time were binding, but as previously mentioned in chapter 2 the Court was not an original feature of the Convention and it was not compulsory when it was set up in 1959.\textsuperscript{5} After the entry into force of protocol 11 there has only been one authoritative body to adjudicate on matters of Convention law and that, of course, is the Court (now a full-time institution.)\textsuperscript{6} However, the ‘new’ full time Court, whilst having compulsory jurisdiction,\textsuperscript{7} does not have responsibility (or status) to enforce its rulings. Instead that task is left to the CoM\textsuperscript{8} with no sanction if they choose not to enforce the Court’s rulings.\textsuperscript{9} In that way it can be said that while the Court’s rulings are legally binding on the State/s to whom are parties to the case, in practice whether they are enforced may fall within the discretion of the CoM.

\textsuperscript{3} Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery established thereby CETS No: 155 (Opened for Signature 11\textsuperscript{th} May 1994, entered into force 1\textsuperscript{st} November 1998).

\textsuperscript{4} Judgments of the Court are officially only binding on the parties to the case (Article 46(1) states: The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.” However, it has been argued that because the Court usually follows its previous decisions it is, a decision of the Court carries a form of erga omnes effect see: S Greer, The European Convention on Human Rights: Achievements, Problems and Prospects, (Cambridge University Press 2006) at page 280.

\textsuperscript{5} As the reader may recall from Chapter 2, originally member States had the choice whether or not to grant a declaration giving the right for matters within its jurisdiction to be referred to the Court and this could be made on a time-limited basis. See above chapter 2.4.

\textsuperscript{6} ECHR Art 19.
\textsuperscript{7} ECHR Art 32.
\textsuperscript{8} ECHR Art 56(2).

\textsuperscript{9} In fact the only mention of the powers of the Committee of Ministers within the Convention (other than the aforementioned supervision of Court judgments) is in Article 54 which says: “Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.” As such it can be suggested that the powers of the CoM are entirely discretionary.
6.2. Checks and Balances Mechanisms

6.2.1 Political Discretion in the Committee of Ministers

As mentioned, judgments of the Court are transmitted to the CoM for it to supervise their execution by the member State/States to which they have been issued. However, the CoM face no sanction should they allow a member State to get away with not complying with the judgment of the Court. This in a way is analogous to a jury’s discretion to find a defendant not guilty despite clear and unequivocal evidence of their guilt. Here the Court clarifies the law but nevertheless the CoM, as a jury in this analogy, has the ultimate discretion whether to supervise implementation of the judgment effectively or effectively ignore it. In fact the nature of this stage of a case has been described in a leading academic text book in the following terms:

“...The process is not an adversarial one. It is based essentially on peer pressure and political persuasion exercised within a forum of where there is a genuine commitment to effective enforcement of judgments, but also on a commonality of political interest and often a self-interested tolerance of practical problems associated with execution."

What this means is that while the member States generally try to work together to ensure implementation of the Court’s decisions, political exigencies may dictate that this is not always so. However, one potential benefit of this process is that an effective ‘non-supervision’ of the Court’s decision/s might form powerful feedback to the Court. This would let the Court know that the

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member States, through their representatives in the CoM, do not agree with the Court’s case judgment, which the Court might take into account in future decisions.

Should the CoM be faced by a recalcitrant member State, its ultimate sanction is to ask that State to withdraw from the Council of Europe (CoE) and should the State fail to do so, deem it to have left.\textsuperscript{11} Effectively this means that the ultimate sanction of the CoM is to expel a State from the CoE and the ‘Convention club’.\textsuperscript{12} However, this is an extreme and highly undesirable option which may have potential political consequences. To date compliance with the Court’s decisions has been remarkably high\textsuperscript{13} and so the CoM has not been particularly challenged as to how it would react in what would likely be a politically charged environment where a State outright refuses to comply with a ruling of the Court against it. However, the recent prisoner voting cases\textsuperscript{14} have led to a well-publicised political furore in the UK with Members of Parliament passing an early day motion in the House of Commons not to give prisoners the right to vote, in effect stating a position not to implement the decision of the Court.\textsuperscript{15} While this motion is not a binding motion and the UK has yet to officially refuse to implement the judgment it is notable that it has yet to do so,\textsuperscript{16} and to date the CoM has done little but posture its concern at the UK’s omission. The UK’s omission to address its systemic


\textsuperscript{12} For use of this term see e.g. E Bates, \textit{The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights}, (Oxford University Press, 2010) at 281.

\textsuperscript{13} See Baroness Hale, ‘Common Law and Convention Law: Limits to Interpretation’, (2011) \textit{EHRLR} 534 at 543.

\textsuperscript{14} The prisoner voting cases include, but are not limited to: \textit{Hirst v. United Kingdom (No.2)} (App.No. 74025/01)(6 October 2005) and \textit{Greens and M.T. v. United Kingdom} (App.Nos. 60041/08 and 60054/08) (ECtHR 11 April 2010) for a detailed account see E Bates, ‘Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg’ 14(3) 2014 \textit{HRLR} 504 and Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Draft Voting Eligibility (Prisoners) Bill Report (2013-14, HL 103, HC 924) especially at paras 31-32.

\textsuperscript{15} See HC Deb 10 February 2011 Vol 592 Col 586.

\textsuperscript{16} It has been reported in the Telegraph newspaper that Dominic Raab, the UK Minister for Human Rights had reported to the Committee of Ministers that there was “...no realistic prospect of lifting the ban on prisoner voting for the foreseeable future.” (See D Barret, ‘David Cameron on verge of landmark victory over prisoner voting as ministers shelve reforms’, \textit{The Telegraph}, 10\textsuperscript{th} December 2015) <http://www.telegraph.co.uk/news/worldnews/europe/12045076/David-Cameron-on-verge-of-landmark-victory-over-prisoner-voting-as-ministers-shelve-reforms.html> accessed on 5\textsuperscript{th} February 2016.)
failure to allow some prisoners to vote resulted in the Court issuing a pilot judgment in 2015 in which it combined 1015 applications together and quickly found a violation of Article 3 of the First Protocol of the Convention (the right to free elections.)\(^\text{17}\) This may suggest that the Court had lost faith in the efficacy of the CoM to ensure the implementation of its 2005 \textit{Hirst v. UK (No.2)} decision.\(^\text{18}\) However, perhaps to avoid stepping on the toes of the CoM, the Court found its finding of violation sufficient to achieve just satisfaction in the case. In effect in this case, apart from the political embarrassment of a mass finding of violation, the UK has so far escaped tangible sanction for its breach of the Convention. Such discord between the Court and the CoM, however, may indicate a deeper problem of lack of constructive dialogue between the two institutions. This occurs where the CoM representing the member States disagrees with the Court’s decision but the Court feels its decision should be implemented but is unable to get the support of the CoM to do this. Such discord may suggest a need for greater communication and understanding between the two institutions in order to raise the efficacy and legitimacy of Convention law.

What it means if the CoM fails to take action, as it appears to have done with respect to the UK’s non-compliance to date with the \textit{Hirst (No.2)} judgment, is open to interpretation. However, one possible capability of the CoM’s discretion not to robustly supervise implementation of the Court’s judgment, may be a method of informally checking the Court’s judicial reach. The problem with this is that it is unreliable and may be construed as arbitrary by member States. In the case of Prisoner voting in the UK, the CoM’s ineffectiveness has failed to assuage feelings of ‘mission creep’ in Convention law.\(^\text{19}\)

\(^{17}\) \textit{McHugh and Others v. the United Kingdom} (App.No. 51987/08 and 1,014 others) (ECtHR 10 February 2015).

\(^{18}\) \textit{Hirst v. UK} (n14).

\(^{19}\) Joint Committee on Draft Voting (Prisoners) Bill (n14) especially at paras 37.
6.2.2 Convention Amendment

Amendment of the Convention has been discussed earlier in this thesis.20 Previously these amendments in the form of protocols to the Convention, have been to increase the Convention’s scope or improve the functioning of the Convention machinery.21 However, this need not be the case. Member States collectively have the ability to amend the Convention in a way that might either diminish the scope of the Convention or reduce the accountability of States for breaching their Convention obligations. The process of amending the Convention, like other international treaties, is cumbersome. Amendment requires the signature and ratification of all member States (47 at the time of writing.) A good example of the difficulty in successfully amending the Convention comes in the form of protocol 14.22 The aim of Protocol 14 was to amend the control machinery of the Convention to enable a more efficient processing of applications.23 However, Professor Bowring points out that Russia resisted this change thus severely considerably delaying the reform process.24 As a temporary fix to this delay the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe recommended the adoption of a new Protocol No. 14bis which would not require unanimous ratification to come into force and would only be binding on those parties that ratified it.25 Although primarily developed as a way of increasing the Court’s efficiency in dealing with ill-founded or simple and repetitive cases,26 Protocol 14 contains a clause that has the potential to diminish Convention protection. That clause is Article 12 which amends the main Convention text to require the Court to declare inadmissible cases where:

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20 See e.g. above chapter 2.6.
21 E.g. Protocols 11 and 14 to the Convention.
23 Ibid at preamble paragraph 5.
24 Bowring (n2) at 590.
25 Ibid at 591.
26 Paragraph 5 of Protocol 14’s Preamble states:
   “Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;”
“the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”

While the clause in its preambular context sounds innocuous enough, it was adopted after the High Level Conference of the CoM at the behest of the United Kingdom’s chairmanship of the same body. The UK had for some time been voicing considerable discontent and scepticism of the Court and as such when viewed in this light, it is possible that the motives behind the change in admissibility criteria were to limit the ability of the Court to ‘micro-manage’ the domestic arrangement of the member States. However, such a change may also be a re-settlement of the working relationship between the Court and the member States. This may ensure clearer separation of roles to enable the Court and the member States to work together with less misunderstanding about whether they or the other party are over-stepping their role. In a sense then treaty amendment can be done in keeping with the evolution of the member States’ desired constitutional status for the Court and the Convention to improve dialogue and their working relationship. However, it may also be a simple measure to reprimand and restrain a court they see as aggrandising its role, which might ultimately damage the credibility of the Court.

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While the discussion of the change of the admissibility criteria in Protocol 14 is speculative, a more recent example of a change in the relationship between the Court and the member States can be seen in the adoption of Protocol 15.\footnote{Protocol No. 15 amending the Convention on Human Rights and Fundamental Freedoms (Opened for signature 24 June 2013, not yet in force).} Protocol 15 for the first time amends the Convention to include specific mention of the margin of appreciation doctrine, which was previously only a judicial discovery of the Court with no specific reference in the Convention text.\footnote{Article 1 of Protocol 15 will insert a new recital into the main Convention text which will state:}

“Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,”

As, at the time of writing this protocol has yet to enter into force, it remains to be seen whether this will act only as a formal amendment with no effect on Convention adjudication. However, what can be said is that this has the potential to limit the effective reach of the Convention to applicants as more matters are left to the self-interest of the member States. This may then be seen, to some extent, as a way of checking the Court’s power. However, from another perspective, and this seems to be supported by the academic literature and the extra-judicial writings and speeches of the Strasbourg Judges as a resettlement of the constitutional roles\footnote{See e.g. S Greer and L Wildhaber, ‘Revisiting the Debate about ‘constitutionalising’ the European Court of Human Rights’, (2012) 12(4) HRLR 655 and R Spano, ‘Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity’, (2014) HRLR 1.} of the Court and the member States in ensuring the effective protection of Convention rights, respectively. This resettlement of the division of roles between the Court and the member States, like other amendments to the Convention has both the power to check or promote the Court’s power. However, more broadly it has the potential to clarify the working relationship between these two arms of Convention law and could act as a form of dialogue reducing confusion between the Court and the member States. This though will very much depend on the nature and implementation of the amendment.
6.2.3 Non-Compliance

Of the few unilateral options open to member States who are displeased with the Court’s rulings non-compliance has already to some extent been considered. Though non-compliance to the Court’s rulings is rare, and to date there have been no express refusals at State level to there are notable examples of State reluctance to implement adverse decisions against them. The most notable is the previously cited ire from the United Kingdom with regards to the so-called prisoner voting cases stemming from the Court’s decision in *Hirst (No.2) v. UK*. 32

It is helpful here to provide a little more by way of a brief background to this saga. However, such background will be brief in order to avoid unnecessary divergence from the topic of checks and balances at hand. The Court in *Hirst (No.2) v. UK*33 ruled that the UK’s blanket ban on those incarcerated in the UK at the time of an election under S8 of the Representation of the People Act 2002 is a disproportionate interference with the right to hold free and fair elections pursuant to Article 1 of the Third Protocol of the Convention. However, because the UK had failed to implement the judgment and change its laws further violations occurred and resulted in a further application against the UK being heard in the case of *Greens and M.T. v. UK*34 of 2010. The issue of the UK’s non-compliance was not *per se* the main discussion of the Court’s communicated decision. It was clear to the Court that the UK had not done anything to remedy the violation found in *Hirst* so extensive discussion was not needed on the substantive point of violation. Instead the Court focussed its reasoning on whether the situation was suitable for it to utilise its pilot judgment procedure in order to directly require the UK legislature to bring forward proposals to remedy its legislation in compliance with the *Hirst v. UK (no.2)* ruling. The UK later controversially applied to appeal this

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32 *Hirst v. UK (n14).*
33 Ibid.
34 *Greens and M.T. v. UK (n14).*
decision to the Grand Chamber but its application was rejected. As other similar cases from other member States were going to be heard by the Court, the CoM agreed to suspend the UK’s obligation to amend its legislation until those cases had been decided to clarify what standard was required of the UK. However, after communication of those decisions the UK still did not bring forward proposals to amend its legislation, resulting in the Court, reinstating the cases it had struck from the Court’s list and hearing them as a single conjoined case. Here, though the Court seemingly backed down on the issue in practice, whilst re-affirming the substantive principle that subject some qualifications prisoners must not be disenfranchised because of their incarceration. The Court found a violation of the Convention but held that this finding itself was a sufficient remedy for the applicants. What this means is that should the CoM fail to take action on the UK’s failure to take measures to reprimand the UK’s omission to change its law there will be no independent judicial check on the UK in this regards. This undoubtedly leads to a diminishing of the Court’s authority. However, while this method is completely at the discretion of the member State, subject only to its own internal political concerns that it is illegal in international law. Where this occurs too frequently it may raise broader concerns that compliance with Convention law and the Court’s rulings for member States is optional. Such a possibility has the potential to bring the Convention into disrepute as members may come to see compliance with their Convention obligations as optional, as opposed to their membership itself of the Convention which of Course is optional. Although elsewhere in this study and indeed this chapter dialogue has been implicitly suggested to be a positive phenomenon, in this situation the costs and benefits of it are more open to

36 McHugh and Others v. UK (n17).
37 Ibid at paras 10 and 17.
38 Article 26 of the Vienna Convention on the Law of Treaties makes it clear that treaty obligations of which a State is a party to, must be carried out in good faith. (see Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 Article 26)
interpretation. The clear signal to the Court that the member State or States are unhappy may be useful in signposting to the Court that it needs to exercise more discretion in future matters or give better explanations. However, it could create an antagonistic relationship between that member State, the Court and potentially the CoM. Far from being a form of dialogue that might, in the long-term, benefit the legitimacy of the Convention and the Court this would likely result in a diminution of the authority of Convention law and lead to the reduction of the Court’s ability to protect Convention rights.

6.2.4 (D)evolution

Discussed in the previous chapter, the possibility of Convention (D)evolution may be act as a form of check on the growth and/or operation of Convention law. As discussed, if it seems that the primary indicator of evolution and thus organic growth of Convention obligations as, declared by the Court, is tenured upon a pro-evolutionary consensus among member States, then if the development of that consensus stops or reverses then so too should the Court’s evolutionary expansion of Convention rights. This is because the member States are implicitly communicating their intention for the substantive content for the relevant Convention standard. In this way an implicit form of dialogue has taken place by the member States to the Court. However, as discussed in the previous chapter, it is likely to be difficult for a singular State to engineer a (d)evolution of the Convention.\(^3^9\) This is both a good thing and a bad thing as regards the system of checks and balances is concerned. It reduces the effectiveness of this method to hold a renegade Court in check. As such it makes this aspect of the system of checks and balances ineffective in all but the most concerted efforts of the member States to come to a new settlement of Convention law. However, the relative difficulty to engineer a (d)evolution of the Convention can be seen as an important aspect of the protection of

\(^3^9\) See above chapter 5.
the Convention. If one State could engineer a (d)evolution of the Convention it would render the Convention void of its protective qualities as instead of a violation being declared, the Court would simply find the Convention to have (d)evolved leaving the applicant without remedy. Although this chapter primarily points towards checking and balancing the powers of the Court, it is important not to lose sight that the Convention is a collective system of human rights enforcement.\(^{40}\) This is very important as it can be said that its *modus operandi* is to ensure the protection of European human rights from an erosion in standards such as that experienced in Nazi Germany by way of ensuring members are loosely bound to a European average.\(^{41}\) So for a single State or small group of States to effectively be able to ‘lower’ the human rights legal settlement afforded by the Convention would go against the Convention system of law and would infringe on the ‘core’ of the relevant Convention rights.\(^{42}\) In this situation where a fundamental disagreement between one or a small group of Convention States occurred where the State/s were not prepared to submit to the Court’s authority, then it would be more appropriate for them to withdraw from the Convention. Currently though, and as shown in the previous chapter, this possibility is unlikely to be effective due to judicial resistance to it.\(^{43}\)

### 6.3. Existing Checks and Balances Conclusion

The existing system of checks and balances appears to some extent, capable of controlling the actions of the Court. However, because of its non automatic nature, calling it a ‘system’ of checks and balances amounts to a mischaracterisation of the situation. Perhaps due to the rush and

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\(^{40}\) See e.g. Bates (n12) at 5.

\(^{41}\) Ibid.


\(^{43}\) See above chapter 5.1.
enthusiasm to put together a working human rights convention in the post-war era, and the ad hoc reforms to the Convention overtime, no coherent institutional strategy for checks and reforms appears to have developed. This is understandable also from the original structure of the Convention as States essentially had much greater unilateral control over their convention obligations. However, the balance of authority to interpret and adjudicate Convention compliance gradually shifted from member States to the centralised system of adjudication we see today with a permanent Court with compulsory jurisdiction to hear individual petitions, and confusion and misconception surrounding some of the Court’s interpretation have come to the fore. It thus seems a new assessment of the system of checks and balances has become necessary to ensure confidence in Court’s status and restore understanding and dialogue in the Convention system. Currently if the Court oversteps what the member States collectively think is its appropriate role, it is far from guaranteed that its actions will be kept in-check and those checks may appear to be somewhat antagonistic in nature. Considering this assessment of the existing Convention checks and balances, the next part of this chapter considers the effectiveness and appropriateness of various reforms that have been suggested for the Court.

6.4. Checks and Balances Reforms Considered

In the previous section the effectiveness of the existing Convention checks and balances has been considered and brought into sharp relief. If one is of the opinion that reform is needed, then the next question, logically, is what should be done to improve it? This is not a new topic and commentators and judges speaking extra-judicially have made suggestions on reforms that might

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45 ECHR Article 32.
46 ECHR Article 34.
increase the legitimacy, or at least acceptability by member States, of the Court’s case law. This section considers some possible methods of reform against the existing system of checks and balances and evaluates their likely impact and suitability in the context of the Convention’s broader aims to protect European human rights. It is suggested that if these reforms are to work and to restore confidence in the Convention system then they will need to aim to address miscommunication and confusion in the Convention’s dialogical model.

Among the suggested reforms are a system of provisional judgments; requests for preliminary rulings; a move towards a more ‘constitutional court’ model of adjudication where the Court would only deal with the most serious cases that set general principles of Convention law and qualified majority decision making in the Court. It has also been proposed elsewhere that the UK could renegotiate its relationship to the Court so that the Court’s rulings against the UK would be advisory only. Other possible options for reform are altering the Convention preamble to reflect a more subsidiary nature and changing amending the specific Convention clauses to make expressly clear the desired settlement of Convention law in that area. It may also be possible to amend the CoM’s monitoring framework to create a jurisprudence review panel separate from the function of supervising the execution of judgments by member States. Overall however, one theme of evaluation for these different potential reforms is whether they improve the dialogical relationship between the Court and the member States’ institutions, improving the effectiveness of subsidiarity in the Convention system.

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6.4.1. Provisional Judgments

Lady Justice Arden, Head of International Judicial Relations in England and Wales and former ad hoc judge at the Court of Human Rights, has suggested a system of provisional judgments for the Court.\(^49\) As proposed by Arden LJ, this system would mean that when the Strasbourg Court’s decision would ‘significantly develop its jurisprudence’ then it would not issue a binding decision but communicate a provisional judgment.\(^50\) This provisional judgment would contain details of how the Strasbourg Court proposed to develop Convention law giving national Court’s an opportunity, “and a generous period of time” to give their feedback on the practicality of this development.\(^51\) However, successive reforms of the procedural machinery of the Convention have placed great importance on ensuring the efficient running of the Court’s case docket.\(^52\) It has been acknowledged for some time that the Court has been suffering under the strain of an overload of cases.\(^53\) As such it already takes a considerable time to reach a full hearing of the Court even at chamber stage.\(^54\) Any additional delays in the process of obtaining a decision in a case would therefore be undesirable. Such delays are not likely to solely exist on the Strasbourg level. This process would create an additional burden on the judicial capacity of the member States, some of whom have previously been held in violation of Article 6 of the Convention for excessive length of their proceedings.\(^55\)

\(^{49}\) Arden (n1) at 29-30.
\(^{50}\) Ibid at 30.
\(^{51}\) Ibid at 30.
\(^{52}\) In this respect see particularly the preamble to Protocol 14 of the Convention.
\(^{54}\) A document from the Court itself states: “The Court endeavours to deal with cases within three years after they are brought, but the examination of some cases can take longer and some can be processed more rapidly.” (See. Public Relations Unit of the Court, ‘The ECHR in 50 Questions’, European Court of Human Rights, <http://www.echr.coe.int/Documents/50Questions_ENG.pdf> (accessed on 1 February 2016) at page 9.
\(^{55}\) A good example here is the notorious situations in both Italy and Greece overly long delays in judicial hearings.
It should also be noted that the make-up of the judiciary to some extent reflects the member States by virtue of having one judge elected to the Court from each member State.56 This alongside the Court’s programmes of secondments into the registry are likely to ensure a reasonable reflection of the views of the national legal systems in ECtHR decisions. Furthermore the potential for improved practical knowledge from member State judiciaries could be achieved through the existing mechanisms if member States were to make a concerted effort to ensure the experience and skills of their judicial candidates. However, if one views the potential, practical gain from this measure, higher than the cost of slower decision finalisation, this method may improve the perception of ECtHR decisions. Certainly it has the potential to encourage collaboration between the Court and the member States if the Court were to refer and to some extent address the submissions of the domestic courts in its decisions.57

Perhaps the most potent benefit of the Arden’s provisional judgment procedure is that it would better reconcile the Court’s judgments with the important aspect of natural justice that “...justice should not only be done, but should manifestly and undoubtedly be seen to be done.”58 If the Court engaged with this process and included indications it had taken into the national courts’ feedback into account this may help instil greater confidence that the Court is not acting in isolation to the member States. Certainly from a dialogical stand point, this method, if implemented well, could open up an active and consistent dialogue with member States’ courts helping to avoid feelings of the remoteness of the Strasbourg Court as a ‘foreign’ international Court.59 This sentiment has been echoed by Merris Amos who has said:

56 Although it should be noted that they sit independently of their member States.
57 It should be noted that Amos, as an example, has noted that the ECtHR already has a practice of paying attention to decisions of the instant case from domestic courts in its decisions (See e.g. M Amos, ‘The Dialogue Between United Kingdom Courts and the European Court of Human Rights’, (2012) 61(3) ICLQ 557 at 573).
59 This was observed by the Attorney General for the Isle of Mann in the pleadings of the Tyrer v. UK: Tyrer v. The United Kingdom, Series B, vol.24 1977-1978 (Carl Heymanns Verlag KG, 1981) at 68.
“The general public and their representatives in governments and legislatures are far more likely to consider a judgment of the ECtHR legitimate and acceptable if it is reflective of their values. And a judgment of the ECtHR is much more likely to meet this criterion if it is the result of a dialogue with a national court.”

Another clear benefit of using such a procedure would be the potential to avoid situations such as occurred in respect of the Court’s hearsay evidence jurisprudence. In this example the Court had previously ruled that in accordance with Article 6(3)(d) (the defendant’s right to examine or have examined witnesses against him) in Luca v. Italy that:

“where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6.”

However, while the Court’s statement of Convention law sounds perfectly reasonable in isolation, it caused problems for the British laws regarding hearsay evidence. While generally the above statement is true for English law, the UK law was at odds with Strasbourg jurisprudence because the Criminal Justice Act 2003 (CJA 2003) allows for some exceptions including under s116. CJA 2003 S116

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60 Amos (n57) at 575.
63 Ibid at para 40.
allows for the evidence of an absent witness to be admissible where that witness is unavailable for certain reasons including death, fear or illness. The CJA 2003 s 114(1)(d) also allows for the admission of hearsay evidence where the relevant court deems it to be ‘in the interests of justice’ to do so. The UK law was challenged and initially in *Al Khawaja and Tahery v. UK* the fourth section chamber found that the UK’s hearsay evidence laws violated Articles 6(1) and 6(3)(d) of the Convention. The UK government requested an appeal of the case to the Grand Chamber which was ultimately granted. In the meantime the UK Supreme Court (UKSC) was seized of the same issue in *R v. Horncastle and Others*. Faced with a direct decision of the Strasbourg Court concerning these laws the UK Human Rights Act 1998 s2 required that the UKSC ‘take into account’ the Strasbourg decision and s3 of the same Act required them to interpret the UK law in-line with Convention law or if unable to s4 required the Court to issue a declaration that the UK law is incompatible with the Convention. In considering the case the UKSC objected to the Strasbourg jurisprudence. In concluding his consideration of the Strasbourg jurisprudence in connection to the *Horncastle and others* case, Lord Phillips stated that in these cases he did not think it would be fair to apply the sole or decisive test from Strasbourg further stating:

“In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take into account the reasons that have led me not to apply the sole or decisive test in this case.”

As mentioned the *Al Khawaja and Tahery* case was subsequently granted a hearing in the Grand Chamber of the European Court of Human Rights. The majority decision here gave extensive note

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64 *Al Khawaja and Tahery v. UK* (App.No. 26766/05 and 22228/06) (ECtHR 20 January 2009) (Fourth Section).
65 Ibid at para 48.
67 See e.g. ibid at para 66.
68 Ibid at para 108.
and consideration of the UKSC’s *Horncastle* decision in coming to its conclusions. Ultimately, the Grand Chamber reversed the decision of the fourth chamber. In doing so the Court said:

“It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial *dicta* that may have suggested otherwise (see, for instance, *Lucà*, cited above, § 40). To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.”\(^70\)

In essence the Court was treading a fine-line by not reversing its ‘sole or decisive test’ but at the same time dealing with the different nature of the UK trial system as pointed out by the UKSC in *Horncastle*.\(^71\) While it may be argued that the ability of the UK Government to appeal in this case demonstrates an ability of the Grand Chamber to take into account views from the domestic courts such a refutation would be undesirable. This defence would only apply to cases first heard in a chamber decision and not those relinquished to the Grand Chamber under Convention Article 30.

Also given that it is well-known that the Court has been suffering from an overload of cases for some

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\(^{69}\) *Al Khawaja and Tahery v. the United Kingdom* (App.No. 26766/05 and 22228/06) (15 December 2011) (GC).

\(^{70}\) Ibid at para 146.

\(^{71}\) Professor Helen Fenwick has likened this and other recent cases of the Court as showing the Court is taking an ‘appeasement approach.’ See H Fenwick, ‘The Conservative stance in the 2015 election on the UK’S relationship with the Strasbourg Court and its jurisprudence – bluff, exit strategy or compromise on both sides? (Part II)’ UK Const. L. Blog (10\(^{th}\) March 2015) (available at <https://ukconstitutionallaw.org/2015/03/12/helen-fenwick-the-conservative-stance-in-the-2015-election-on-the-uks-relationship-with-the-strasbourg-court-part-ii/> accessed on 10/03/2016.)
time, the need for a rehearing of a case after it has already been decided upon in a chamber decision is highly inefficient and would detrimentally impact the Court’s workload, whilst also slowing down the delivery of justice. The example of the hearsay evidence cases is a good example of constructive dialogue between the UK Courts and the ECtHR where the ECtHR was able to adapt its approach. However, the proposed provisional judgment mechanism would potentially allow this dialogue to take place sooner, thus avoiding unnecessary appeals and delay for applicants and avoiding confusion.\footnote{Merris Amos has warned of the danger that it can take 5 years to get an answer from the ECtHR from the point of lodging an application. See Amos (n57) at 563.}

Another option, not discussed by Arden LJ in her speech\footnote{Arden (n1).} for this mechanism may be to include the relevant ministries of the member States, or the CoM within the pool of recipients of the provisional judgment. This could occur similarly to how member States can be granted permission to intervene in the pleadings stages of an application.\footnote{See rule 44(3) and rule 44(4) of the Court.} The key advantage of this is that it would allow for discussion and dissent to be aired at a stage where the Court is able to take it into account. As the judgment at this stage would be provisional, providing that the Court takes into account the submissions of the member States it is unlikely to cause damage to its credibility. Instead it would further enable the Court to work with member States in coming to its own independent decision, rather than guessing their consensus views on the subject matter through the implication of various sources of evidence detailed in chapter 4.\footnote{See above chapter 4.2.} This aspect may make it suitable for use in conjunction with a more formalised supervision of State execution of the Court’s decisions which will be discussed later in this chapter.
On the whole this measure may be of diplomatic benefit and thus may increase the level of ‘buy-in’ to the Convention by member States. However, this potential benefit will depend on how the Strasbourg and National Court’s interact with the procedure and may be to the detriment of the already overburdened workload of the Court.

### 6.4.2. Qualified Majority Decisions

This idea stems from criticism that some significant decisions have been made by a very small majority, the argument here is that if the judges of Strasbourg are divided in their opinion, then it is an area where reasonable people may reasonably differ. Where this is the case it would arguably be appropriate for the issue to be left to the member States. Thus the imposition of a qualified majority threshold can be seen in the light of a new constitutional settlement that in cases of doubt would replace the Court with the individual member States. While this may be seen as a diminution of the Court’s authority it would reduce the chances that the Court might come under criticism for making decisions where perhaps only one more judge voted in favour of finding a violation than voted for no finding of violation in a given cause of action. However, although decisions against member States would now, because of visible judicial solidarity in the Court, have a clear and strong message to member States.

Unfortunately, this strong message comes at the expense of applicants who will now have less chance to succeed in their claims. To consider whether this is fair it is perhaps worth considering the acceptability of the opposite situation where in order to find no violation a qualified majority would have to be found. Here the likely argument would be that this was biased against the member States and created something of a presumption of violation. In our given situation where the qualified majority would work against the applicant, this is tantamount to a presumption of innocence.
towards the member States. Such a restriction of the enforcement of the Convention seems to go against the general direction that has arguably been inherent since the early days of the Convention, to provide for the most effective protection of the Convention rights possible. For instance one may recall in the *Wemhoff case* the Court stated that it was necessary “to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties”\(^76\) and the latter prospect is precisely what the imposition of a qualified majority voting system would do. Given our previous discussion of core rights, this could potentially infringe the core of the Convention right in question if it became very difficult to achieve such a qualified majority.\(^77\)

A final issue arises as to what level to set the number of judges voting in favour of a violation before a violation is found by the Court. This itself is an issue on which even those in support of this proposal may agree to differ. It is important not to set the threshold too high, lest only the most clear cases of violation would result in success for the applicant. If this were the case then applicants may be left without effective redress for their concerns. However, if the qualified majority threshold was set too low then this may fail to sufficiently address the criticisms of marginal decisions and thus have little impact on the Court’s perceived, overall legitimacy. What is perhaps most disturbing about this possible reform is that it goes against the growing trend previously mentioned towards a more constitutional nature for the Court by impugning the Court’s decisions where the majority decision is not a strong majority and resisting its action.

\(^{76}\) *Wemhoff v. Germany* (App.no. 2122/64) (ECtHR 27 June 1968) at para 8.

\(^{77}\) Örücü (n42) at 46. Discussed in chapter 5.8.
6.4.3 Strengthening the Margin of Appreciation

One aspect of the problem with the system of checks and balances to date is the lack of formalism regarding the inherent discretions contained within the Convention system. One aspect of the Convention is the deference shown by the Court towards the member State decision making. The most prominent doctrine that encapsulates this is the margin of appreciation doctrine first formally declared in the Court’s *Greece v. UK (Cyprus Case)* judgment. However, to date it has existed, much like the living instrument doctrine, in the Court’s jurisprudence in the absence of express treaty statement. The member States have now seen fit to conclude Protocol 15 which will, for the first time, expressly incorporate the margin of appreciation doctrine into the Convention text in the preamble. While this stops short of expressly defining what the member States view as the appropriate margin of appreciation in any given area of Convention law it does imply that they wish the Court to consider the Convention as a treaty tenured on the principle of subsidiarity. What is most striking about this reform is that it does not alter the substance of the Convention but instead adjusts the balance of responsibilities in implementing and enforcing the Convention between the Court and the member States. This adjustment may suggest a shift to a more constitutional justice model for the Convention. Here the Court would concern itself with only the most serious situations and enables and trusts the member States to alleviate lower level violations. This to some extent emboldens the ‘hesitant and slow’ constitutionalisation of the Convention system that Professors

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80 Article 1 of Protocol 15 will insert the recitation:

“Affirming that the high Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by the Convention.”
Greer and Wildhaber argue is already occurring\textsuperscript{81} and was discussed earlier in Chapter 2 of this study. The better understanding of the division of responsibilities for protecting Convention rights may also serve to dispel resultant tension between the Court and the member States resulting from confusion over potential judicial over-reach.

Where perhaps this reform gains its greatest strength is that it continues to formalise the current developing trend of the Court’s relationship with the member States towards greater subsidiarity. It has already been suggested in several places that the Court’s contemporary trend in adjudicating cases has been towards leaving more issues to the discretion of the respondent State.\textsuperscript{82} This phenomenon has been described by Judge Spano as ‘the age of subsidiarity’\textsuperscript{83} and may mark a move for the Court to dispense a more general form of justice leaving the specifics of how that Convention justice is dispensed to the member States. It is worth noting at this juncture that this might, at least to some extent, appease the criticism of Lord Hoffman mentioned earlier in this study that the human rights are universal in abstraction but not national in application.\textsuperscript{84}

It remains to be seen whether, in practice, the addition of specific mention of the margin of appreciation doctrine will garner a greater recourse to it in the Court’s case law. However, given the argued trajectory of the Court’s contemporary judgments in cases like \textit{SAS v. France}\textsuperscript{85} favouring the State’s margin of appreciation, this may be effective. However, whether such effect will sufficiently appease disgruntled member States to restore their confidence in the Convention system is uncertain. One thing is clear, the Court must be careful not to surrender its ultimate authority to

\textsuperscript{81} Greer and Wildhaber (n31) at 671.

\textsuperscript{82} See e.g. M Kuijer, ‘The Right to a Fair Trial and the Council of Europe’s Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings’ (2013) 13(4) \textit{HRLR} 777 at 784-785.

\textsuperscript{83} Spano (n31).

\textsuperscript{84} L Hoffmann, ‘The Universality of Human Rights’, (2009)125 \textit{LQR} 416 at 422.

\textsuperscript{85} \textit{S.A.S v. France} (App.No. 43835/11) (ECtHR 01/07/2014).
preside over European human rights standards\(^\text{86}\) to the member States. To do so would risk undermining the Convention founding principles of providing an external check on States,\(^\text{87}\) and its credibility amongst potential applicants.

### 6.4.3. Reform of the Committee of Ministers

Previously we outlined how once the Court has communicated its decision and it has become final it is then transmitted to the Committee of Ministers for supervision of its implementation by the relevant member State/s.\(^\text{88}\) We also noted in the first part of this chapter that the CoM is a political body made up of representatives of the member States and as such this can lead to a political decision to not enforce a decision of the Court. This itself can lead to a potential contagion effect, whereby one member State being effectively excused from its Article 46(1) obligation to abide by the judgments of the Court, may provide an excuse for another member State either delaying implementation or refusing to abide by the Court’s decision in its respective case. An example of this cited by Ed Bates\(^\text{89}\) is Azerbaijan’s failure to release a political prisoner in compliance with the Court’s decision in *Mammadov v. Azerbaijan*.\(^\text{90}\) Here having previously been ordered by the CoM to release the prisoner, the Azerbaijan authorities had failed to do so and the situation came up for review alongside the UK’s prisoner voting case of *Hirst (no.2)*. It is reported that the UK had forcefully relayed that it would not be implementing the *Hirst* decision anytime soon\(^\text{91}\) and the CoM decided to leave the situation for review 12 months later. Bates argues that as the *Mammadov* decision was considered by the CoM alongside the UK’s non-compliance with the *Hirst (no.2)*

\(^{86}\) See ECHR Article 32(1) and 32(2).

\(^{87}\) See especially Bates (n12) at 6-7.

\(^{88}\) ECHR Article 46(2).


\(^{91}\) See D Barret, ‘David Cameron on verge of landmark victory over prisoner voting as ministers shelve reforms’, *The Telegraph*, 10\(^\text{th}\) December 2015.
decision that: “[i]t seems hard to resist the conclusion that the continued failure to implement Hirst ... saps the Convention’s authority when it comes to the insistence that cases such as Mammadov are also implemented.” If such contagion were to spread than this would harm the credibility of the Court’s judgments as States may simply begin to just ignore them, removing any effective protection the presence of the Court might provide to potential applicants.

What may be needed to ensure this no longer occurs is formalising the process of supervising the execution of judgments. This may entail separating the bureaucratic function of supervising the implementation of the Court’s judgments from the political issues surrounding the general acceptability of the Court’s decisions. This could be done by breaking the formal link between the supervision of judgments from member State representatives and creating an independent body for this purpose much like the EU Commission. This would have the benefit of enabling the Court to give decisions free from the concern that it might lose face when member States fail to implement them and are not effectively supervised by the CoM for their failure to do so. However, it is difficult to imagine that any such new bureaucracy would hold any extra powers above and beyond that which the existing CoM has, and thus should a recalcitrant State refuse to cooperate and submit to the decision of the Court and subsequent commands of the CoM, it would face what might be called ‘the nuclear option’ of suspending the State from the Council of Europe. In the current political climate of growing ire towards the Convention, such a prospect may not hold the same undesirable stigma with the member States. In this circumstance a bureaucratic body would face the internal turmoil of potentially expelling member States, instead of being able to work towards a constructive discourse. Ultimately the success or failure of such a measure would rest (as it currently does with the CoM) upon the willingness of member States to participate in and cooperate with the Convention regime.

93 This is the ultimate sanction of the Committee of Ministers.
The likelihood of this option might be enhanced if it were part of a package of reforms such as the provisional judgment procedure. However, on its own formalising the procedures of the CoM to supervise judgments and ‘expel’ delinquent member States from the Council of Europe would, perhaps, only cure a symptom of the problem at potentially great expense to the Convention as a whole. What would be needed is a constructive dialogue between the Court and the member States to ensure such a situation does not occur and where suitable, the Court adapts its approach accordingly.

6.5. Conclusion

In the first part of this chapter we assessed the vulnerability of the existing Convention system of checks and balances. Its main problem can be fairly characterised as its lack of formal procedures leading to its unpredictable efficacy. However, none of the proposed reforms alone are likely to lead to a significant improvement to this situation, if any at all. In fact some of the suggested reforms on their own have the potential to cause significant harm to the overall Convention system of rights protection such as the imposition of a qualified majority voting system in the Court. With the fundamental weakness of the Convention system of checks and balances being its discretionary nature and Convention amendment being a herculean task any reform of the system of checks and balances requiring structural change to the Convention system is likely to be time consuming. However, in the short-term reforms that might be achievable by a changing of the rule of the Court and not needing treaty amendment may be effective. It is also likely that reform, as has occurred through the lifetime of the Convention, will be a gradual step by step process. If, as has been reported, the Court has already started to move towards a more constitutional model of justice, then reforms that aim to improve the collegiate relationship between the Court and member States

\footnote{See Greer and Wildhaber (n31) at 671.}
will be particularly suitable. If this is so then improving dialogue, between the Court and the member States, in the Court’s checks and balances system may help considerably in this endeavour. In this light the provisional judgment procedure, by ensuring the practicality of the Court’s jurisprudence may aid in the division between member States as primary enforcers of Convention law and the Court as chief interpreter and supervisor of Convention law. The impending changes towards strengthening the margin of appreciation doctrine may helpfully formalise and reinforce this emerging relationship with between the Court and the member States. The effect of this will very much depend on the way in which both the Court and the member States react to it and take on their ‘new’ roles.

From this brief discussion on potential reforms of the Convention system of checks and balances, what more broadly appears to be the case, is that the effectiveness of reforms in increasing the legitimacy and effectiveness of the Court are likely to be linked to their amenability to the nature of the evolving nature of the Court.\textsuperscript{95} This in part may be because the evolving nature of the Court reflects the broader political and diplomatic context in which the Convention operates. As such where a reform has the potential to go against the nature of the Convention’s broader aims, then the less likely it is to be effective. One example of this is the suggested qualified majority voting suggestion for the judiciary. Although having the potential to ensure strong judgments, it also has the potential to weight the justice system in favour of the member States and against the very people it was designed to protect from them, the applicants. Ultimately, the optimum package of reforms is open to individual opinion and the choice of reform, if any, is open to the member States to decide. However, reforms that improve dialogue between the Court and the member States may be more likely to be effective than unilateral approaches to marginalising the Court’s action and may

\textsuperscript{95} For further discussion of the evolving nature of the Convention see Chapter 2.
improve understanding of the Court’s more controversial decisions, including those surrounding the living instrument doctrine.
Chapter 7: Conclusion

Written at a time of “...unprecedented vitriol”¹ against the Convention, this study has sought to clarify both the nature of the Convention and how its living instrument doctrine fits in with it. This study contributed a codification of existing knowledge of the living instrument doctrine and the Court’s consensus methodology in order to clear up misconceptions that the Court simply created it for its own ends. It is an assumption of this study that some of the ‘vitriol’ cast upon the Convention is caused by a misunderstanding of the rationale and working of the living instrument doctrine. This misunderstanding may have led some to believe that the Court is simply ‘making it up as it goes along’ and usurping the legislative role and sovereignty of the member States.² However, while the Court may be censured for its lack of transparency and clear explanation of its evolutive interpretation, the doctrine itself is in keeping and an important aspect of the Convention’s nature. Perhaps one aspect of this ire towards the confusion and conflict with regards the Court and in particular its evolutive interpretation has been a breakdown in communication and dialogue between the various Convention organs. This theme along with the nature of the Convention and how the living instrument doctrine fits into this and the appropriate roles of the Convention institutions within the Council of Europe Constitutional order will be freshly considered in this conclusion.

The Convention having been concluded in 1950 and entering into force in 1953, is barely recognisable in terms of its contemporary jurisprudence compared to the jurisprudence of its humble beginnings. However, from the beginning of the Convention, and during its negotiations,

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² See e.g. L Hoffmann, ‘The Universality of Human Rights’, (2009) 125 LQR 416 at 428: “The proposition that the Convention is a ‘living instrument’ is the banner under which the Strasbourg Court has assumed power to legislate what they consider to be required by ‘European public order.’

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two conceptions of the Convention as a more limited international treaty and a fledgling bill of rights for Europe were perceived by various key Convention actors. What appears is that after a slow start the Convention has gradually grown in stature and the Court has continually, and ever more visibly, demonstrated that it has been interpreting the Convention as a form of ‘constitutional like’ document by virtue of its themes and high level of adherence.³ Although the Court’s early jurisprudence was not clear on its perspective of the ECHR’s constitutional nature and its statements could be interpreted as innocuous. However, as was shown in chapter three of this study, the Court’s case law gradually built up, particularly in the 1970’s, and the Tyrer decision in which the Court first expressly stated that the Convention is a living instrument, was part of this crystallisation of the Convention’s constitutional nature. Where it would have been perfectly plausible for the Convention to be interpreted in-line with the understanding of human rights in the 1950’s as a static international treaty, this is not the path the Convention organs have taken. However, to say this is wholly illegitimate is too harsh. While arguments that the more constitutional evolution of the Convention, itself, would have been reasonable prior to the landmark cases of the 1970’s and early 1980’s⁴ for the member States to have complained about the illegitimacy of the Convention’s ‘constitutional’ evolution, however, these judgments made it increasingly clear that this was the path that the Court was taking the Convention along and history shows that no withdrawals or refusal to renew the then optional declarations of the Court’s jurisdiction in respect of a given member State arose. This alone might imply the Court was acting as something of a constitutional court. However, if the member States did overlook the nature of the Convention from these judgments then the Court’s landmark decision in Loizidou v. Turkey (preliminary objections)⁵ expressed this clearly by referring to the Convention ‘...as a constitutional instrument of European

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³ For description of what is meant by the term ‘constitutional’ see above chapter 2.1.
It did so while annulling the effect of the Turkish reservation with regards to the territorial application of the Court’s jurisdiction to Cyprus.

However, still no withdrawals from the Convention occurred and in fact in 1998 when the member States concluded negotiations on Protocol 11, just 2 years later, still no curtailment of the Court or Convention arose. In fact, the importance of Protocol 11 in this process of empowerment of the Convention institutions cannot be stressed enough. As is well-known this protocol replaced the old Commission and part-time Court with a new full-time Court of Human Rights and and made the right of individual petition a compulsory aspect of the Convention system. These actions, rather than restricting the Convention’s process of constitutional evolution may have tacitly encouraged it, by removing barriers to the Court’s jurisdiction. If this was not enough the Court also adopted within its jurisprudence the pilot judgment procedure. In Broniowski v. Poland the Court introduced the pilot judgment procedure. This procedure meant that where there are systemic breaches of the Convention in a particular member State, the Court can indicates some general measures the State might take to become Convention compliant and suspend consideration of applications deriving from the same general system failing. The Court then also, as it did in its Greens and MT v. UK decision suspends the other identical cases with regard to that State from its case list. However, should the State fail to remedy the situation then the Court will re-instate the cases. This mechanism alters the subsidiary relationship between the Court and the member State. Ultimately though, it is up to the member State to decide the precise course of action to take to become

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6 Loizidou (n5) at para 75.
10 Ibid at paras 193-4.
11 See e.g. ibid at para 198.
12 Greens and MT v. The United Kingdom (App.Nos. 60041/08 and 60054/08) (ECtHR 11 April 2011).
13 The Court did this with respect to 1015 applications relating to the UK’s blanket ban on prisoner voting in McHugh and Others v. the United Kingdom (App.No. 51987/08 and 1,014 others) (ECtHR 10 February 2015).
Convention compliant. Certainly however, it can be seen as a further evolution in the relative status of the Court whilst providing a form of unilateral communication from the Court to the member State to help them improve their legal system furthering the purpose of subsidiarity in the Convention system.

Recently the relationship between the Court and the member States has undergone further change with the conclusion of Protocols 15 and 16. The former of the two protocols inserts an express reference to the principle of subsidiarity and the margin of appreciation doctrine into the Convention preamble.\textsuperscript{14} This alteration may be seen to further constitutionalise the Convention system, underlining the approach of the Court in pronouncing general standards for the member States to achieve, and supporting the existence of the living instrument doctrine. This is because it further communicates the relationship and division of responsibilities between the Court and the member States.\textsuperscript{15}

This study has identified the nature of the Convention, although perhaps ambiguous at its entry into force, has gradually become more transparent about its constitutional-like nature. While the primary focus of this study is the living instrument doctrine, the broader context of the clarification of the Convention ‘quasi-constitutional’ nature is an important aspect of the emergence of the living instrument doctrine in the Court’s case law. Contrary to some statements, the Court did not simply create the living instrument doctrine in the infamous \textit{Tyrer v. UK} case of 1978.\textsuperscript{16} However, while

\textsuperscript{14} Previously there was no express mention of either subsidiarity or the margin of appreciation doctrine in the Convention text. It should also be noted that at the time of printing protocol 15 had not entered into force.

\textsuperscript{15} Article 1 of the Protocol 15 will add an additional recitation into the Convention preamble stating: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

\textsuperscript{16} \textit{Tyrer (n4)}. 
chapter 3 of this study showed that a gradual and incremental constitutional like impetus behind the Convention may have logical led to the Court’s living instrument statement in *Tyrer* this may nonetheless, not be clear to a non-specialist audience. What is perhaps more concerning is that the Court has overtime failed to provide a clear understanding of how the doctrine operates and this dialogical failure may have led to misconceptions that the Court has been using consensus to disguise what are really its legislative motives,\(^\text{17}\) in conflict with the norm of international law that is State sovereignty. As a result improvement in the communication mechanisms between member States and the Court is needed to clarify the doctrines operation.

With regards to the above mentioned failure of the Court to properly explain the *modus operendi* of its living instrument doctrine we saw earlier in chapter 4 that the Court usually exercises a consensus model. The aspects of consensus were shown to be common legislation and practice; mutual international law obligations; statement and practice of Council of Europe institutions and common changes in social perceptions.\(^\text{18}\) While the Court’s focus on showing these has been, at best changeable, even in cases where it has shown the presence of these it has been unclear as to their relevant weighting on the Court’s evolutive interpretation. However, it may not be possible or even reasonable to expect the Court to provide a cast iron instruction manual on the operation of consensus, after all “[d]eparture from the practice hitherto observed is not only permitted, but required, if there are better reasons for another treatment of the question of Law.”\(^\text{19}\) Furthermore in the case of alleged violations of Article 3 of the Convention (the right to freedom from torture and inhuman and degrading treatment) the Court has shown less regard for showing the relevant

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\(^{17}\) See e.g. D Raab, *The Assault on Liberty: What Went Wrong with Rights*, (Fourth Estate, 2009) at 130 and Hoffmann (n2).

\(^{18}\) See above chapter 4.2 for more detailed discussion of these aspects of European Consensus.

consensus for a potentially evolutive interpretation. Instead in these cases the Court has relied on 
the fairly vague statement it first espoused in Selmouni v. France that:

“the Court considers that certain acts which were classified in the past as “inhuman and 
degrading treatment” as opposed to “torture” could be classified differently in future. It 
takes the view that the increasingly high standard being required in the area of the 
protection of human rights and fundamental liberties correspondingly and inevitably 
requires greater firmness in assessing breaches of the fundamental values of democratic 
societies.”

This failure of the Court to explain its reasoning for arriving at its decisions fully may have damaged 
its credibility with member States and commentators alike. However, some greater communication 
of how the living instrument doctrine operates in general and in individual cases would be beneficial 
to improving understanding of Convention law for member States. Indeed, it may well be this failure 
of explanation that has led to complaints that the Court has been making up or legislating 
Convention law as it goes along. However, more broadly this may be seen from a more holistic 
perspective as a dialogical failure in the Convention system that may also hamper the effectiveness 
of the important principle of subsidiarity in the delivery of Convention rights.

To understand this dialogical failure it is important here to take a brief moment to first conceptualise 
the forms of dialogue between the various Convention actors. Although the Convention system lacks

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a separation of powers in the traditional sense seen in domestic jurisdictions, i.e. a legislative, and
effective and a judiciary,²² it can nevertheless be said to have a form of separation of powers
relevant to its specific constitutional situation. The power to legislatively alter the Convention lies
with member States, the judicial arm of the Convention is clearly found in the Court (and prior to the
entry into force of Protocol 11 the Court and the Commission.) The executive layer of the
Convention is more complicated to discern. The role can loosely be seen as being shared among the
State institutions tasked with ensuring Convention law in their domestic jurisdictions i.e. domestic
Courts and authorities or the member States in their individual capacity. The nature of the
separation of powers means that it would be inappropriate for the different branches of power to
have a direct two way conversation and indeed Romano identifies this as a potential problem of
dialogue.²³ Instead dialogue takes different forms depending on the specific institution.

The Court’s most obvious forms of dialogue that it communicates are its case judgments. As we have
seen it has been less than clear on how its evolutive interpretation works. However, another aspect
of this failure of the Convention dialogue is the failure to answer the question on whether
Convention standards may evolve to a relatively lower standard than previous decisions of the Court
and understandings entailed. Indications from commentators has been that this is not possible and
the only express mention of the possibility in case decisions has come in the form of separate
opinions of judges suggesting that this isn’t possible. However, this seems at odds with the Court’s
clear emphasis on consensus reasoning to justify its evolutive interpretations. In chapter 5 it was
suggested that the sources of consensus are an indication that the member States have impliedly
amended Convention law. Thus the Court’s evolutive decisions in this regard are merely declaratory
of the new settlement of Convention rights. Looking at this through a dialogical approach then,

²² For general discussion on the models of separation of powers see e.g. A Le Sueur, M Sunkin and JE Khushal
University International Journal of International Law and Politics 755 at 781-782.
consensus may be seen as a form of dialogue flowing from the member States (the legislative arm of the Convention separation of powers) towards the Court on what they perceive the proper settlement of Convention rights should be. However, the problem here is that this ‘statement’ or ‘communication’ may be ambiguous and instead of a concrete, collectively State-centred body giving the authoritative interpretation on what consensus means to the Convention law, it is the Court that makes the ‘authoritative’ interpretation of consensus and thus Convention law.\(^\text{24}\) Effectively the communication is taking part in a tacit manner based on inferences and implication. This leads to a very real risk that the Court may misinterpret what the member State Consensus is and through this misunderstanding interpret the relevant Convention law standard incorrectly, having very real consequences on the obligations of the member States and as a follow on from this, their relationship with the Court itself. It may be this that has partially contributed towards some of the ire that towards the Convention today.

On this issue of the potential for the Court to interpret this consensus ‘message’ incorrectly, the Court itself has not helped matters. By failing to give a clear indication of what the relevant quantum of States showing through the various forms of consensus outlined above, that they agree to a different settlement of Convention rights the Court has made it difficult for analysts to assess whether the Courts interpretation is accurate or not. This also means that States are unable to predict the path of Convention law and diminishes their ability to control their own legal commitments fully, potentially eroding their cherished State Sovereignty.

Far from being the case that the Court has found an evolutive interpretation in the case of overwhelming consensus in some exceptional cases, it has nevertheless found no evolution of

\(^{24}\) ECHR Article 32(1) grants the Court jurisdiction over all matters concerning the interpretation and application of the Convention and its protocols.
Convention law. In *A, B and C v. Ireland* if the Court were to have followed its usual approach where a very high level of consensus is present in favour of a given Convention standard, then it would have likely found a violation in all three applicant’s cases. Instead it found that the high level of Consent did not narrow the member States margin of appreciation and as such found only a violation in respect of one of the third applicant. This blurred the line between evolutive interpretation and the State’s enjoyment of its margin of appreciation exposing problems with the Court’s consensus model that need clarifying. The Court’s decision in this case was not been without criticism and may serve to challenge the perceived legitimacy of the Court’s approach. However, some have offered something of a justification of the Court’s approach in this case. Luzius Wildhaber et al have suggested that the Court’s noting that the situation with regards to abortion and the rights of the unborn child fall into a new ‘political exception’ defence. They stated with regards to the Court’s decision in the *A, B and C* case:

“[The Court] qualified the situation as consensus. But it refused to consider this as decisive, on the basis of reasons which emphasize judicial self-restraint and resemble a *de facto* ‘political question’ – doctrine and the notion of the “persistent objector””

So far from being a clear and automatic doctrine, the living instrument doctrine remains mired in uncertainty by the input of political considerations into the Court’s legal adjudication. To some extent this is an inevitable consequence of the Court making evolutive interpretations that will have potentially significant impacts on State sovereignty. However, while uncertainty is not desirable,
neither is the Court imposing standards on States who could very clearly be understood in advance not consent to the new obligations. The problem here, is that this is not how the Court has muddied the waters in this area by not explaining this clearly enough. Perhaps this is to preserve its own independence of action in deciding whether an evolutive interpretation to a new Convention standard is relevant. Unfortunately, this leads to confusion and a failed dialogue between the Court and the member States in how Convention law operates and can give the impression that the Court is making its decisions *ad hoc* on the basis of its own ambitions for Convention law, juxtaposed with ensuring its decisions do not incur too much adverse reaction from the member States.

Chapter 4 also discussed whether there are limits to Convention evolution and if so what they might be. While it is outside the scope of this study to debate the precise limits of Convention evolution, it is notable that the Court has already confirmed that it is not possible to find wholly new rights in Convention law via the living instrument doctrine. In this way the evolutive interpretation differs from customary international law, which can create new legal obligations in any legal sphere. In this sense the Court has distinguished its constitutional position from that of the International Court of Justice by limiting its jurisdiction substantively in addition to the obvious territorial limits attached to the Convention. However, the extent to which the Court can extend existing Convention rights and interpret them to include new and novel aspects is unclear. If we are to assume that consensus is the primary tool for legitimation of Convention rights then it is likely that the limits of Convention law evolution, within the subject areas detailed in the Convention text, are restricted only by the extent to which consensus is likely to exist. If this is the case, then given that evolution to greater protection

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30 Although it should be noted that the Court in recent years has expanded the exceptions to territorial jurisdiction of the Convention by taking an expansive approach to the jurisdiction requirement in Article 1 of the Convention. See e.g. *Al Skeini v. the United Kingdom* (App.No. 55721/07) (ECtHR 07 July 2011) at para 136. The jurisdiction of the ICJ can be found in Articles 36-38 Statute of the International Court of Justice (26 June 1945, entered into force 24 October 1945) 15 UNCIO 355.
from the Convention imposes greater burdens on the member States that such consensus will become ever more elusive. As such while there may in theory be no ‘hard ceiling’ beyond which Convention obligations can grow there will is in effect a ‘soft-ceiling’ beyond which it will be increasingly unlikely for Convention law to progress. Should the Court then continue to utilise evolutive interpretation to increase the substance of Convention protection then it is likely that its legitimacy would come into question and member States might react negatively, potentially refusing to implement the Court’s decisions. For this reason it is highly important that the Court continue not just to take effective and accurate note of evolving consensus among member States but also to make it clear that this is what it is doing and explain its reasoning behind its decisions, to avoid confusion in the legal dialogue between the Court and the member States that may lead to the current friction and tension experienced between the Court and the member States today.

Thus far in this chapter aspects of ‘positive’ evolution have been the focus. However, in order to get a ‘bigger picture’ view on the living instrument doctrine the possibility of a ‘negative’ evolution taking place has to be considered. So far academic discourse on this area has been limited and inconclusive, largely suggesting resistance to the idea that the Convention might evolve through the living instrument doctrine to encompass lower substantive protection. However, this thesis contributes a more in-depth analysis of the possibility and reasons that it is not only theoretically possible but necessary in order to maintain consensus’ legitimating role. In this light the reader is encouraged to think of evolution in the sense of the more neutral term ‘change.’ However, for the purpose of clarity, evolution to a Convention standard that may be said to contain less protection to

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31 Helgesen describes the increasing unwillingness of States to engage in new human rights commitments (JE Helgesen, Dialogue between Judges, Strasbourg, 2011) <www.echr.coe.int/Documents/Discussion_Dialogue_2011_ENG.pdf> accessed on 15th February 2011, pages 19-28 at 25.) If this is the case it is likely to also be so for the purposes of European Consensus given that the member States are aware that increasing consensus is likely to lead to a formalisation of new obligations by way of the Court’s evolutive interpretation.

32 See e.g. Helgesen (n31) at 25 and Baroness Hale, ‘Common Law and Convention Law: The Limits to Interpretation’, (2011) EHRLR 534 at 543.

33 See above chapter 5.3.
an individual than was previously granted may be called a (d)evolution. As mentioned, to date the Court’s dialogue on the possibility of (d)evolution has been incomprehensive, but generally negative. However, if the Court’s discourse surrounding and reliance on consensus as a primary trigger for Convention evolution then its approach to (d)evolution somewhat contradicts this approach. This contradiction both begs questions of the legitimacy of consensus as a motivator for Convention evolution and the legitimacy of the Court’s evolutive interpretations to date. In effect while the Court is on one hand suggesting, through using its consensus methodology, that where the States imply consent to be bound to a higher standard then Convention law will evolve, they seem to suggest where the States, through consensus suggest they are either no longer consent to be bound by that standard or view their obligations differently, the Court will not allow the Convention to evolve. Such an approach by the Court presents something of a double standard in favour of human rights expansion, but to the detriment of State Sovereignty. This sits uneasily with creating a clear dialogue of respect to State sovereignty and human rights protection in Europe. This would also call into question the use of Consensus as a methodology for identifying the contemporary will of the member States for evolutive interpretation and thus the legitimacy of the Court’s evolutive interpretation.

However communication while assuming that consensus is a form of implication to the Court that the member States are consenting to be bound to altered human rights obligations, it is important to consider the nature of the Convention text itself. Seeing consensus as a form of implied communication from the States to the Court would suggest that the Convention text itself is an expressly communicated instruction for the Court to uphold the listed rights. This being so, the Court would be unwise to diminish Convention rights in a way that would be inconsistent with the Convention text itself. Such a ‘(d)evolution’ would clash with what might be described as the irreducible ‘core’ of the right where the Court would be crossing over the line between evolutive
interpretation and to evolutive legislation. In the case of the Convention chapter 2 identified that one of the foundation reasons for it was to prevent a regression into totalitarianism, so allowing (d)evolution to reduce Convention rights this far would go against the object and purpose of the treaty. This is because there is an inevitable degree of uncertainty in interpreting the intentions of the member States through consensus relative to the greater degree of certainty contained in interpreting textual obligations in the Convention. Certainly any (d)evolution that would go against the spirit of the Convention in protecting human rights without discrimination would require a greater level of communication of the intent of the member States and it is unlikely that this could be done without amendment of the Convention text itself.

Another problem for (d)evolution would be the courts quasi-precedential system. Even assuming that the Convention can evolve to a standard that is lower in comparison to the previous enunciation of Convention law, it is difficult to see how a trend towards (d)evolution would emerge in practice. This is because unlike ordinary evolution where States are free to exceed Convention requirements, if a single, or small number of States, were to provide for a lesser standard of human rights protection they would risk being found in violation of the Convention by the Court. Although the Court is not bound by its previous decisions it has already said that in the interests of legal certainty it would usually follow them. It is also the case that a decision of the Court is only binding on the State responding to the case at hand. However, it has been suggested that because of this previously noted ‘quasi-precedent’ in the Court, its decisions have a form of *erga omnes* effect. This

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36 Article 31(1) of the Vienna Convention on the Law of Treaties requires treaties to be interpreted in good faith in light of their objects and purposes.
means that the principles in ECtHR decisions will apply equally to all member States regardless of whether they are a litigant party to the case.\textsuperscript{37} As such member States would be foolish to act unilaterally in attempting engineer a (d)evolution of the Convention. Unfortunately, the question of how a (d)evolution might take place exposes a significant practical problem of dialogue between the constitutional arms of Convention law. How are the member States supposed to communicate to the Court that the Convention has ‘(d)evolved’ and also how is the Court supposed to identify this communication in its evolutive interpretation, in a way that does not result in a so-called ‘ratchet-effect’.\textsuperscript{38}

As has been shown throughout this study and again in this chapter, dialogue between the Court and the member States tends to be ineffective and often implicit in nature. This leads to an important question on whether the Convention has adequate dialogue between the various Convention actors to ensure that it reflects the contemporary standards and expectations. One important aspect of this is the Convention’s systems of checks and balances. Put simply what can the member States do if they are unhappy with the direction of Convention law and are these mechanisms sufficient to ensure the legitimacy of the Convention system? Although chapter 6 illustrated that in theory there are ways that member States can show concern and react to the Court’s decisions. However, in reality these are bound in practical difficulties. A key aspect of this is that they are bound in the uncertainty of international politics relying on the member States acting in concert. However, as is well-known in international law generally and with the notable example of the ratification process of


Protocol 14 of the Convention,\textsuperscript{39} it is not easy to achieve agreement between multiple States. As such the effectiveness of these individual mechanisms is changeable and cannot be relied upon to ensure productive and collegiate interaction between the Court and the member States. However, although these various mechanisms of checking and balancing the actions of the Court seem relatively ‘hotchpotch’ any reforms must address the deeper problem which has become increasingly apparent in recent years. This problem is namely the failure of the Convention dialogical model leading to inter-institutional confusion and perhaps inaccuracy in understanding between the various arms of governance in the Convention separation of powers model.

With growing animosity from member States, media outlets and private individuals, it is crucially important to address concerns over the legitimacy of ECHR law addressing the Convention’s troubled dialogical model. The study looked at reforming the dialogue of the Convention system through its ‘system’ of checks and balances considering the constitutional separation of roles between the separate Convention institutions. It is important, given the Convention’s nature as a ‘quasi-constitutional’ international law treaty,\textsuperscript{40} that the system of checks and balances pays appropriate heed to the nature of the Convention and the consequent role of the Court in interpreting it. Any amendments aimed purely at reducing the authority of the Court without providing alternative assurance of protection of human rights standards risks casting doubt on the independence of the Convention as a law binding member States for the benefit of their people.


They would also cast doubt on the very most basic conception of the Convention suggested in chapter 2, of the Convention as a form of “collective security against tyranny and oppression.”

The question then arises, how should the ‘system’ of checks and balances be reformed to improve this situation? While there are multiple methods of reform, some may be more effective than others. What becomes apparent in considering possible reforms is that those which seek to address the channels of discourse between the Court and the member States are more likely to offer a solution to the Convention’s legitimacy crisis. A good example of this would be by implementing some system of preliminary rulings that allows for member States to make representations (interventions) in cases. Such a measure would enable the member States to feed into the considerations of the Court before they make an evolutive interpretation before they became final and could thus enable the Court to improve the accuracy of its consensus method. Given that it has been commented that the registry’s research division is incapable of providing a full comparative analysis of the law of all member States for all applications arising before the Court. This would enable a more complete consideration of the views of the member States and providing the Court makes clear reference to how these submissions have affected its final decision may restore confidence that the Court is not simply making up Convention law as it see fit. Perhaps the reason dialogical approaches are likely to garner greater success in restoring confidence in the Convention system is because they are in-line with the move towards greater subsidiarity in Convention system and constitutionalisation already occurring in the Court in the forms of pilot judgments and severity clauses in admissibility.

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41 See Bates (n35) at 4.

42 T Zwart, ‘More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done’ in S Fogaitis, T Zwart and JN Fraser (Eds), The European Court of Human Rights and its Discontents: Turning Criticism into Strength, (Edgar Elgar 2014) 71-95 at 93.

43 On the move towards subsidiarity in the Convention system see: R Spano, ‘Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity’ (2014) 14(3) HRLR 487 at 491.


45 See e.g. Greens and MT v. UK (n12).
criteria. Instead of pitting the Court against the member States, they can be seen to encourage the different arms of Convention governance to work together through constructive dialogue, whilst respecting the legitimate, exclusive areas of competence of each arm. Reforms that simply act to reduce the scope of the Convention and the action of the Court risk being both difficult to gain agreement on and likely to face resistance from the Court should they appear to go against the general human rights tenor of the Convention.

Overall this thesis has identified that the Convention is and always was a living instrument from its inception but confusion surrounded this aspect of its nature. However, overtime this evolving nature became clear and prior to the famous 1978 Tyrer judgment, there are signs that this is how the Court was interpreting it. However, confusion still remains as to precisely how the Court interprets the Convention as a living instrument and this can lead to the perception that it is acting as a form of legislator. Such a possibility offends the idea of a separation of powers within the Convention system and may be, at least in part, what has caused the current legitimacy crisis it faces today.

What can be gleaned though is that the Court purports to leave the impetus for Convention evolution to the member States, and instead it interprets their common legal obligations and practices as evidence that they have impliedly amended the Convention. If this is so then, in theory, there is no limit to what, in relative terms, may be described as growth or diminution of the substance of Convention rights. However, this is not to say that the Convention can be interpreted in a way that would either reduce the rights contained below the minimum content of the Convention text without an express instruction by the member States in the form of treaty amendment.

Ultimately the Court acknowledges, through its consensus model of interpretation, that it is the will

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47 Tyrer (n4).

48 See e.g. Hoffmann (n2); Zwart (n42) at 91 and Spano (n43) at 488.
of the member States in concert that should define the content of Convention law. However, the potential for inaccuracy in the Court’s evolutive interpretation and perception of illegitimate judicial law making exists largely because the Convention’s inter-institutional dialogue is based on tacit signals in the form of consensus and explanations of the Court. This can lead to miscommunication and the existing inter-institutional tension we see today. It is thus necessary for the member States and the Court, together, to solve this problem by working together to improve the Convention’s dialogical model and coming to a mutual understanding of the current, and in-time the future, human rights settlement within Europe.
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