

# COMPARATIVE LAW METHOD IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE LIGHT OF THE RULE OF LAW

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## Abstract

In several cases, comparative law exercises have been given excessive weight, which has given rise to conflicting interpretations in the case law of the European Court of Human Rights (ECtHR). This use of the comparative law method by the Court has been widely criticised. The critical voices have generally argued in terms of what is prohibited by the principle of the rule of law, which the Court itself is also bound to take into account, namely the arbitrary use of power. In the light of these criticisms, it is a challenging task to examine whether and to what extent the comparative law method complies with the principle of the rule of law, which is the aim of this paper. An analysis of several ECtHR cases demonstrates that in many respects the comparative exercises of the Court indeed do not comply with the requirements set by the formal conception of the rule of law. The application of the comparative law method is neither consistent nor sufficiently transparent. In addition to exploring the problematic aspects of the application of the comparative law method, the paper also formulates some recommendations in order to bring this method into accordance with the principle of the rule of law.

## 1 Introduction

The principle of the rule of law is one of the most fundamental principles of law. Explicitly or implicitly, it pervades all spheres of legal life.<sup>1</sup> It is not disputed that the general aim or the underlying idea of the rule of law is to limit the exercise of public power. While Plato focused on the restraint of tyranny,<sup>2</sup> during the Middle Ages the principle of the rule of law was used to limit the king's omnipotence, and

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<sup>1</sup> The literature on the principle of the rule of law is abundant. See inter alia T. J. Zywicki, 'The Rule of Law, Freedom, and Prosperity' (2003) 10 *Supreme Court Economic Review* 1; M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *Southern California Law Review* 5; R. H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1; N. S. Marsh, 'The Rule of Law as a Supra-National Concept', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961); A. L. Goodhart, 'The Rule of Law and Absolute Sovereignty' (1958) 106 *University of Pennsylvania Law Review* 7; M. J. Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Review* 4; D. Kochenov, *The Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law: A Legal Appraisal of EU Enlargement* (2007) (providing a good overview of the literature in this respect).

<sup>2</sup> B. Z. Tamanaha, *On the Rule of Law* (2004) at 10.

more recently it has become the limit of the arbitrary use of power by the executive.<sup>3</sup> Although this principle is generally considered to constitute the limits of the *power of the government*,<sup>4</sup> it can arguably also be applied with respect to any public institutions having the power to take far-reaching decisions on questions related to the life of persons, as this power might also give rise to arbitrary use. The judiciary, including the European Court of Human Rights (ECtHR), whose practice forms the special focus of this paper, is such an institution: it delivers decisions that have a profound effect on individuals.<sup>5</sup> Relevantly, Judge Martens of the ECtHR explains in one of his dissenting opinions that '[t]he rule of law – that essential protection of the individual to which the Preamble of the Convention refers and which the European Court is bound to take into account – ... requires that the individual ... be secured ... protection against ... powerful entities ...'.<sup>6</sup> It follows from Judge Martens argument that the Court itself is also bound by the principle of the rule of law, which in his words entails the essential protection of individuals against powerful entities.

Arguably, adjudication can be regarded as being in harmony with the principle of the rule of law if all aspects of this process comply with it. In other words, the principle of the rule of law should be respected in each and every moment of the adjudication process. Accordingly, it can also be examined whether the comparative law method applied by the Court, which in several cases has been given quite significant weight, also lives up to the principle of the rule of law. Besides cases in which the comparative exercise played an important role, the Court has also carried out comparative exercises in order to make some supporting arguments for some of its decisions.<sup>7</sup> In these latter cases, however, the comparison carries little (or less) weight, which means that it is less important to what extent this comparison complies with the rule of law. Accordingly, the paper only addresses those cases in which the result of comparison proved to be decisive or significant in terms of the ultimate decision.

The comparative law method applied by the ECtHR has invited severe criticism. It has been argued, inter alia, that in the case law of the Court the comparison is carried out randomly, that it is superficial and that it is interpreted arbitrarily. These observations are even more striking in the light of the view that 'for some comparatists, the attraction of comparative legal study is that it is a means of "putting legal science on a sure and realistic basis"'.<sup>8</sup> In other words, the comparative law method is often regarded as bringing objectivity into legal reasoning.<sup>9</sup> Remarkably, these criticisms use the language of what is generally seen as prohibited by the rule of law: arbitrary use of power. In this light, it seems to be an exciting task to examine whether and to what extent the ECtHR's comparative law method in fact meets the requirements of the rule of law.

First of all, this paper identifies the implications of the rule of law requirements to the comparative law method. Against the background of this theoretical framework,

<sup>3</sup> For an overview on the development of the concept of the rule of law, see Tamanaha, above n. 2.

<sup>4</sup> See inter alia Tamanaha, above n. 2, at 10.

<sup>5</sup> The European Court of Human Rights itself has also accepted this position. Judge Zupančič, for instance, argued that '[o]ne must constantly keep in mind the original intent of all judicial conflict-resolution, which is to resolve by logic what would otherwise be resolved by arbitrariness, force, etc. The essence of the rule of law is that the logic of private force be replaced by the public force of logic.' *Nuutinen v. Finland*, ECHR (2000), Dissenting Opinion of Judge Zupančič, joined by Judges Panfıru and Türmen.

<sup>6</sup> *Gustaffson v. Sweden*, ECHR (1996), Dissenting Opinion of Judge Martens, joined by Judge Matscher (emphasis added).

<sup>7</sup> The author would like to thank M. Busstra for drawing her attention to this point.

<sup>8</sup> R. Cotterrell, 'Seeking Similarity, Appreciating Difference: Comparative Law and Communities', in A. Harding and E. Özücü, *Comparative Law in the 21st Century* (2002) 35 at 37. Cotterrell cites K. Zweigert and H. Kötz, *Introduction to Comparative Law* (1998) at 33.

<sup>9</sup> See also E. Brems, *Human Rights: Universality and Diversity* (2001) at 419.

it then performs a detailed analysis of the case law of the ECtHR. Each section starts by presenting the problematic aspects of the comparative law method on the basis of the case law of the Court. These issues are subsequently analysed from the perspective of the rule of law.

## 2 The Rule of Law and the Comparative Law Method: Setting the Framework

The importance of the principle of the rule of law is also discernible in the abundant academic literature on this topic. On the basis of these academic discussions, two main conceptions of the rule of law can be distilled: the substantive conception and the formal conception.<sup>10</sup> Tamanaha summarises the differences between these conceptions as follows: '[f]ormal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law.'<sup>11</sup> In other words, the formal theory of the rule of law does not impose any requirements on the content or substance of the law. In view of the fact that methodological questions are concerned with formal or procedural considerations and do not address substantive matters, this paper only devotes attention to the formal approach concerning the rule of law. It has been argued that, roughly speaking, the essence of the formal conception of the rule of law concerns the requirement that the law should be capable of guiding one's conduct.<sup>12</sup> Often, further requirements are also presented in terms of the formal concept of the rule of law. The most frequently recurring requirements include: the law has to be correctly passed, the law should be clear, the law should be relatively stable and so forth. On the basis of these criteria, the broad requirement that the law should be capable of guiding the conduct of people can arguably be broken down to three sub-criteria: laws can provide guidance if they are *correctly passed* and if they are *transparent* and *consistent*.

In order to be able to analyse the comparative law method as applied by the ECtHR, these requirements have to be adapted to this particular method. First of all, it is not the *law* that is analysed here, but the *method* used by the ECtHR when it engages in comparisons. Secondly, it is the *Court* and not the *legislator* that has to comply with the rule of law. Consequently, in terms of the comparative law method of the Court, the formal concept of the rule of law means that *the comparative law method should be capable of guiding the Court's reasoning* and the conduct of people.

In addition to this, the three sub-criteria set for the law in order to be capable of guiding conduct also have to be transposed to the comparative law method.<sup>13</sup> The criterion of being correctly passed refers to the way (method) in which the law is adopted. In this context, it can be argued that the comparison has to be carried out in a *methodologically correct* way in order to be regarded as correctly passed. The criterion of being methodologically correct can, arguably, be divided into three questions that deserve separate consideration: why, what and how to compare. The first question (*why to compare*) necessitates the identification of the aim of comparison. The

<sup>10</sup> See inter alia P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* (Autumn); Radin, above n. 1, at 793; M. L. Fernandez Esteban, *The Rule of Law in the European Constitution* (1999) at 91-97.

<sup>11</sup> Tamanaha, above n. 2, at. 92.

<sup>12</sup> Kochenov, above n. 1, at 98-102.

<sup>13</sup> The literature on the comparative law method is very rich. See inter alia K. Zweigert and H. Kötz, *Introduction to Comparative Law* (1998); M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (2006); P. de Cruz, *Comparative Law in a Changing World* (1999); H. K. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research* (1949); R. Michaels, *The Functional Method of Comparative Law* (2005).

second question (*what to compare*) refers to the sources of comparison and the levels of abstraction with respect to the comparison.<sup>14</sup> The last question (*how to compare*) examines the way in which the comparison is carried out. In order to comply with the requirements of the rule of law, furthermore, all these aspects have to be addressed in a consistent and transparent manner. *Transparency* can, arguably, be read as a discernable and logical build-up of arguments. *Consistency* can be seen as referring to theoretical consistency in the application of the method and consistency across the cases.

Hereinafter, the paper will focus on the answers in the case law of the Court to the above-mentioned questions of why, what and how to compare. Each question is divided into sub-elements. With regard to every element, this paper examines whether and to what extent the particular issue can be regarded as being in line with the requirements of transparency and consistency.

### 3 Why to Compare

At the time of its adoption, the European Convention on Human Rights aimed to lay down minimum standards, i.e. to function as the lowest common denominator among the member states of the Council of Europe.<sup>15</sup> This approach is generally based on the argument that the Court respects the sovereignty of the states and that it also needs the cooperation of the states parties, since it is ultimately for them to enforce the Court's decisions. In other words, the Court has adopted the position that its role is subsidiary to that of the contracting states.<sup>16</sup> It has been argued that the subsidiarity principle refers to 'the subsidiary role of the Convention machinery and entails first of all what may be termed a "procedural relationship" between the national authorities responsible for implementing the Convention and deciding human rights issues on the one hand and the Convention institutions on the other.'<sup>17</sup> Based on this subsidiarity approach, the Court has elaborated its doctrine of the margin of appreciation, describing the extent of discretion the respondent states have in concrete cases when it comes to legitimate limitations. In determining the latitude a state has for defining whether a certain limitation to the right is necessary, the Court has often relied on comparative arguments, mainly in the form of searching for a common European standard. In addition to this, the Court also uses comparative considerations in order to determine the scope of the rights and obligations enshrined in the Convention.

The following sub-sections explain what these two purposes (determining the margin of appreciation and assessing the scope of rights and obligations) mean and how they have been combined with the comparative law method. Subsequently, it will be analysed whether and to what extent the comparative exercises of the Court comply with the requirements of transparency and consistency.

#### 3.1 Margin of Appreciation

As expressed by the Court, the particular extent of the margin of appreciation has to be determined on a case-by-case basis. A couple of factors that play a role in the Court's specification of the concrete latitude given to the state have been identified

<sup>14</sup> Cotterrell, above n. 8, at 36.

<sup>15</sup> See *inter alia* Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2001) at 3; Brems, above n. 9, at 360-361.

<sup>16</sup> See *inter alia* Arai-Takahashi, above n. 15, at 3.

<sup>17</sup> H. Petzold, 'The Convention and the Principle of Subsidiarity', in R. MacDonald et al. (eds), *The European System for the Protection of Human Rights* (1993) 41 at 49.

by the Court as well as by scholars.<sup>18</sup> As mentioned above, one frequently recurring and often decisive factor is the examination of the existence or lack of a so-called common European standard. According to the Court if '[t]he domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground' in a certain area, 'a more extensive European supervision corresponds to a less discretionary power of appreciation.'<sup>19</sup> In contrast, in the absence of a common view among the contracting states, the respondent government is given broad discretion.

However, the Court's application of the concept of the margin of appreciation is, arguably, far from being transparent and consistent. A lack of transparency and consistency can be identified in relation to at least four issues: conceptual considerations; the phase in which the margin of appreciation is determined; combining this concept with certain principles of interpretation; and the sources of comparison. As this last issue is addressed in a separate section, the present section focuses solely on the other three issues.

The doctrine of the margin of appreciation in the case law of the Court is often intertwined with the proportionality test carried out by the Court in relation to the limitations on the exercise of fundamental rights.<sup>20</sup> For this reason, it is not surprising that the Court frequently relies on comparative considerations 'in the evaluation of the proportionality or the reasonableness of an interference with a protected right, i.e. in the balancing between the right and the community interest (or the right of the other person) justifying its restriction.'<sup>21</sup> In fact, the Court has in many instances applied comparative arguments in the justification phase in which it examined (or should have examined) the proportionality of a given measure. The reason for this lies in the fact that the margin of discretion is determined with respect to the legitimate aim that the respondent aims to achieve with the challenged measure.<sup>22</sup> In other words, the definition of the actual extent of discretion enjoyed by the state takes place in the phase when the Court examines the proportionality of the limitations imposed by the state on the exercise of fundamental rights and freedoms. However, in many cases, the lack of a common approach has given too broad a discretion to the respondent state, which has led to very superficial or even no scrutiny of the respondent's arguments. In fact, this approach has resulted in the phenomenon that the broad margin of appreciation has served as a justification, and, vice versa, that the narrow margin has almost automatically excluded the possibility of the respondent to justify the interference with the right in question.<sup>23</sup> For instance, in the *Marckx* case, the respondent state's justification was rejected by the Court on the basis that there was a narrow margin of appreciation, as there was a common European standard.<sup>24</sup> In contrast, due to the lack of a common European approach in the *Sheffield* case, the respondent state's margin of appreciation served as a justification. In this case, the Court explained that '[t]he Court is ... *not persuaded* that it should depart

<sup>18</sup> See inter alia K. Henrard, *Mensenrechten vanuit internationaal en nationaal perspectief* (2008) at 201-202; R.K.M. Smith, *Textbook on International Human Rights* (2007) at 165.

<sup>19</sup> *Sunday Times v. the United Kingdom* (1979) Series A, No. 30, 59.

<sup>20</sup> See inter alia Arai-Takahashi, above n. 15, at 14; G. Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705 at 711.

<sup>21</sup> Brems, above n. 9, at 412.

<sup>22</sup> Concerning Articles 8-11, these aims are a given, since they are laid down in the second paragraph of the respective articles. A certain proportionality test is also carried out with regard to the other articles, in the context of which it is the legitimate aim concerning which the margin of appreciation can be established.

<sup>23</sup> In Letsas' words '[t]he Court has used this doctrine extensively, albeit not at all coherently, to grant contracting states an area of legislative power that escapes judicial review.' G. Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR?' (2004) 15 *European Journal of International Law* 279 at 296.

<sup>24</sup> *Marckx v. Belgium*, ECHR (1979) 41.

from its *Rees* and *Cossey* decisions and conclude that on the basis of scientific and legal developments alone the respondent State *can no longer rely on a margin of appreciation to defend its continuing refusal* to recognise in law a transsexual's post-operative gender.<sup>25</sup>

In contrast to this approach, it seems that the Court has distinguished the test of proportionality from the determination of the margin of appreciation in at least one case. In the recent *Evans* case, the Court first addressed the extent of the discretion, which was found to be broad as there was no common ground among the member states, and only afterwards turned its attention to the question whether the article concerned has been complied with. It concluded that 'given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.'<sup>26</sup> Accordingly, it can be seen here that the extent of the discretion merely defined the intensity with which the proportionality test was carried out.

The way in which the Court has used the doctrine of the margin of appreciation has been criticised by many scholars as being inconsistent either theoretically or across cases.<sup>27</sup> It has been suggested that, from a theoretical perspective, a distinction should be made between the determination of the margin of appreciation and the actual balancing exercise of the proportionality test, as different factors have to be considered in the establishment of these two matters. For this reason, the margin of appreciation should solely determine the intensity of review with which the proportionality test is carried out, as in the *Evans* case, and the comparative exercises should be carried out with respect to the determination of the particular extent of discretion. This would also mean that some kind of proportionality test should be carried out in each and every case<sup>28</sup> and that the broad margin of appreciation cannot serve as a justification.

Closely related to this issue is the question in which phase of the adjudication the Court determines the extent of the discretion. As explained above, the Court has generally and traditionally defined the margin of appreciation during the phase in which it examined whether the challenged measure was necessary – which is quite logical in the view of the relationship between the determination of the margin of appreciation and the proportionality test. This was the case, for instance, in the *Sunday Times*,<sup>29</sup> *Müller*,<sup>30</sup> *Dickson*<sup>31</sup> and *Stoll*<sup>32</sup> cases. However, as mentioned, in a recent case the Court devoted its attention to the margin analysis at the beginning of the adjudication process, in a phase apparently separated from the proportionality test.<sup>33</sup> Examining the extent of the margin of appreciation in a separate phase (or at least in a manner that is clearly separate) is more consistent with and conforms to a greater extent to the theory behind the margin of appreciation, thus enhancing the proper use of the doctrine.

Last but not least, the determination of the margin of appreciation has been combined with two principles of interpretation: evolutive interpretation and

<sup>25</sup> *Sheffield and Horsham v. the United Kingdom*, ECHR (1998), 58 (emphasis added).

<sup>26</sup> *Evans v. The United Kingdom*, ECHR (2007), 92.

<sup>27</sup> See inter alia P. Mahoney, 'The Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Review* 1 at 4; K. Henrard and M. Busstra, 'Conflicting Fundamental Rights: Broad Parameters for a Model of Review' (manuscript) at 9-10.

<sup>28</sup> Henrard and Busstra, above n. 27, at 9-12; Letsas, above n. 20.

<sup>29</sup> *Sunday Times v. the United Kingdom*, ECHR (1979) Series A, No. 30.

<sup>30</sup> *Müller v. Switzerland*, ECHR (1988) Series A, No. 133.

<sup>31</sup> *Dickson v. the United Kingdom*, ECHR (2006); *Dickson v. the United Kingdom*, ECHR (2007).

<sup>32</sup> *Stoll v. Switzerland*, ECHR (2006).

<sup>33</sup> See for instance *Evans v. the United Kingdom*, ECHR (2007), 81.

autonomous interpretation.<sup>34</sup> It has been argued that these principles contradict each other and the margin of appreciation doctrine.<sup>35</sup> Theoretically, evolutive interpretation means that the interpretation of certain terms of the Convention might change over time in accordance with changes in European (or other) societies – a comparative exercise is thus inherent in this principle. Evolutive interpretation was invoked, for instance, in the *Sheffield* case with respect to the use of ‘protection of morals’ as a justification ground. The Court established that, at the time when the dispute took place, no evolution could be discovered concerning the public acceptance of transsexuals. Specifically, ‘the Court is not fully satisfied that the legislative trends outlined by *amicus* suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status.’<sup>36</sup> Since there was no evolution in this field, the margin of appreciation given to the respondent state was considered to be broad.

In contrast, the autonomous interpretation emphasises that the Convention constitutes a legal order that is different from that of the contracting states. Thus, in principle, comparison becomes unnecessary. Strikingly, however, the Court has also looked for a common position in several cases in which it based its arguments on the principle of autonomous interpretation. In the *Sunday Times* case, for instance, the Court argued that ‘the expression “authority and impartiality of the judiciary” has to be understood “within the meaning of the Convention”.’<sup>37</sup> This means that ‘[i]f and to the extent that Article 10(2) was prompted by the notions underlying either the English law of contempt of court or any other similar domestic institution, it cannot have adopted them as they stood: it transposed them into an autonomous context.’<sup>38</sup> Still, the Court added that ‘[t]he domestic law and practice of the Contracting States reveal a fairly substantive measure of common ground in this area.’<sup>39</sup>

The comparative method was thus invoked with regard to both principles, which gives the impression that, in practice, in contrast to the apparently underlying idea, the autonomous interpretation is not (or at least not always) independent from the law and practice in the member states. However, one has to remember that this elaboration was made with respect to a legitimate aim that might justify an interference with the right at stake and with respect to which the margin of appreciation is (and should be) ascertained. As explained above, for the determination of a state’s concrete latitude, it is conceptually appropriate to examine (as one of the factors) whether a common European standard exists. Arguably, it is quite misleading to talk about principles of interpretation in the context of specific legitimate aims pertaining to the justification clauses of Articles 8-11. In fact, the key issue is the difficulty of determining the (non-)existence of a common ground. In other words, in the *Sunday Times* case it would have been more appropriate to state that there was a narrow margin of appreciation, as there is a common position on the legitimate aim of protecting ‘the authority and impartiality of the judiciary’, while with respect to the aim of protecting morals in the *Sheffield* case a more thorough and elaborated comparative examination was necessary, on the basis of which it could be established that there was no common position. Arguably, in the *Sunday Times* case, it was the fact that

<sup>34</sup> When discussing the principles of autonomous and evolutive interpretations, Brems considers the margin of appreciation as another principle of interpretation. Arguably, however, it is not the margin of appreciation in the above meaning that can be regarded as the third principle of interpretation, but rather the so-called ‘better placed’ argument (i.e. the contracting state is better placed or better suited to decide on a certain issue). If this is the case, the margin of appreciation of the respondent becomes broader. Brems, above n. 9, at 360.

<sup>35</sup> See inter alia Brems, above n. 9, at 395.

<sup>36</sup> *Sheffield and Horsham v. the United Kingdom*, ECHR (1998), 57.

<sup>37</sup> *Sunday Times v. the United Kingdom*, ECHR (1979) Series A, No. 30, 59.

<sup>38</sup> *Id.*, at 60.

<sup>39</sup> *Id.*, at 59.

there was a common agreement that made the Court talk about the autonomous meaning of the expression at stake. In contrast, in the *Sheffield* case, the Court's reasoning in terms of an evolutive interpretation originated from the reality that it had to look at the evolution of the acceptance of transsexuals in order to establish whether a common position existed. To put it simply, in order to be transparent and theoretically consistent concerning the examination of the legitimate aims for assessing the extent of the discretion enjoyed by the state, the Court should not use or refer to the language of the principles of interpretation.<sup>40</sup>

In sum, the principle of the rule of law requires that the Court be more clear, explicit and conceptually consistent regarding the application of the doctrine of margin of appreciation. The doctrine of the margin of appreciation can in principle be determined by searching for a common position. However, the result of the comparison should merely define the concrete latitude of discretion enjoyed by the respondent state and should not preclude the application of the proportionality test.<sup>41</sup> In order to clearly distinguish the determination of the margin of appreciation from the justification phase, it is strongly recommended that the Court define the concrete margin separately. Finally, the Court should avoid using the language of the principles of interpretation when it comes to examining legitimate aims in order to determine the latitude given to a state in a particular case.

### 3.2 Scope of Rights and Obligations

In addition to assessing the particular margin of appreciation a state enjoys, the Court also determines the scope of rights and obligations. In the assessment of this matter, the Court has often relied on the comparative law method. In several cases, the result of this assessment was decisive in terms of whether there was an interference with a particular right.<sup>42</sup> The term 'scope of rights and obligations' is meant to refer to those provisions of the Convention that lay down the various rights and obligations and does not include the terms in the exception clauses. The scope of the rights was at stake, for instance, in cases concerning freedom of association,<sup>43</sup> civil rights and obligations,<sup>44</sup> the duty to work in detention<sup>45</sup> and degrading or inhuman punishment.<sup>46</sup> Moreover, the reach of certain articles has been expanded by positive obligations<sup>47</sup> whose scope has in many instances also been determined by means of comparative exercises.<sup>48</sup>

With respect to freedom of association in the *National Union of the Belgian Police* case, for instance, the Court established the scope of the right to freedom of association by means of comparison, concluding that

<sup>40</sup> Similarly, scholars should also refrain from using the terminology of principles of interpretation in the context of assessing the margin of appreciation.

<sup>41</sup> In the view of the dissenters in the *Evans* case, 'the margin of appreciation should not prevent the Court from exercising its control, in particular in relation to the question whether a fair balance between all competing interests has been struck at the domestic level. The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review.' *Evans v. The United Kingdom*, ECHR (2007), Joint Dissenting Opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para 12.

<sup>42</sup> See also Brems, above n. 9, at 413.

<sup>43</sup> See, for instance, *National Union of Belgian Police v. Belgium*, ECHR (1975) Series A, No. 19; *Demir and Others v. Turkey*, ECHR (1998). See also Brems, above n. 9, at 413-414.

<sup>44</sup> *König v. Federal Republic of Germany*, ECHR (1978) Series A, No. 27.

<sup>45</sup> *De Wilde, Ooms and Versyp v. Belgium*, ECHR (1979) Series A, No. 58, 90.

<sup>46</sup> *Albert and Le Compte v. Belgium*, ECHR (1983), Series A, No. 58.

<sup>47</sup> See, for instance, the extension of the scope of Article 2 to environment-related issues in *Öneryıldiz v. Turkey*, ECHR (2002) and *Öneryıldiz v. Turkey*, ECHR (2004).

<sup>48</sup> See also Brems, above n. 9, at 413.

while Article 11 para. 1 ... presents trade union freedom as one form or a special aspect of freedom of association, the Article ... does not guarantee any particular treatment of trade unions, or their members, by the State, such as the right to be consulted by it. Not only is this latter right not mentioned in Article 11 para. 1 ..., but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It is thus not an element necessarily inherent in a right guaranteed by the Convention, which distinguishes it from the 'right to a court' embodied in Article 6....<sup>49</sup>

Similarly, in the *Sigurður* case, the Court accepted that

[c]ompulsory membership of this nature ... does not exist under the laws of the great majority of the Contracting States. On the contrary, a large number of domestic systems contain safeguards which, in one way or another, guarantee the negative aspect of the freedom of association, that is the freedom not to join or to withdraw from an association.<sup>50</sup>

Concerning the assessment of the scope of rights and obligations in combination with comparative exercises, there are at least two matters of concern in terms of the requirements of the rule of law. The most visible of these is the combination of the comparative law method with the above-mentioned principles of interpretation. Moreover, like assessing the margin of appreciation, the determination of the scope of rights and obligations also raises complications as to the sources of comparison from a conceptual perspective. This issue will be addressed in the next section.

Similarly to the margin of appreciation, the comparative law method has been combined with the principle of either autonomous or evolutive interpretation in many instances involving the determination of the scope of rights and obligations. As explained above, it seems conceptually incorrect to carry out comparative exercises in combination with the principle of autonomous interpretation, while a comparative approach is inherent in the evolutive interpretation.

Notwithstanding the immanent conceptual difficulties, the Court has combined the principle of autonomous interpretation with some comparative exercises, for instance in the *König* case, in order to establish what the term 'civil rights and obligations' means. Here, the Court established that

[w]hilst the Court thus concludes that the concept of 'civil rights and obligations' is *autonomous*, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. ... In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and the *national legal systems* of the other Contracting States.<sup>51</sup>

Similarly, the autonomous meaning of 'criminal law' was also defined with the help of a comparative exercise in the *Öztürk* case. Here, 'having reaffirmed the "autonomy" of the notion "criminal",<sup>52</sup> the Court explained that 'misconduct of the kind committed by Mr. Öztürk continues to be classified as part of the criminal law in the *vast majority* of the Contracting States.'<sup>53</sup>

Likewise, the Court has combined the evolutive interpretation with a comparative approach, among others, in order to determine the scope of the right to freedom of association. In the *Demir* case, for instance, it argued that

[i]n the light of [the] developments, the Court considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 ... should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems.<sup>54</sup>

In terms of these principles of interpretation, and irrespective of the question whether they are applied in order to assess the margin of appreciation or the scope of rights and obligations, Letsas argues that, if combined with the comparative approach, both

<sup>49</sup> *National Union of Belgian Police v. Belgium*, ECHR (1975) Series A, No. 19, 38.

<sup>50</sup> *Sigurður A. Sigurjónsson v. Iceland*, ECHR (1993), 35.

<sup>51</sup> *König v. Federal Republic of Germany*, ECHR (1978) Series A, No. 27, 89 (emphasis added).

<sup>52</sup> *Öztürk v. Federal Republic of Germany*, ECHR (1984) Series A, No. 73, 50.

<sup>53</sup> *Id.*, at 53 (emphasis added).

<sup>54</sup> *Demir and Others v. Turkey*, ECHR (1998), 153-154.

principles of interpretation aim to find a common position,<sup>55</sup> to achieve a ‘better understanding’ of the concrete matter and to ensure that the protected rights are not ‘theoretical or illusory but practical and effective’.<sup>56</sup> It can thus be argued that, when combined with a comparative approach, autonomous interpretation comes close to evolutive interpretation insofar as their purpose is concerned.<sup>57</sup> Nevertheless, there is at least one clear difference in the application of these principles, namely between the fields with respect to which they are employed. The case law of the ECtHR shows that the evolutive interpretation is applied to the determination of the scope of particular rights and the extent of the positive obligations stemming from those rights (such as the scope of the freedom of association), while autonomous interpretation is invoked when it comes to interpreting one of the terms in the definition of the right (like the meaning of ‘civil rights and obligations’) or in relation to certain classifications. In this respect, the Court seems to be at least consistent. Be this as it may, as argued above, this does not justify the application of a comparative method in combination with the principle of autonomous interpretation, as conceptually they are difficult to unite.<sup>58</sup> For this reason, the Court should either explain what it means by autonomous interpretation or avoid invoking this principle of interpretation or comparative arguments in this respect, in order to be theoretically consistent.

## 4 What to Compare

In order to be methodologically correct, it should also be examined what the Court compares and what it should compare in order to assess the margin of appreciation or define the scope of rights and obligations. This aspect of the comparative law method can be divided into two sub-questions: which legal systems are compared (sources of comparison) and at what level of abstraction is this comparison carried out?

This section addresses these two sub-questions separately. It examines whether and to what extent the choice of sources and the chosen level of abstraction for the comparative exercise comply with the requirements of consistency and transparency.

### 4.1 Sources of the Comparison

As already indicated above, in order to establish whether there is a common ground concerning a particular aspect of a case, the ECtHR relies on different sources: it looks for a common European standard and often also relies on international legal

<sup>55</sup> Letsas argues that the Court in fact looks for a ‘better understanding’ and ‘the moral truth’ of the ECHR rights. Letsas, above n. 23, at 295-305.

<sup>56</sup> Letsas, above n. 23, at 302.

<sup>57</sup> Letsas observes and argues that ‘the Court ruled that autonomous concepts should be interpreted according to the “common denominator of the respective legislation of the various contracting parties”’. The introduction of this standard echoes a requirement of consensus: in constructing the meaning of the ECHR concepts, the ECtHR must seek to respect and accommodate a certain convergence on meaning among the various contracting states.’ Letsas, above n. 23, at 295.

<sup>58</sup> In his dissenting opinion in the *Öztürk* case, Judge Matscher also realised that concerns can be raised with respect to the autonomous interpretation. He explains that ‘[i]t goes without saying that autonomous interpretation is the method best suited to multilateral conventions, and particularly rule-making instruments, such as the European Convention on Human Rights. Nonetheless, reliance on this method of interpretation raises problems of legal hermeneutics which are far more complex than one might at first suppose. These problems above all concern the “value” which should be attributed to the law of the State in question and to the legal systems of the other Contracting Parties in the endeavour to arrive – having regard to the object and purpose of the Convention – at a common understanding underlying the concepts contained in the text.’ *Öztürk v. Federal Republic of Germany*, ECHR (1984) Series A, No. 73, Dissenting Opinion of Judge Matscher, 2.

norms.<sup>59</sup> With respect to the two aims identified above, the following sources can be explored in the case law of the Court: international legal norms, ECJ case law and EU law, Council of Europe treaties, domestic law and practice, and even the law and practice of non-European countries.<sup>60</sup>

In the *Marckx* case, for instance, the Court relied to a lesser extent on the domestic law in the contracting states and to a greater degree on two Council of Europe treaties as evidence of the evolution and existence of a common ground for defining the margin of appreciation.<sup>61</sup> This case was concerned with the distinction made between legitimate and illegitimate children under Article 14 taken in conjunction with Article 8 (in addition to Article 8 taken alone). As a justification, the respondent government argued that, at the time when the Convention was drafted, it was generally accepted to make a distinction between these children. However, by laying down that the Convention ‘must be interpreted in the light of present-day conditions’, the Court explained that it ‘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 continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim *mater semper certa est*.’<sup>62</sup> In its further elaboration, the Court emphasised the importance of the two treaties that have been adopted in this area, both of which have been ratified only by four members of the Council of Europe,<sup>63</sup> and established that ‘[i]n fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.’<sup>64</sup> Thus, the common European standard was established on the basis of two Council of Europe treaties that have been ratified by only a small number of member states and not with respect to the law and practice in the member states.

In contrast, but also in the framework of defining the concrete margin of discretion, the comparison in the *Odièvre* case focused on the law and practice in the contracting states alone, and no reference was made to international documents, which gave rise to criticism in the joint dissenting opinion.<sup>65</sup> This case concerned the right of the applicant to obtain information about her natural family, which conflicted with the right of her mother to give birth anonymously. While the majority of the Court accepted that ‘most of the contracting states do not have legislation that is comparable to that applicable in France’, the joint dissenters criticised this position by arguing that the majority ‘fail[s] to refer to the various international instruments that play a decisive role in achieving a consensus and which seek to ensure a balance

<sup>59</sup> As Brems observes, ‘[l]ike comparison between the rules and practices of the states parties, reference to other conventions is used to point at an international consensus. Sometimes this consensus is somewhat wider than that among the member states of the Council of Europe.’ Brems, above n. 9, at 414.

<sup>60</sup> Besides this classification, a further division can also be made on the basis of who has made the comparison: experts, public opinion or legal consensus.

<sup>61</sup> *Marckx v. Belgium*, ECHR (1979).

<sup>62</sup> *Id.*, at 41.

<sup>63</sup> ‘Admittedly, of the ten States that drew up the Brussels Convention, only eight have signed and only four ratified it to date. The European Convention of 15 October 1975 on the Legal Status of Children born out of Wedlock has at present been signed by only ten and ratified by only four members of the Council of Europe. ... 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.’ *Marckx v. Belgium*, ECHR (1979), 41.

<sup>64</sup> *Marckx v. Belgium*, ECHR (1979), 41.

<sup>65</sup> *Odièvre v. France*, ECHR (2003), Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää.

between competing rights in individual cases.<sup>66</sup> In contrast to the *Marckx* case, here it was precisely the international developments or trends that the dissenters believed were lacking in the determination of the margin of appreciation.

In the much-discussed *Christine Goodwin* case, the intervener carried out a comparison at the level of the contracting states as well as countries outside Europe in order to show that there was a common approach that would narrow the margin of appreciation of the respondent state. On the basis of this study, the Court laid down that there was no common European approach among the contracting states. However, less importance was attached to this ‘than to the clear and uncontested evidence of a continuing international [in this case at non-European level – M.A.] trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.’<sup>67</sup> In other words, the margin of appreciation of the respondent was narrowed on the basis of the law and practice in non-European states, like South-Africa, Canada, the majority of US states and others.

While, in the above cases, the comparison was used to define the margin of appreciation, the *M.C.* case is a good example of the use of international sources of law and domestic legislation, in addition to examining the state of the art at the level of the Council of Europe, in order to define the positive obligations that arise with respect to Articles 3 and 8 (i.e. the scope of these particular rights and the obligations stemming from them). To define the obligations of the state ‘to ensure adequate protection against rape’, the Court first of all looked at the definitions of rape in several member states of the Council of Europe, perused some relevant decisions of the International Criminal Tribunal for the former Yugoslavia and relied on the description of this term in the Recommendation of the Committee of Ministers of the Council of Europe on the protection of women against violence.<sup>68</sup>

The last example for the application of the comparative law method in assessing the scope of the rights and obligations is the recent *Demir* case. Here, the Court made an overview of its case law in which it relied on international law in its comparative exercises, concluding that

[t]he Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of the European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.<sup>69</sup>

These examples clearly show that the sources of comparison differ widely in the case law of the Court, irrespective of the aim of the comparison. Two main problems can be identified in the Court’s approach in this respect: the combination of the source and aim of the comparison is theoretically problematic and, as mentioned, the selected sources differ on a case-by-case basis.

First of all, given that the doctrine is based on the principle of subsidiarity, it is quite striking from the perspective of theoretical consistency that, in its search for

<sup>66</sup> *Id.*, at 15.

<sup>67</sup> *Christine Goodwin v. the Kingdom*, ECHR (2002), 85. See also *I. v. the United Kingdom*, ECHR (2002).

<sup>68</sup> *M.C. v. Bulgaria*, ECHR (2003). ‘166. In the light of the above, the Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the member States positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalization and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.’

<sup>69</sup> *Demir and Baykara v. Turkey*, ECHR (2008), 85.

the concrete margin of appreciation, the Court uses international or non-European sources. Nevertheless, as argued, this reliance on international law can to some extent be explained by the fact that the member states of the Council of Europe are also part of this international legal system. For this reason, the subsidiarity principle can also be indirectly invoked in this respect. In any event, comparison at the international level seems to emphasise implicitly the universality and distinctiveness of the validity of rights and obligations in the Convention, as opposed to functioning as the lowest common denominator. Arguably, the use of international sources can be combined with the assessment of the scope of rights and obligations, since the Court's task is to ensure the enhanced protection of Convention rights and enforce the obligations stemming from them. In other words, the Court is not (or much less) bound by subsidiarity considerations in this respect. However, this is clearly not the case with respect to the determination of the margin of appreciation. As explained, the latitude a state enjoys is defined on the basis of the legitimate aim it pursues. This means that the extent of the margin of appreciation is defined from the perspective of the respondent state. Accordingly, it seems unreasonable to invoke *international* instruments, since the respondent state has ratified a *European* treaty. However, this does not mean that some international treaties that are ratified by the member states of the Council of Europe could not be invoked, as the states are also parties to these instruments.

In addition, it is essential that the application of the sources of comparison is consistent across the cases and that the choice made is transparent. As the above cases generally illustrate, the choice of the concrete source is decisive for the result of comparison. In this respect, the *Christine Goodwin* case is quite remarkable, as a comparison is possible with previous cases on the same issue. In the *Christine Goodwin* case, the Court used international sources, on the basis of which it came to a different conclusion than it did in earlier cases concerning the rights of transsexuals where it solely examined the law and practice of the contracting states. As indicated above, there might be evolution insofar as the existence and ratification of international treaties are concerned, which would justify an international comparison. However, the Court should at least clarify why it has chosen a particular source of comparison.

## 4.2 Level of Abstraction in the Comparison

It has been observed that in some cases the Court examines the countries' general direction concerning the disputed issue, while in other cases it requires that the member states' approach be comparable in terms of concrete provisions or measures.<sup>70</sup>

In this respect, the *Sheffield* case has been regarded as quite controversial. In this case, the Court had to examine whether or not a positive obligation existed under Article 8 to modify a system which post-operative transsexuals claim operates to their prejudice. In order to find an answer to this question, comparative exercises were carried out. The ECtHR was

not fully satisfied that the legislative trends outlined by *amicus* suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.<sup>71</sup>

Instead of examining whether a general trend to recognise the post-operative gender of transsexuals could be identified in the contracting states, the Court required that

<sup>70</sup> See inter alia Brems, above n. 9, at 417-418.

<sup>71</sup> *Sheffield and Horsham v. the United Kingdom*, ECHR (1998), 57.

member states have similar regulations in all aspects related to gender alteration. With respect to this case, Brems observed that ‘a stricter interpretation of the consensus criterion was used, requiring not just agreement on the general direction, but also on concrete measures.’<sup>72</sup> In fact, the Court employed two different levels of abstraction. While the original question was whether a duty exists as regards the legal recognition of the post-operative gender status of transsexuals, the comparison for determining the existence of a common standard was made with respect to the concrete rules that have been adopted to address the repercussions arising from the legal recognition of this status.

These two levels of abstraction can also be observed in the *Christine Goodwin* case, albeit in a somewhat different form. Here, with respect to Article 8, the Court refused to give any weight to the concrete measures that the states had adopted concerning the legal recognition of transsexuals and at the same time acknowledged the ‘statutory recognition of gender re-assignment’ in a couple of non-European countries. The Court explained that

[i]n accordance with the principle of subsidiarity, it is indeed primarily for the contracting states to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems *the practical problems* created by the legal recognition of post-operative gender status, the contracting states must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a *continuing international trend* in favour not only of increased *social acceptance* of transsexuals but of *legal recognition* of the new sexual identity of post-operative transsexuals.<sup>73</sup>

The Court used one level of abstraction for examining the existence or lack of a common European standard and one for exploring the ‘international trend’. With respect to the former, the comparison was carried out at a more concrete level, while in the international context a more abstract (and arguably the correct) comparison was realised.

Correspondingly, the dissenting opinions in the *Evans* case concerning the withdrawal of one party’s consent to an *in vitro* fertilisation treatment can be interpreted as implicitly criticising the level of abstraction at which consensus was looked for. In the view of the dissenters, ‘the fact that different States strike the balance [with respect to the withdrawal of the consent of the parties] at different points ... is not decisive if we consider that what counts most is how best to secure the conflicting rights of individualised parties.’<sup>74</sup> Following this observation, the dissenters briefly discussed the comparative law existing in this respect. This observation of the dissenters can arguably also be interpreted as indicating that the comparison should not be carried out at the level of concrete regulations but that the consensus should concern how different states try to resolve such conflicting rights.

As the above cases clearly show, the choice of the level of comparison can also be decisive for the final outcome of the comparative exercise and thus plays an important role in this context. The above-mentioned examples show that the comparative law method was not applied in a consistent and transparent manner. On the one hand, the Court was clearly not consistent across the cases in its choice of a particular level of abstraction; on the other hand, it did not explain why it chose that particular level of abstraction.

Arguably, two considerations seem to be relevant in identifying the level of abstraction for the comparison. First of all, it is generally accepted by the Court that the choice of the concrete means to achieve the aims of the Convention is left

<sup>72</sup> Brems, above n. 9, at 418.

<sup>73</sup> *Christine Goodwin v. the United Kingdom*, ECHR (2002), 85 (emphasis added). See also *I. v. the United Kingdom*, ECHR (2002), which was concerned with similar problems and was decided on the same day by the Court using the same arguments.

<sup>74</sup> *Evans v. the United Kingdom*, ECHR (2007), Joint Dissenting Opinion of Judges Traja and Mijović, 5.

to the contracting states. In other words, it is not for the Court to tell the states which concrete provisions they should adopt as long as the goals are reached. In this respect, states always have a 'basic' margin of appreciation, which would indicate that the comparison should and cannot be engaged in at this concrete level. Secondly, the level of abstraction should defer to the level at which the concrete rights or interests have been formulated.<sup>75</sup> As the *Evans* case demonstrates, while the original question was how to strike a balance between the conflicting interests, the comparative exercise was undertaken in relation to a very specific question. It can be concluded that if the comparison is carried out at a more concrete level than the level at which the original question as to the violation of the right at stake is formulated, the comparison cannot serve as proper evidence or an appropriate argument that could tilt the balance in favour of either position.

## 5 How to Compare

The last question that needs to be addressed relates to the realisation of the comparison. In this context, at least three sub-issues can be identified and examined. These are: the occurrence of the comparison, the thoroughness of the comparison and the interpretation of the comparison.

This final section examines whether the realisation of the comparative exercise fulfils the requirements of the rule law. More specifically, it analyses whether and to what extent the occurrence, thoroughness and interpretation of the result of the comparative exercise are transparent and consistent.

### 5.1 Occurrence of the Comparison

The Court does not rely on comparative arguments in all cases that are or at least seem to be comparable to each other in principle.<sup>76</sup>

In this context, examples can be found inter alia in cases concerning conflicting rights. In these cases, the justification ground is 'the protection of the rights and freedoms of others' with respect to which the margin of appreciation is determined. For instance, in the *Odièvre* case, concerning the question whether one can obtain identifying information about one's natural family in the case of anonymous child abandonment,<sup>77</sup> the Court made use of the comparative method and used the result of comparison as a weighty argument. However, no comparison was carried out, for instance, in *Öllinger*<sup>78</sup> (concerning the conflict between the right to peaceful assembly and the right to manifest one's religion) or *Pini and Others*<sup>79</sup> (concerning the conflict between the applicants' right to develop family ties with their adopted children and the children's interests). Similarly, in relation to the 'prevention of disclosure of information received in confidence' as a justification ground, the Court did not make use of comparison in each and every case. For instance, in the *Stoll* case, concerning the applicant's conviction for 'secret official deliberations' as an alleged violation

<sup>75</sup> See inter alia R.C. Green, 'Interest definition in equal protection: a study of judicial technique' (1998) 108 *Yale Law Journal* 439 at 441, 444-447; J.H. Gerards, *Belangenafweging bij rechterlijke toetsing aan fundamentele rechten* (2006) at 8; M.J. Busstra, 'De afweging gewogen. Een analyse van twee tegenstrijdige uitspraken ten aanzien van de SGP en het vrouwenkiesrecht' (2008) 169 *Themis* 235 at 236-237; F.M. Coffin, 'Judicial balancing: the protean scales of justice' (1998) 63 *New York University Law Review* 16 at 29.

<sup>76</sup> With respect to conflicting rights, see also Henrard and Busstra, above n. 27, at 16-18.

<sup>77</sup> *Odièvre v. France*, ECHR (2003).

<sup>78</sup> *Öllinger v. Austria*, ECHR (2006).

<sup>79</sup> *Pini and Others v. Romania*, ECHR (2004).

of his right to freedom of expression, a comparison was carried out.<sup>80</sup> In contrast, no comparative considerations were brought up, for instance, in the *Bluf!* case, in which the seizure and subsequent withdrawal of a particular issue of a journal was at stake.<sup>81</sup>

These cases demonstrate once again that the Court is not consistent across cases in applying the comparative law method and that it also does not offer reasons for applying or dispensing with the comparative approach. Arguably, if a comparative exercise that proved to be decisive was carried out with respect to a term or expression (be it one of the justification grounds or related to the scope of rights and obligations), the Court should not refrain from relying on the comparative law method in other similar cases –except, obviously, in very clear cases. A comparison could arguably only be refused if a case raises an issue in relation to which a comparison in a similar case has already revealed a common position. Importantly, however, the interval that has elapsed between the decision in the similar case and the case in question should not be too long, as the situation may have evolved in the meantime. In any event, the Court should explain why it is or is not carrying out a comparison. Admittedly, the facts submitted by the applicant, the respondent government and/or the third party also determine whether a comparison is made, since in most cases it is one of the parties that makes or suggests a comparison. However, this does not take away the need for an explicit reasoning for using or waiving the comparison.

## 5.2 Thoroughness of the Comparison

The Court has often been criticised to the effect that the comparison it carries out is very superficial.<sup>82</sup> Even judges have expressed their disapproval of the incompleteness of the comparison. For instance, in the *Öztürk* case, Judge Matscher argued in his dissenting opinion that the comparison should have been ‘of a far more detailed nature than those carried out so far by the Convention institutions.’<sup>83</sup> In practice, the thoroughness with which a comparison is carried out varies widely, from a deep state-by-state analysis to merely acknowledging the existence or lack of a common approach without any further elaboration.

In the *Stoll* case, for instance, the Grand Chamber relied on a detailed comparative study made by a rapporteur concerning a resolution of the Council of Europe<sup>84</sup> and considered a number of Council of Europe resolutions. Moreover, it referred to the practice of the UN Human Rights Committee and the Inter-American Court of Human Rights. Similarly, in the *M.C.* case, the Court relied on the comparative analysis made by the intervener. ‘The intervener stated that over the past two decades the traditional definition of rape had undergone reform in civil and common law jurisdictions and in international law. ... [It] submitted copies of reports on the relevant law of several European and non-European countries, prepared by legal scholars or professionals, or by research assistants.’<sup>85</sup> Extensive comparative analysis can also be discovered

<sup>80</sup> *Stoll v. Switzerland*, ECHR (2007), 107.

<sup>81</sup> *Vereniging Weekblad Bluf! v. the Netherlands*, ECHR (1995).

<sup>82</sup> Carozza argues that the Court’s comparative ‘analysis is remarkably casual, superficial, and incomplete.’ P.G. Carozza, ‘Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights’ (1998) 73 *Notre Dame Law Review* 1217 at 1224. See also Arai-Takahashi, above n. 15, at 197; J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (1998) at 224; Henrard and Busstra, above n. 27, at 17-18.

<sup>83</sup> *Öztürk v. Federal Republic of Germany*, ECHR (1984) Series A, No. 73, Dissenting Opinion of Judge Matscher, A.2.

<sup>84</sup> *Stoll v. Switzerland*, ECHR (2007), 44. and 107.

<sup>85</sup> *M.C. v. Bulgaria*, ECHR (2003), 126 and 129.

when the principle of evolutive interpretation is applied, since in these cases the Court explicitly wants to draw attention to the existence or absence of any concrete developments in the field. This was the case, for instance, with respect to the legal position of transsexuals.<sup>86</sup>

In contrast, in many instances, the Court merely ‘refers in general to the presence or absence of a consensus, in “the law” of “the member states”, without undertaking any thorough comparative research.’<sup>87</sup> For instance, in the *Sunday Times* case, the Court stated without any explicit examination that ‘[t]he domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area.’<sup>88</sup>

Again, there is a lack of consistency (both theoretically and across cases) and transparency concerning the thoroughness of the comparison. Arguably, a superficial comparison cannot serve as an appropriate means of evidence that could tilt the balance in favour of either argument. This means that it is not appropriate if the Court merely concludes that there is a common approach on the basis of which it establishes the concrete extent of the margin of appreciation or draws far-reaching conclusions with respect to the scope of rights and obligations. The Court should make its arguments explicit, otherwise the comparative technique becomes subjective and, thus, arbitrary.

### 5.3 Interpretation of the Comparison

Significant differences exist in the interpretation of the comparative exercise. Several dissenting opinions are telling in this respect. The example par excellence of diverging or conflicting interpretations of the comparison are the cases regarding transsexuals. Brems also criticises the comparative exercise of the Court in this respect when she states that ‘[t]he transsexualism cases cast some doubt on the objective character of the consensus criterion.’<sup>89</sup> For instance, in the *Cossey* case, the majority ruled that at that time there was no common ground among the member states on the recognition in law of post-operative gender status. However, the dissenters interpreted the same facts in the opposite way, concluding that there was a common European standard on this issue.<sup>90</sup>

It is not only in the transsexual cases that one finds such conflicting readings; other examples can also be found. For instance, in the *Odièvre* case, seven judges in their joint dissenting opinion argued that ‘the suggestion that the States had to be afforded a margin of appreciation owing to the absence of a common denominator between their domestic laws simply does not tally with the extracts of comparative law on which the Court itself relies.’<sup>91</sup> Similarly, the dissenters in the *Hirst* case also disagreed with the conclusion drawn from the comparative exercise concerning the scope of a right; namely whether or not prisoners have the right to vote. In their words

<sup>86</sup> See *Rees v. the United Kingdom*, ECHR (1986) Series A, No. 106; *Cossey v. the United Kingdom*, ECHR (1990) Series A, No. 184; *Sheffield and Horsham v. the United Kingdom*, ECHR (1998); *Christine Goodwin v. the United Kingdom*, ECHR (2002); *I. v the United Kingdom*, ECHR (2002).

<sup>87</sup> Brems, above n. 9, at 419.

<sup>88</sup> *Sunday Times v. the United Kingdom*, ECHR (1979) Series A, No. 30, 59.

<sup>89</sup> Brems, above n. 9, at 417.

<sup>90</sup> See also *Sheffield and Horsham v. the United Kingdom*, ECHR (1998).

<sup>91</sup> *Odièvre v. France*, ECHR (2003), Joint Dissenting Opinion of Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, 12.

[a]n 'evolutive' or 'dynamic' interpretation should have a sufficient basis in changing conditions in societies of the Contracting States, including an emerging consensus as to the standards to be achieved. We fail to see that this is so in the present case. Our conclusion is that the legislation in Europe shows that there is little consensus about whether or not prisoners should have the right to vote.<sup>92</sup>

Again, these cases reveal that the Court's interpretation of the result of the comparison has been inconsistent and obscure. Arguably, such conflicting readings are mainly caused by a methodologically incorrect comparison. In other words, if the comparison is carried out properly, the result of the comparison would not have given rise to such conflicting readings. This also means that when the Court realises that there is no agreement on the interpretation of the comparison, it should look again to see where the accomplishment of the comparative exercise went wrong. Moreover, in order to prevent conflicting readings of the comparison, the Court should clearly explain which facts provided the basis for its conclusion.

## 6 Conclusions

This analysis of several cases of the European Court of Human Rights in which the comparative law method was given too much weight demonstrates that, in many respects, the comparative exercises of the Court do not comply with the requirements set by the formal conception of the rule of law: the application of the comparative law method is neither consistent nor transparent enough. For this reason the comparison carried out by the Court should not guide the Court's adjudication to such a crucial extent, as the faults made during the comparative exercise ultimately have far-reaching consequences for the decision taken.<sup>93</sup> In any event, the Court should not attribute too much value to the result of comparison, which should simply be regarded as one of the factors in the determination of either the margin of appreciation or the scope of rights and obligations.

This paper has identified three elements of the comparative law method and has examined whether and to what extent they comply with the principle of the rule of law. These elements are: the aim of the comparison (why to compare), the sources and level of abstraction of the comparison (what to compare), and the realisation of the comparison (how to compare). In this respect, the most complicated aspect of the comparative law method is the identification and conceptual clarification of the particular aims of comparison. In addition, the case law illustrates that, given the conceptual uncertainties concerning the doctrine of the margin of appreciation, the sources of the comparison are not chosen in a (theoretically) consistent and transparent manner. With regard to the aims and the respective sources of the comparison, comparing the law and practice of the member states of the Council of Europe arguably puts the emphasis on the subsidiarity principle and the Convention's nature as a minimum standard for the parties. In contrast, the reliance on international law and practice implicitly emphasises the Court's position as a supranational human rights organ whose aim is the enhancement of the protection of fundamental rights. This seems difficult to combine with the subsidiarity considerations underlying the doctrine of the margin of appreciation. Unlike the margin of appreciation doctrine and the limitation clauses, however, the determination of the scope of rights and

<sup>92</sup> *Hirst v. the United Kingdom*, ECHR (2005), Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens, 6.

<sup>93</sup> See also Letsas, who poses the question why the Court ever turned to consensus. His answer is that '[m]any people and many judges resort to what "most states do" because they are not confident in the objectivity of moral reasoning. Other reasons flow from the traditional tendency to look at international law as consent-based relations among sovereign states, a tendency that forces some ECtHR judges to feel like the guardians of their country's sovereignty. None of these reasons, however, fits the history of the ECHR practice or serves some value embedded in that history. Letsas, above n. 23, at 281, 305.

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obligations can be combined with the Court's role as an international supervisory organ, and for this reason comparison at the international level is conceptually appropriate. Nevertheless, the Court should provide logical and discernable reasoning and be consistent across cases with regard to any choices made in the context of the comparative law method.