Beyond Expansion or Restriction? Models of Interaction between the Living Instrument and Margin of Appreciation Doctrines and the Scope of the ECHR

Rachael Ita and David Hicks *

Abstract

The living instrument doctrine of the European Court of Human Rights (ECtHR) is criticized as restricting the margin of appreciation of States and expanding the scope of the European Convention on Human Rights (ECHR). Systematic examination of this claim is usually overlooked in the context of the relationship between the admissibility and merits phase of ECtHR cases. This paper considers this claim in the context of jurisdictional arguments on incompatibility *ratione materiae* (subject matter outside the scope of the Convention) and the link to the merits of the case. Case law of the ECtHR from January 1979 to December 2016 is assessed to elaborate four models of interaction between the margin of appreciation and living instrument doctrines. This paper argues the need to go beyond consideration of expansion and restriction of the scope of the ECHR, and to assess the Court's appetite for allocating new duties to States based upon the case arguments and positioning of living instrument and margin of appreciation doctrines.

1 Introduction

The question of the scope of applicability of the ECHR is fundamental to the competence of the ECtHR to hear a case brought before it.[1] The high rate of cases being struck out at the admissibility phase therefore impacts negatively on the capacity of the Court to make decisions on the merits.[2] Articles 34 and 35 of the ECHR specify the different conditions to be satisfied for admissibility of cases before the Court, one of which is that the subject matter should not be incompatible with the provisions of the Convention.[3] Although four main grounds of

* Rachael Ita, PhD, Senior Lecturer in Law, Leicester De Montfort Law School, De Montfort University. Leicester, Leicester UK, Rachael.ita@dmu.ac.uk; David Hicks, PhD, Senior Lecturer in Criminology, School of Law and Social Sciences, University of Derby, Derby, UK, D.Hicks@derby.ac.uk.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5.

[2] 'Merits' refers to the substantive question of compliance in the case and is used interchangeably with the words 'compliance phase'. In 2018, 93.6% of the cases brought before the Court (40,023 out of 42,761 cases) were declared inadmissible or struck out of the list of cases. See 'A Practical Guide on Admissibility Criteria' Council of Europe/European Court of Human Rights' Updated on 31 August 2019 7. Available at < https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf last accessed 2 March 2020.

[3] Article 35(3).

incompatibility exist,[4] this paper focuses on the issue of incompatibility *ratione materiae*, which is the argument that the subject matter of the application before the Court is outside the scope of the Convention. In dealing with such questions, the case law of the Court is particularly important, and the interpretive tools used by the Court in those cases cannot be overlooked.[5]

The margin of appreciation and living instrument doctrines are two of the tools of interpretation which are embedded in the Court's jurisprudence. The margin of appreciation doctrine is an interpretive tool created by the Court to grant some degree of flexibility to member States in their interpretation and application of the rights enshrined in the Convention. The Court will only interfere if the State goes outside of its space or 'room for manoeuvre'.[6] The living instrument doctrine involves an evolutive approach, which is a contrasting interpretation method to considering the diversity of member States. The Court describes the Convention as a 'a living instrument which must be interpreted in the light of present-day conditions' or 'present-day circumstances'.[7] The Court has been criticized for narrowing the margin of appreciation afforded to States and expanding the scope of the Convention through its use of the living instrument doctrine.[8] This in turn is argued to make States liable for violations in circumstances where they should not be responsible.[9] These arguments are usually

[4] Incompatibility *ratione personae* (competence of the person), incompatibility *ratione loci* (place of alleged violation), *incompatibility ratione temporis* (time of alleged violation) and incompatibility *ratione materiae* (subject matter of the application).

[5] The relevance of interpretation to the question of incompatibility *ratione materiae* is underscored by the referral to the case law of the Court within the guide to admissibility published by the Court. See A Practical Guide, *supra* n 2 at 58.

[6] Seminal works on the margin of appreciation include: Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Dordrecht Nijhoff 1996); Arai-Takahashi Y, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); George Letsas, *A Theory of Interpretation of the European Court of Human Rights* (OUP 2007); Andrew Legg, *The Margin of Appreciation Doctrine in International Human Rights Law: Deference and Proportionality* (OUP 2012).

[7] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).

[8] Baroness Hale, 'Common Law and Convention Law: The Limits to Interpretation' (2011) EHRLR, 534; Françoise Tulkens, Section President of the European Court of Human Rights. Seminar 'What are the Limits to the evolutive interpretation of the Convention?' (Dialogue between Judges 2011) 6; *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) (Dissenting Opinion of Judge Sir Gerald Fitzmaurice), para 39.

[9] *Ibid Golder* para 39; *Brown v Stott* [2003] 1 AC 681 at [703] Lord Bingham.

based on a consideration of the outcome of selected cases from the Court's jurisprudence. What is absent from existing literature is a systematic analysis of a comprehensive sample of ECtHR case law to determine whether there is a consistent pattern of expansion or whether there is also restriction in the living instrument versus margin of appreciation doctrines debate. Also absent from the literature is a focus on any links between the admissibility and merits phase and whether the positioning of these doctrines at either phase makes a difference to the outcome.

This paper aims to close these gaps and bring an original contribution to the literature in both a methodological and substantive way. Methodologically, unlike other studies that focus on a qualitative approach, this paper adopts a combination of the quantitative method of descriptive statistical analysis and the qualitative method of doctrinal textual analysis to the case law sample. Rigor is shown in the depth of the case law analysis which spans the period of 1979 -2016, something not yet done in the literature. Substantively, it identifies four models of interaction between both doctrines at the admissibility and merits phase, a distinction not seen in existing literature in this area. It argues that the way in which the Court balances the admissibility phase arguments is noteworthy as it has a clear impact on the outcome of the case. Significantly, the case analysis shows that expansion of the scope of the Convention is distinct from a finding that the State has violated its obligations. Where living instrument and margin of appreciation arguments are put side by side, the Court remains reluctant to allocate new duties to the States, thereby retaining the significance of the margin of appreciation doctrine. In light of this finding, it is argued that ECtHR monitoring of the boundaries of the scope of duties allocated to the State offers helpful predictive insights (in comparison to only focusing on expansion and restriction) into the impact of living instrument and margin of appreciation arguments.

This paper consists of four main parts. First, it sets out the conceptual framework in

relation to the use of interpretive tools and the determination of admissibility *ratione materiae*. Second, it provides an explanation of the research design adopted in this analysis. Third, it provides an empirical analysis to identify four models of interaction in the margin of appreciation and living instrument arguments before the Court. The results show that the impact of the interaction between the living instrument and margin of appreciation doctrines at the admissibility phase results in both expansion and restriction of the scope of the Convention. The fourth part provides a textual analysis of a selection of the Court's decisions highlighting the distinction between expansion of the scope of the Convention, and a finding that the State has violated its obligations. Where the living instrument and margin of appreciation doctrines are placed side by side, the margin of appreciation doctrine remains relevant in restricting the scope of obligations of States under the Convention.

2 Conceptual Framework: Tools of Interpretation and the Determination of Scope of Applicability of the ECHR

The main aim of this article is to examine the use of margin of appreciation and living instrument arguments to determine the scope of applicability of the Convention when an application is challenged on the ground of incompatibility *ratione materiae*. The first resort in determining the scope of applicability of the ECHR is the text of the Convention itself. Article 32 ECHR clearly restricts the scope of the Court's jurisdiction to the human rights guaranteed under the Convention. The determination of the scope of these rights is however not an easy task due to the 'relatively vague' nature of the Convention's provisions.[10] For example, although Article 12 ECHR guarantees a 'right to marry', questions arise as to whether the scope

[10] Wojciech Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe and the Idea of Pilot Judgments' (2009) 9(3) H R L Rev 397.

of this article includes a right to marry for persons of the same sex.[11] The tools of interpretation used by the Court are therefore relevant to the determination of questions on the scope of the rights in the ECHR, which in turn impacts on the question of the scope of applicability of the Convention.

Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) enshrine the rules on interpretation of treaties.[12] These rules are recognized by the ECtHR as customary international law and applied by the Court in its interpretation of the Convention.[13] The general rule of interpretation in Article 31(1) contains the overarching principle that a treaty should be interpreted in good faith.[14] In addition to the principle of good faith, the three key tools of interpretation in Article 31(1) are: 'the text', 'the context' and the 'object and purpose'.[15] 'These three elements in turn reflect the three main schools of interpretation which preceded the VCLT: the textual/objective school, the intention of the parties/subjective school and the teleological/purposive school.[16] Supplementary rules of interpretation are contained in Article 32 VCLT which make the preparatory documents relevant in specific situations. In addition to the rules of interpretation contained within Articles 31 – 33 VCLT, the Court, through its case law has created other tools of interpretation.[17] The margin of appreciation and living instrument doctrines fall within the category of tools of interpretation created by the Court.

It is expedient to provide an overview on the nature of the margin of appreciation and living instrument doctrines and their presence within the jurisprudence of the Court. As

[11] This has been addressed by the Court in *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) and *Oliari and others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015).
[12] Vienna Convention on the Law of Treaties 1155 UNTS 331.
[13] *Golder Supra* n 8 at para 29.
[14] Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, Cambridge University Press 2013) 208; A similar view is expressed by Fitzmaurice in Malgosia Fitzmaurice, 'The Practical Working of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 169, 179.
[15] Fitzmaurice, *ibid*.
[16] Oliver Morse, 'Schools of Approach to the Interpretation of Treaties' (1960) 9 Catholic University Law Review 36,39; Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretations and other Treaty Point' (1957) 33 British Yearbook of International Law 203.
[17] For a detailed examination of the interpretive tools by the Court, see D J Harris *et al*, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (4th edn, OUP 2018) 6-24.

previously noted, the margin of appreciation is the allowance given by the ECtHR to national authorities to interpret and apply the provisions of the Convention. It reflects the subsidiary nature of the Court's supervisory role. It is agreed that the doctrine owes its origin and development to the case law of the (now defunct) European Commission on Human Rights (the Commission) and the (continuing) functions of the ECtHR,[18] although there is divergence on the question of when the doctrine was first used by the Commission[19] and by the Court.[20] Notwithstanding its origins, the margin of appreciation doctrine is now embedded within the enforcement system of the Court. It is noteworthy that Article 1 of Protocol No 15 seeks to bring an end to the absence of the margin of appreciation doctrine in the text of the Convention as it requires the terms 'margin of appreciation' and 'subsidiarity' to be added to the Preamble of the Convention.[21] With 45 ratifications out of the 47 member States to the ECHR, it would appear that the absence of the doctrine in the text of the Convention will soon be corrected.[22] Although the margin of appreciation doctrine has become a significant part of the Court's case law, its incorporation into the jurisprudence of the Court has remained a subject of debate with

[18] For a detailed examination of the structural amendments to the system of control as a result of Protocol No. 11 of 1998, see Ed Bates, *The Evolution of the European Convention on Human Rights: From its Conception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 452-467.

[19] Hutchinson traces the origins to the Commission's report in the case of *Lawless v Ireland* (No 3) App no 332/57 (ECtHR, 1 July 1961), para 90, (Michael R Hutchinson, "The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) ICLQ 638,639), but other commentators argue that the margin of appreciation was first introduced and adopted by the Commission in its report on the earlier 1958 case of *Greece v United Kingdom* App no 176/56 (Commission Decision, 26 September 1958). See R St J Macdonald, 'The Margin of Appreciation', in R St J Macdonald, F Matcher, H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff 1993) 83, 85; Yourow, *supra* n 6 at 15; Arai-Takahashi, *supra* n 6 at 5.

[20] Eva Brems points out that the first express use of the term 'margin of appreciation' was in the 1971 case of *De Wilde, Ooms and Versyp v Belgium* App nos 2832/66, 2835/66, 2899/66 (ECtHR, 18 June 1971) (Eva Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights, (1996) 56 Zeitschrift Fur Auslandisches Offentliches Recht Und Volkerrecht 240, 243 available at < http://www.zaoerv.de/56_1996/56_1996_1_2_a_240_314.pdf> (last visited 25 February 2020), However, Judge Spielman writing extra judicially argues that the first proper use of the term by the Court itself was in the 1976 case of *Engel and Others v Netherlands* App nos 5100/71; 5101/71; 5102/71; 5354/72; and 5370/72. See Dean Spielmann, 'Whither the Margin of Appreciation?' (UCL – Current Legal Problems (CLP) Lecture, University College London, 20 March 2014) 3 available at < https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf> (last visited 25 February 2020).

[21] Protocol No 15 Amending the European Convention on Human Rights and Fundamental Freedoms, CETS No. 213.

[22] Current status of ratifications as at 19 March 2020. Available at < https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=oLQSxdkB > (last visited accessed 19 March 2020.

mixed reactions.[23] The Court articulated its justification for the use of the doctrine in *Handyside v United Kingdom*.[24] From that case three key factors can be deduced as justification: subsidiarity, diversity of contracting States and the 'better position' rationale.[25] These three factors arguably form the bedrock of the justification of the use of the margin of appreciation doctrine by the Court.

In a similar vein, the 'living instrument' doctrine neither appears in the text of the Convention nor in the preparatory documents. It is rather an interpretative tool created by the Court. The living instrument doctrine requires the Court to adopt an approach to the interpretation of the Convention in which the provisions of the Convention are not considered as static but rather reflect evolving standards and contemporary realities. Tulkens argues that the ECHR was already considered a living instrument prior to the 'genesis' of the doctrine in the seminal *Tyrer v United Kingdom*, which was just the first case in which the Court stated this expressly.[26] This view is adopted here. The living instrument doctrine has been applied to both substantive and procedural elements of the Convention,[27] which suggests it reflects an

[23] On the one hand, some have welcomed the doctrine – e.g. A H Robertson and J G Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd edn MUP 1993) 369; Arai-Takahashi, *supra* n 6 at 3; K A Kavanaugh, 'Policing the Margins: Rights Protection and the European Court of Human Rights' (2006) EHRLR 422; whilst on the other hand, some have criticised it for various reasons - e.g. P Van Dijk and GJH van Hoof, *Theory and Practice of the European Court of Human Rights* (2nd edn, 1990) 583-606; *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997), Partly dissenting opinion of De Meyer J; Letsas 'Two Concepts of the Margin of Appreciation' (2006) Oxford Journal of Legal Studies 705.

[24] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 48.

[25] *ibid*. For more on the argument for justification of the use of the margin of appreciation doctrine in this way by the Court, see Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Føllesdal et al. (eds), Constituting Europe. The European Court of Human Rights in a National, European and Global Context (2013) 62, 69; Føllesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359.

[26] Tulkens, *supra* n 8 at 7. Similar views on the living character of the Convention have been expressed by George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in in Ulfstein G, Follesdal A and Schlütter B (eds), *Constituting Europe*: *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2012) pp 106-141, 108; Thomas Webber, 'The European Convention on Human Rights and the Living Instrument Doctrine: An Investigation into the Convention's Constitutional Nature and Evolutive Interpretation' (DPhil Thesis, University of Southampton 2016) Chapter 3.

[27] For example, *Loizidou v Turkey* (preliminary objections) App no 15318/89 (ECtHR, 23 March 1995). This has not been without criticism. See 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, 'The Margin of Appreciation', in R St J Macdonald, F Matcher, H Petzold (eds), *The European System for the Protection of Human Rights* (Drodrecht: Martinus Nijhoff, 1993) 147, 150.

overarching principle that governs the interpretation of the Convention. Whilst the Court in *Tyrer* did not proffer any justification for its invocation of the living instrument doctrine,[28] several sources have been referred to as justification for its use. These range from inferences from the text of the ECHR itself,[29] to considerations of the special character of the Convention.[30]

Some argue that use of the living instrument doctrine results in an extension of the scope of the Convention beyond the intention of the drafters.[31] This creates the attendant question of the limits of the doctrine, a question that remains a source of debate.[32] A related issue is the impact of the living instrument doctrine on the margin of appreciation afforded to states. The crux of the issue arises when the court is faced with a 'hard case'[33] or scenario where it could reach two different decisions depending on the weight it gives to one doctrine or the other. Deference to the member State via the margin of appreciation doctrine will lead to a decision in which the Court does not find a particular issue to come within the scope of its *ratione materiae* jurisdiction even where there have been developments in society to suggest otherwise. This paper seeks to examine the tension that exists between the living instrument and margin of appreciation doctrines in the light of the question of incompatibility *ratione materiae*.

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[28] An omission which has been seen as 'unfortunate' by Mowbray in Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) HRL Rev 57.

[29] See Christos Rozakis, 'Is the Case-Law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to a Creation of a European Public Order?' A Modest Reply to Lord Hoffman's Criticisms' (2009) 2 UCL Human Rights Law Review 51, 57; Mireille Delmas-Marty, 'The Richness of Underlying Legal Reasoning' in M Delmas-Marty (ed), *The European Convention for the Protection of Human Rights, International Protection Versus National Restrictions* (Kluwer Academic Publishers 1992) 319, 337.

[30] J G Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993) 69; Ost expresses these two principles as well, although he couches them in different terms. See François Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in Mireille Delmas-Marty(ed) *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Kluwer Academic Publishers, 1992) 288, 309 (Translation directed and edited by Christine Chodkiewicz); Luzius Wildhaber, 'The European Court of Human Rights in Action' (2004) 21 Ritsumeikan Law Review 83,86.

[31] For example in the case of *Sigurdur A Sigurjónsson v Iceland* App no 16130/90 (ECtHR, Judgment of 30 June 1993) where the Court decided based on the living instrument doctrine, that Article 11, which provides for freedom of association must also be interpreted to cover a negative right of association.

[32] It has even generated conferences with a particular focus on the limits of the Convention. For example, the Seminar 'What are the Limits to the evolutive interpretation of the Convention?' (Dialogue between Judges 2011).

[33] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 85, refers to 'hard cases'.

3 Research Design

This paper adopts a combination of quantitative and qualitative methods to analyze all judgments of the Court from 1979 to 2016 in which both the margin of appreciation and living instrument doctrines were referred to. The first research method used in the analysis is the quantitative method of descriptive statistics. Descriptive statistics are tools used to organize and summarize data.[34] In this paper, tools such as percentages, tables and bar charts are used to organize and summarize the data generated from the relevant case law of the ECtHR.[35] The use of descriptive statistics is limited; it does not provide a qualitative analysis of the issues that may be raised from the results. Whilst it may provide insights into patterns of ECtHR decision-making, it will not provide any qualitative answers as to the underlying reasoning.

In the light of the above limitations, the second research method applied in this paper is doctrinal textual analysis. Doctrinal research may be described as 'the process used to identify, analyze and synthesize the content of the law'.[36] Doctrinal research also has its limitations as it takes an 'insider's view of the law'.[37] This is because the arguments are generated from a synthesis of the law itself rather than from a study of external factors. Furthermore, due to the number of examples of case law to be considered, doctrinal research itself would be limited in the categorization of the case law prior to analysis. This limitation is ameliorated as the choices on how to proceed with the doctrinal analysis builds upon descriptive statistical analysis to categorize and identify patterns based upon a comprehensive overview of the relevant case law.

Following the examination of the nature of the adjudicatory structure for the ECHR pre- and post-1998, the relevant judgments that formed the data for analysis in this paper were: (1)

[34] Zealure C Holcomb, *Fundamentals of Descriptive Statistics* (Routledge 2017) 2.
[35] *ibid* 2, 9.
[36] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7, 9; Paul Chynoweth, 'Legal Research' in Andrew Knight, Les Ruddock (eds) *Advanced Research Methods in the Build Environment* (Wiley Blackwell, 2008) 28, 29.
[37] Hutchinson, *ibid* 7, 15.

Pre 1998: Final decisions of the Commission in cases that were not referred to the Court, and all decisions of the Court; (2) Post-1998: Judgments of the Chamber that have become final and all decisions of the Grand Chamber. These selections were made to ensure comprehensiveness of the study and also validity due to the status of the cases being considered. The case law of the Court was accessed through the Human Rights Documentation (HUDOC) database.[38]

Following an identification of the relevant Court, the next stage was identifying the search criteria that would be appropriate to collating the case law. Given the focus on the scope of the Convention at the admissibility phase, it was logical to search broadly for cases in which the margin of appreciation and living instrument doctrines were referred to. The analysis was however not limited to instances where the ECtHR expressly referred to 'living instrument'. Instead, it also looked at cases where the Court used terms which have a similar connotation to the living instrument. The following words/phrases were identified: "current circumstances", "evolving standards" and "evolving". Consequently, the search criteria were expanded to include cases in which the margin of appreciation and any of these other terms were present. This has been undertaken to ensure the accuracy and robustness of the research data.

The next issue was the information retrieval model to apply in order to ensure accuracy. HUDOC offers two options for a text search: the 'simple search field' and 'Boolean search screen'.[39] Although the Boolean model is arguably the most criticized model, for the purpose of this paper it was considered the most suitable information retrieval model to apply.[40] This is because the query terms were not just individual words, but rather phrases: for example, "margin of appreciation" AND "living instrument". A search mechanism that would involve

[38] http://hudoc.echr.coe.int/eng.

[39] HUDOC User Manual, 26 September 2016 6 available at < http://www.echr.coe.int/Documents/HUDOC_Manual_2016_ENG.PDF> accessed 16 January 2017.

[40] For more on the Boolean model, see Djoerd Hiemstra, 'Information Retrieval Models' in Ayşer Göker and John Davies (eds), *Information Retrieval: Searching in the 21st Century* (John Wiley & Sons Ltd, 2009) 3-4.

retrieving results of cases that had both phrases in them was therefore necessary. Whilst every attention has been given to ensure accuracy of the data used, it is worth noting that the results obtained are limited to the case law that was returned following the Boolean search and manual examination of the case law.

4. Models of Interaction between the Margin of Appreciation and Living Instrument Doctrines: Descriptive Statistical Analysis

4.1 *Results of Descriptive Statistical Analysis*

In this paper, descriptive statistics tools used to organise and summarise data were applied to the ECtHR case law sample. In order to foster reliability and validity of the research, the data had to be collected in a systematic manner.[41] Following the defined selection criteria in section 3 above which details the research design, the final sample of cases being subjected to systematic analysis for this paper was 75 cases.[42] The cases were read and then manually coded based on the relevance of the margin of appreciation and living instrument arguments to a contention of incompatibility *ratione materiae* of the issue before the Court. The result showed that the question of compatibility *ratione materiae* was contested in 35 cases or 47% of the case law in question. A further examination of the 35 cases in which compatibility *ratione materiae* was contested, showed that in 14 or 60% of those cases, compatibility *ratione materiae* was contested with either the margin of appreciation or living instrument argument or both. The presence of these two doctrines to determine the question of admissibility ties in with the literature which highlights the scope

[41] Lee Epstein & Andrew D Martin, *An Introduction to Empirical Legal Research* (OUP 2014) 46-58.
[42] A full data sheet on all the cases that were examined is retained by the author.

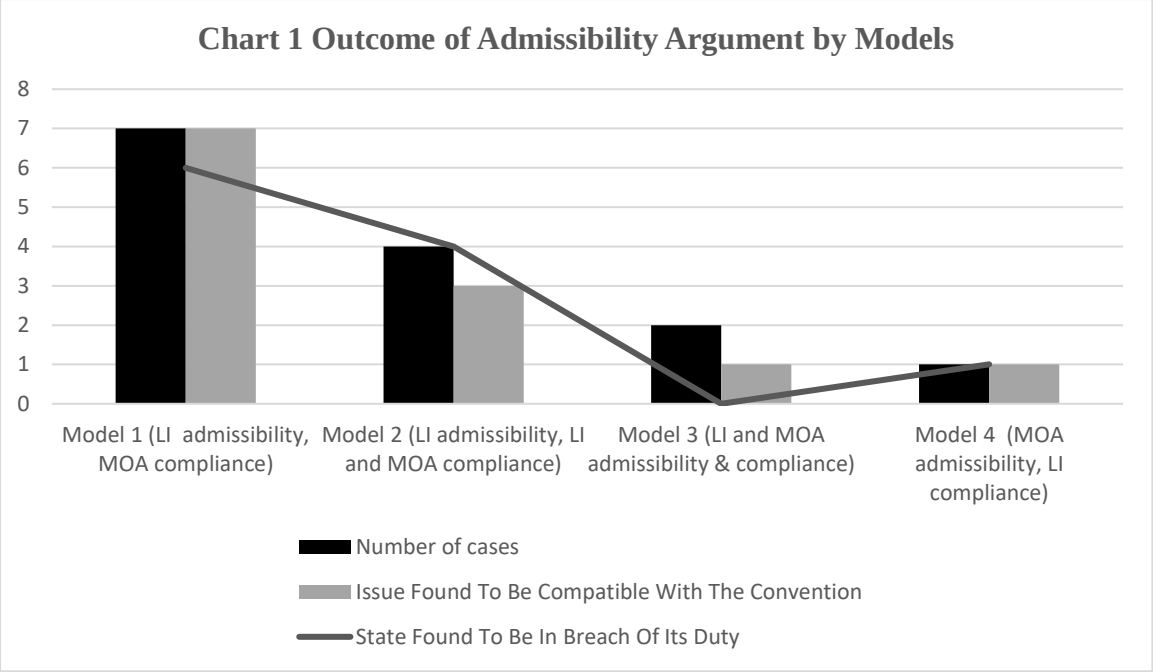
of the Convention as an area that has been affected by the interaction of the two doctrines in the jurisprudence of the Court.[43]

The case law was examined to discover where the living instrument (LI) and margin of appreciation (MOA) doctrines were present alongside the possible interaction models in Table 1 below from admissibility to the merits/compliance phase.

Table 1: Modelling ECtHR Decision-Making			
	Living Instrument (LI)	**Margin of Appreciation (MOA)**	**LI and MOA**
Constitutive Model	Admissibility	Compliance	
Strong Constitutive Model	Admissibility		Compliance
Weak Constitutive Model			Admissibility and Compliance
Deference Model	Compliance	Admissibility	
Strong Deference Model		Admissibility	Compliance

After reviewing the case law, there were only four of the models present (which respectively correspond to Models 1-4 in Chart 1 below): Constitutive Model, Strong Constitutive Model, Weak Constitutive Model and the Deference Model.

[43] The words 'admissibility' and 'applicability' are used interchangeably in this paper.



It can be seen from Chart 1 that the 'Constitutive Model' accounts for the greatest number of cases in the case analysis. The seven cases in that category make up 50% of the sample. On the other end of the spectrum are cases in the 'Deference Model'. There was only one case in that category which accounted for just 7% of the sample. The results show that living instrument arguments are used mostly to addresses the admissibility question – thirteen cases involve the use of living instrument arguments to address admissibility questions, as opposed to seven cases where the living instrument was used in the compliance stage. For the margin of appreciation doctrine, it is mainly used in the compliance stage – thirteen cases, as opposed to three cases in which it was used in the admissibility argument. This could be interpreted as the living instrument doctrine being used to determine whether a right exists whilst the margin of appreciation determines whether the State has breached its duty under the Convention. In other words, the living instrument doctrine used for the question of the definition of the right, and the margin of appreciation doctrine used to

determine the boundaries of application of the right.[44] The margin of appreciation may however be raised as a counteracting factor where the living instrument doctrine is applied to admissibility as can be seen in the Weak Constitutive Model. This model however accounts for just two cases, 14% of the sample. As the Weak Constitutive Model is one where the potential for conflict between both doctrines may arise, the low numbers initially suggest that the opportunities for such direct conflict in the sense of both doctrines being applied to determine in particular compatibility *ratione materiae*, is at a low level in the case law of the ECtHR.

The further point to assess is the outcome of the cases where there are these different interactions between the margin of appreciation and living instrument doctrines. This would give an initial indication of how these doctrines are having an impact on the jurisprudence of the Court and on the protection of human rights in Europe generally. It would help to show if there is a correlation between the finding that a particular issue is compatible *ratione materiae* with the Convention and a resultant finding of a breach of a duty under the ECtHR to secure the right in question. Chart 1 shows that the highest number of violations in percentage terms by Models, was seen in the Deference Model where there was a 100% result of the State being found to be in breach of its duty. There was only one case in that category though, so overall, based on case numbers, it accounts for the least number of violations. The highest number of violations based on number of cases was found in cases under the Constitutive Model. In six out of the seven cases in that model, the overall finding of the Court was that the State had breached its duties under the Convention.[45] This is 85% of the cases in that category. In relation to the four cases in the Strong Constitutive Model,

[44] This reflects the debate on the use of the margin of appreciation for 'norm application' as opposed to 'norm definition' see Yuval Shany, 'Toward a general Margin of Appreciation Doctrine in International Law?' (2006) 16(5) EJIL 907.

[45] The finding of violation has been coded on the basis of there being at least one successful compatibility argument and one finding of a breach of obligation of the State.

the Court found the State to be in violation of its obligations in all four cases, even though in one of the cases, the argument for compatibility of one of the articles of the Convention was rejected.[46]

With regards to the two cases in the Weak Constitutive Model, the Court did not find a violation in any of the cases. It is instructive to note that of the 14 cases examined, in 12 cases, the Court found at least one violation of the Convention. The 2 cases in this model were the only ones where the Court did not find a violation. The overall outcome is that in almost all the cases where the issue was found to be compatible following a successful living instrument argument, the State was also found to be in violation of the Convention's guarantees even where a margin of appreciation argument had been used as a defence by the State. It was in only two cases that the margin of appreciation argument was sufficient to prevent a finding of violation. One could deduce from this that not only is the living instrument having an impact on the scope *ratione materiae* of the Convention, it is also indirectly having an impact on the overall outcome of the case. The determination that an issue is compatible *ratione materiae* with the Convention is therefore one that should not be overlooked as it sets the basis for the possibility of a finding of violation.

4.2 *Limitations of the Descriptive Statistical Analysis*

The outcome of the descriptive analysis has shown that living instrument arguments have been more successful than margin of appreciation arguments in making decisions where compatibility *ratione materiae* has been contested. However, in the two instances where both arguments were placed side by side in dealing with the admissibility issue, the margin of appreciation superseded the living instrument argument. The descriptive statistics have

[46] In *Johnston and others v Ireland* App no 9697/82 (ECtHR, 18 December 1986), the Court found that the case was not compatible *ratione materiae* with Article 12 of the Convention. It however found a breach in relation to Article 8 taken in conjunction with Article 14.

also shown that there is a high correlation between a finding that an issue is compatible *ratione materiae* with the Convention and an overall finding that there has been a breach by the State of its duty under the Convention.

This type of analysis however suffers some limitations. First, descriptive statistical analysis whilst revealing the outcome of the decision on compatibility, does not explain the reason for the decision or the interpretive approach applied by the Court in coming to its decision. Second, this approach does not highlight what types of issues were before the Court and whether there is a correlation between the decision on compatibility and the type of issue before the Court. Third, whilst the sample represents all the cases that had an express reference to the margin of appreciation and living instrument doctrines or their variants, it is still a fraction of the overall case law of the Court. The value-added offered by the descriptive statistical analysis is to provide a systematic overview of a given sample, to identify patterns in the data, and to establish points of inference that would benefit from more detailed doctrinal analysis.

5 Models of Interaction: Doctrinal Textual Analysis

The textual analysis in this section adds to the descriptive statistical analysis above by examining the way in which Court used the interpretive tools in the case. The case law will be categorised based upon its impact in either expanding (positive decision on compatibility) or restricting (negative decision on compatibility) the scope *ratione materiae* of the Convention. The case law will be further categorised based on the outcome of the case and the allocation of duties to the State.

5.1 *Restriction Ratione Materiae of the Scope of the Convention*

The living instrument doctrine in its interaction with the margin of appreciation doctrine has been criticised for expanding the scope of the Convention. An area that is not usually examined is the restriction of the scope of the Convention. In examining the case law here, it was necessary to find out if there were cases where the scope was restricted even where there had been a living instrument argument. These are cases where the Court rejects the living instrument argument and finds that the issue is not compatible *ratione materiae* with the Convention. By rejecting the argument for compatibility, the ECtHR restricts the scope of the ECHR. From the descriptive statistical analysis, above, there were two cases which fell within the category of the Court restricting the scope *ratione materiae* of the Convention. These are discussed below based on the model that was adopted in the case, with a greater focus on the Model 3 case due to the tension between both doctrines.

5.1.1 Constitutive Model

In the Constitutive model, the Court applies the living instrument doctrine to the question of admissibility and the margin of appreciation doctrine to the question of compliance. By restricting the margin of appreciation to compliance, the Court can use this model to ensure a uniform definition of the scope of the rights in the ECHR, whilst still leaving room for the states to implement the rights in line with their varying national particularities. In *Johnston v Ireland*,[47] one of the admissibility questions was whether a right to divorce could be derived from Article 12 which guarantees the right to marry. The Court referred to Article 31(1) of the VCLT and held that in order to determine this it will 'seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and

[47] *Johnston v Ireland* App no 9697/82 (ECtHR, 18 December 1986) para 51.

purpose'. It agreed with the Commission 'that the ordinary meaning of the words "right to marry" is clear, in the sense that they cover the formation of marital relationships but not their dissolution'.[48] The Court went on to find that Article 12 was inapplicable in this particular case because it did not grant a right to divorce.

5.1.2 Weak Constitutive Model

In the weak constitutive model, the Court applies the living instrument and margin of appreciation doctrines to the determination of both the admissibility question and the compliance question. This is seen as a 'weak' constitutive model as it allows the margin of appreciation to be relevant to the consideration of the definition and scope of the right under the ECHR. In *VO v France*,[49] the Court had to consider whether a foetus fell within the protection of Article 2 such that failure to classify the unintentional killing of a foetus of 20-21 weeks as unintentional homicide would amount to a violation of the Convention. This raised the argument of whether Article 2 which guarantees the right to life applies to an unborn child. The applicant urged the Court to consider scientific developments in interpreting the text of the Convention, arguing that there was current scientific evidence to show that all life began at fertilisation.[50] This could be considered as a living instrument argument with a focus on expert consensus.[51] The government on the other hand urged the Court to consider the differences in the legal provisions in contracting States where abortion laws exist, arguing that a finding that Article 2 extends to the unborn would not be a progressive 'living instrument' interpretation.[52] They pointed to the fact that there were different statutory periods for abortion in the contracting States and that this was an area

[48] Ibid paras 51-2.
[49] *VO v France* App no 53924/00 (ECtHR, 8 July 2004).
[50] *Ibid*, para 47.
[51] The Court itself later refers to the term 'living instrument' when giving its judgment. This will be considered later on.
[52] *VO*, supra n 52, paras 52-54.

where the States had a margin of appreciation.[53] In this case therefore, both the living instrument doctrine and the margin of appreciation doctrine were presented as arguments to determine the issue of admissibility.

In addressing the admissibility argument, the Court began by adopting a textual interpretation in line with Article 31 VCLT, acknowledging that Article 2 of the ECHR is silent on when the protection of the right to life begins.[54] The Court considered this case to be different to previous cases[55] and couched the key issue as whether, with the exclusion of cases where a mother had requested an abortion, 'harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article'.[56] This necessitated a determination of when the right to life begins.

The Court took the view that there was no consensus amongst the States on when the right to life begins, concluding that:

> It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions.[57]

The Court also declined answering the question whether the unborn child is a person for the purposes of Article 2 of the Convention'.[58] It concluded that '*even assuming that Article 2*

[53] *Ibid* para 55.
[54] *Ibid* para 75.
[55] The previous case law examined had dealt with different contexts of abortion rather than an involuntary termination of pregnancy through negligence. In earlier cases, the existence of the foetus had been considered to be intrinsically linked with that of the mother. See *VO* (n 20) paras 75-78;
[56] *VO* supra, n 52 para 81.
[57] *Ibid* para 82.
[58] *Ibid* para 85.

was applicable in the instant case…there has been no violation of Article 2 of the Convention'.[59]

The Court therefore deferred to the national authorities on the question of admissibility, allowing the margin of appreciation to determine the question of the application of Article 2 to an unborn child. For this, the majority opinion was criticized even by those who voted in favour of a finding of no violation of Article 2.[60] In his dissenting opinion, Judge Rees argued for greater weight to be given to the living instrument doctrine. Referring to the developments in genetic safeguards, he pointed out that in the Charter of Fundamental Rights of the European Union which prohibits reproductive cloning of 'human beings', the protection of life applies to the initial phase of human life.[61] He argued that in light of the Convention being a living instrument, 'the manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life'.[62] Judge Rees took the position that that there should be no margin of appreciation applied to the issue of the applicability of Article 2, (an absolute right) to the case.[63] Rather, the margin of appreciation should only be applied to the effect of Article 2, to determine the measures the States needed to take to discharge its positive obligations under Article 2, not to restrict the applicability of Article 2.[64] He concluded that Article 2 applied to the unborn child and there had been a violation of this provision by France.[65] In essence, he was arguing for a 'Constitutive Model' to be applied to this case, where the living instrument doctrine would be used to determine the applicability of Article 2 and the Margin of Appreciation restricted to the question of compliance.

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[59] *Ibid* para 95.
[60] *Ibid* (Separate Opinion of Judge Rozakis joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen).
[61] Article 3(2) Charter of Fundamental Rights of the European Union; (Dissenting Opinion of Judge Rees), para 5.
[62] *VO supra*, (Dissenting Opinion of Judge Rees), para 5 (emphasis added).
[63] *Ibid* para 8.
[64] *Ibid*.
[65] *Ibid* para 9. Similar arguments on the weight to be given to the living instrument doctrine were made in the dissenting opinion of Judge Mularoni, joined by Judge Strážnická.

It can be seen from the Court's decision in *VO*, that where the Weak Constitutive Model was adopted, with the margin of appreciation and living instrument arguments were placed side by side in deciding the issue of admissibility, the margin of appreciation argument served as a limiting factor and superseded the living instrument argument, leading to a restriction *ratione materiae* of the scope of the Convention. The Court could either rely on the living instrument to give an evolutive interpretation to the text of the Convention based on scientific developments (expert consensus) or adopt a restrictive interpretation of the text by giving greater weight to the margin of appreciation afforded to the States as a result of European dissensus on the issue. It chose the margin of appreciation over evolutive interpretation. The dissenting judgments however raise interesting questions on the weight given to scientific developments and how the Court determines which international conventions it will rely on in coming to the decision on consensus. It is noteworthy that the issue of the protection of the unborn child is a sensitive area. This may also have been a contributing factor for the Court. The fact that both arguments were placed side by side and the margin of appreciation was preferred, also goes to the question raised in this paper as to whether there is more to the issue of expansion and restriction and rather a consideration of the positioning of the arguments at the admissibility phase.

5.2 *Expansion Ratione Materiae of the Scope of the Convention*

Expansion *ratione materiae* in this context refers to the use of the living instrument or margin of appreciation arguments in cases where a particular right is not specifically enumerated in the Convention, but the Court finds that the Convention covers this issue. The allegation of expansion of the scope of the Convention is one of the main criticisms levelled against the living instrument approach to interpretation therefore it is an important one to address in this paper. In order to examine the link between the outcome at the admissibility

phase and the overall outcome of the case, the case law was further divided based on whether the Court found the State to be in violation of its obligations as discussed below.

5.2.1 Expansion of the Scope of the Convention, No finding of Violation by the State

This section deals with cases where the ECtHR finds that a particular issue is compatible with the ECHR but finds that the State has not breached its obligations in that case. It is important that these cases are looked at in order to discover the limiting factors on the State's obligation even in cases where it could be argued that there had been an expansion *ratione materiae* of the scope of the Convention. Without the attendant finding of breach of obligation of the State, the importance of a finding of expansion of the scope of the Convention could be seen as merely academic with no actual effect. There were two cases in which the Court made a finding that the issue was compatible *ratione materiae* with the Convention but did not find that there had been a breach of the duty on the State and the two cases involved different models but the similarity in both cases was the presence of the living instrument at the admissibility phase.

5.2.1.1 Constitutive Model

In the case of *Leyla Sahin v Turkey* the admissibility issue before the Court was whether Article 2 of Protocol No 1 to the ECHR (Art 2 PN1) which provides for the right to education, applies to institutions of higher education.[66] In dealing with the issue, the Court applied the living instrument doctrine to the admissibility issue and the margin of appreciation to compliance. Through a combination of the textual, object and purpose as well as evolutive interpretation, the Court found that institutions of higher education came within the scope of Art2 PN1 because the right of access to such institutions was an inherent

[66] *Leyla Sahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005).

part of the right in Art2 PN1.[67] The Court however found that based on the margin of appreciation afforded to the State, Turkey had not breached its obligations in this particular case. The living instrument doctrine was therefore successful in expanding the scope of the Convention to include higher institutions of education when examining the right to education under Art2 PN1, whilst the margin of appreciation doctrine led to no expansion of the duties on the State.

5.2.1.2 Weak Constitutive Model

In *Schalk and Kopf v Austria,* the ECtHR applied the living instrument and margin of appreciation doctrines to both the admissibility and compliance questions.[68] In that case, the applicants, who were a same-sex couple living together brought the action to the ECtHR complaining that the refusal of the authorities to allow them to get married was a violation of Article 12 of the Convention which provided for the right to marry.[69] They also alleged that they had been subject to discriminatory treatment in breach of Article 14 taken in conjunction with Article 8.

The first admissibility question was whether Article 12 included the right to marry for persons of the same sex.[70] The respondent government based their arguments on the text of the Convention and on the space to be given to the national authorities. They contended that 'both the clear wording of Article 12 and the Court's case-law as it stood indicated that the right to marry was by its very nature limited to different-sex couples.'[71] Whilst they conceded that there had been major changes to the institution of marriage since 1950, they argued that 'there was not yet any European consensus on granting same-sex couples the

[67] *Ibid* para 141.
[68] *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010).
[69] *Ibid*.
[70] This was the first time the Court had the opportunity to decide on a case in which two people of the same sex were alleging that they had a right to marry under the Convention.
[71] *Schalk and Kopf*, *supra* n 76 para 43.

right to marry'.[72] They also argued that such a right could not be inferred from Article 9 of the Charter of Fundamental Rights of the European Union ("the Charter") because the Charter referred the issue of same-sex marriage to national legislation.[73] The applicants on the other hand, argued that 'in today's society civil marriage was a union of two persons which encompassed all aspects of their lives, while the procreation and education of children was no longer a decisive element.'[74] Based on the changes that the institution of marriage had undergone, they argued that there was no reason to refuse same-sex couples access to marriage.'[75]

Although the Court did not expressly refer to the rules of interpretation in Articles 31-32 of the VCLT, its initial approach to the issue was based on those rules. In line with its approach in *Johnston*, the Court noted that based on the text of the ECHR, the right to marry under Article 12 was subject to the contracting laws of the member States.[76] It also considered the context at the time of drafting[77] and the object and purpose of Article 12.[78] Neither the textual, contextual nor object and purpose approach could lead to a conclusion that the right of same sex couples to marry could be inferred from Article 12.

The Court proceeded to apply the living instrument doctrine, acknowledging that the applicant was not relying on the textual approach but on the Court's living instrument doctrine. The applicant's argument was that 'Article 12 should, in the light of present-day conditions, be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.'[79] This reinforced the living instrument

[72] *Supra*, para 43
[73] *Ibid*.
[74] *Ibid* para 44
[75] *Ibid*.
[76] Ibid, para 49.
[77] *Ibid*, para 55.
[78] An argument that had been raised in previous case law on transsexuals. See for example, *Christine Goodwin v United Kingdom* App no 28957/95 (ECtHR, 11 July 2002) para 98.
[79] *Schalk and Kopf*, *supra* n 76 para 57.

as a distinct tool of interpretation created by the Court. Whilst acknowledging that there had been major social changes to the institution of marriage since 1950 the Court also noted a lack of European consensus regarding same-sex marriage.[80]

The Court then proceeded to consider international consensus. It compared the ECHR and Article 9 of the Charter of Fundamental Rights of the European Union ('the Charter'). Article 9 of the Charter did not refer to 'men' and 'women' and the accompanying Commentary of the Charter confirmed that Article 9 was meant to be broader in scope than similar Articles in other human rights instruments.[81] The Charter however, also acknowledged the diversity in the national laws on this issue, leaving the decision on whether to allow same-sex marriage to the States.[82] Relying on Article 9 of the Charter, the Court decided that it 'would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex'.[83] As a result, it concluded that Article 12 was applicable to same sex relationships.[84]

This decision of applicability on the basis of the provisions of the Charter of Fundamental Rights of the European Union which does not actually specify same-sex marriage, is not consistent with the Court's approach to international consensus.[85] Its decision was criticised in the dissenting judgment of Judge Malinverni joined by Judge Kolver who argued that whilst there was a difference in the way Article 9 of the Charter was framed, no inferences could be drawn from this in relation to the interpretation of Article 12 of the Convention.[86] They posited that applying the rules in Article 31 -32 of the VCLT should lead to a conclusion that Article 12 referred to marriage between a man and a woman.[87]

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[80] *Ibid*, para 58. Only six of the forty-seven member States allowed same-sex marriage at the time.
[81] Article 9 of the Charter provides that 'the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.
[82] *Ibid.*
[83] *Schalk and Kopf, supra* n 76 para 61.
[84] *Ibid*.
[85] For example its approach in *VO v France supra* n 52.
[86] See *Schalk and Kopf, supra* n 76 (Concurring opinion of Judge Malinverni joined by Judge Kolver).
[87] *Ibid*.

At this stage, it may be argued that the living instrument doctrine had superseded the margin of appreciation as the Court had relied on evolutive interpretation to conclude that Article 12 was applicable to same sex relationships. However, although the Court found that the issue came within the scope of Article 12, it did not find a violation of the Convention. Relying on the margin of appreciation, it deferred to the national authorities on the issue of how to regulate same-same marriage. It took the view that '[T]he question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State…who are better placed to assess and respond to the needs of the society'.[88] Article 12 did not impose an obligation on the Austrian government to grant a same-sex couple access to marriage.[89] Therefore there had been no violation of the Convention. This application of the margin of appreciation is what Spielmann refers to as a 'the margin within the margin'.[90] This is a situation where the State has a discretion to decide on whether to regulate a particular issue and the manner in which they do so. In this case, a discretion to decide whether or not to recognise same-sex relationships and the status to accord such relationships. A finding of admissibility is therefore not an automatic expansion of the duties on the state.

The second admissibility question was whether the relationship of a same-sex couple also constitute 'family life' for the purposes of Article 8 of the Convention.[91] This question arose as the applicant had alleged that they had been discriminated against because of their sexual orientation because they were denied the right to marry and they did not have any other possibility of their relationship being recognised before the entry into force of the

[88] *Ibid*, para 61-62.
[89] *Ibid*, para 63.
[90] Dean Spielmann, 'Whither the Margin of Appreciation?' (UCL – Current Legal Problems (CLP) Lecture, University College London, 20 March 2014) 8 available at < https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf> accessed 10 August 2018.
[91] Although both the applicants and the respondents were in agreement that the Court should rule that the relationship between a same-sex couple also falls within the notion of 'family life' provided for in Article 8, the Court still considered the issue. *Schalk and Kopf, supra* n 76 paras 76, 79, 82.

Austrian Registered Partnership Act.[92] They alleged that this amounted to a breach of Article 14 taken in conjunction with Article 8.[93]

The Court in addressing this question acknowledged the wide margin of appreciation of the state in this area.[94] It however drew attention to the evolution that had taken place in social attitudes towards same-sex couples since its previous decision in the *Mata Estevez case* in 2001, noting that 'a considerable number of member States have afforded legal recognition to same-sex couples'.[95] The Court therefore recognised European consensus. In addition it recognised international consensus, noting that 'certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family"'[96] The Court concluded that in view of this evolution, 'the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life".[97] The living instrument doctrine therefore superseded the wide margin of appreciation of the States in this area. In this instance, where both doctrines were placed side by side, to determine the issue of admissibility, the living instrument doctrine trumped the margin of appreciation.

On the question as to whether there had been a breach of Article 14 taken in conjunction with Article 8, once again the Court had to grapple with the competing doctrines of the living instrument and margin of appreciation.[98] The Court acknowledged that the States had a margin of appreciation in this area and that the scope of that margin would vary according to 'circumstances, the subject-matter and its background'.[99] It also acknowledged the role

[92] The Registered Partnership Act, *Federal Law Gazette* (*Bundesgesetzblatt*) vol. I, no. 135/2009, came into force on 1 January 2010.
[93] *Schalk and Kopf***,** *supra* n 76 para 65.
[94] In particular, the Court considered the case of *Mata Estevez v. Spain* App no 56501/00 (ECtHR, May 2001) and *Karner* v *Austria* App no 40016/98 (ECtHR, 24 July 2003). *Schalk and Kopf v Austria* (n 53), para 92.
[95] *Schalk and Kopf, supra* n 76 para 93.
[96] *Ibid.*
[97] *Ibid* para 94.
[98] *Ibid* para 96.
[99] *Ibid* para 98.

of European consensus as a relevant factor.[100] On the first part of the applicant's contention that they had been discriminated against because as a same-sex couple, they did not have access to marriage, the Court was of the view that since it had already held earlier that Article 12 does not impose an obligation on States to grant access to marriage for same-sex couples, Article 14 taken in conjunction with Article 8 could not be interpreted as imposing that obligation on the States.[101] It referred back to its principle that the Convention should be read as a whole.[102]

On the second argument that they had been discriminated against because no alternative means of legal recognition was available to them until the entry into force of the Austrian Registered Partnership Act,[103]the Court noted that the Registered Partnership Act had now come into force. The question was therefore whether the respondent States had a responsibility to provide that recognition earlier than it did.[104] The Court noted 'an emerging European consensus towards legal recognition of same-sex couples' but that 'there is not yet a majority of States providing for legal recognition of same-sex couples'.[105] Based on this lack of consensus, it was an area of 'evolving rights', in which 'States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes'.[106] Once again we see the Court adopting a margin within a margin. The Austrian Registered Partnership Act was part of that emerging consensus and that the legislators could not be 'reproached' for not considering this legislation earlier. The Court was also not convinced that some of the differences which existed between the registered partnerships on the one hand and the institution of marriage on the other, amounted to a discrimination against the

[100] *Ibid*.
[101] *Ibid* para 101.
[102] This was the same approach adopted by the Court in *Johnston* where it found that since the right to divorce could not be derived from Article 12, it could therefore not be derived from Article 8 either.
[103] *Schalk and Kopf, supra* n 76 para 104.
[104] *Ibid.*
[105] *Ibid* para 105.
[106] *Ibid.*

applicants. The Court was of the view that the States 'enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition'.[107] As a result of this finding, it held that 'On the whole, the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership'.[108] There had therefore been no violation of Article 14 taken in conjunction with Article 8.[109]

In the two cases that have been discussed under this section of expansion of the scope *ratione materiae* without expansion of the duty on the State, the Court relied on the living instrument doctrine to find the relevant issues to be compatible with the Convention's guarantees. In *Sahin*, it led to a finding that higher education institutions came within the scope of Art 2 PN1 whilst in *Schalk and Kopf* it led to a finding that Article 12 is applicable to same sex relationships and that the relationship between same sex couples is 'family life' within the ambit of Article 8 ECHR. In both cases however, the Court did not assign any further duties to the States, concluding based on the margin of appreciation doctrine, that the States were not in violation of their obligations under the Convention. This shows the point of considering not just the question of admissibility but its link to an expansion of the duty on the State.

5.2.2 Expansion of the Scope of the Convention, And a Finding of Violation by the State

This section considers cases where the Court found that the issue was admissible and that the respondent State had been in breach of its obligations under the ECHR. The highest number of cases from the sample come under this category.[110] A selection of these cases will

[107] *Ibid* para 108.
[108] *Ibid* para 109.
[109] The applicants' complaint under Article 1 of Protocol No1 which provides for the quiet enjoyment of possessions was dismissed as manifestly ill-founded. - *Schalk and Kopf, supra* n 76 para 115.
[110] 9 out of 14 cases

be discussed below, drawing from the different categories of the use of the living instrument and margin of appreciation doctrines within the cases.

5.2.2.1 Constitutive Model

This model accounted for the majority of cases in which the Court found the issue to be compatible *ratione materiae* with the Convention's provisions. A variety of issues were under consideration: free elections, tax refunds, protection for business premises, physical attacks against the individual, conscientious objection and freedom of information. This range of issues, would, at face value, not appear to offer an underlying logic for decisions of the court, but they are bound together by the Constitutive Model as discussed below.

In some of the cases, the Court applied the living instrument doctrine without engaging in a comparative analysis or raising consensus as a factor in coming to its decision. In *Matthews v United Kingdom*, the question was whether Article 3 of Protocol No 1 which guaranteed the right to free elections was applicable to elections to the European Parliament.[111] In coming to the decision that Article 3 of Protocol No 1 applied to elections to the European Parliament, the Court relied on the living instrument doctrine noting that:

> The Convention is a living instrument which must be interpreted in the light of present-day conditions…The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.[112]

[111] *Matthews v The United Kingdom* App no 24833/94 (ECtHR, 18 February 1999).
[112] *Ibid* para 39.

The intention of the drafters was therefore not a limiting factor in this context. The Court did not however proceed to conduct any comparative analysis in this case. It rather took a textual approach to interpret the word legislature.[113] On the substantive issue of whether there had been a breach of the obligations on the State, the Court affirmed the wide margin of appreciation available to the States in the area of elections. [114] However, since the applicant had been left with no opportunity to express her choice of members of the European Parliament, the Court found that the very essence of the applicant's right to vote as guaranteed under Article 3 of Protocol No 3 had been denied.[115] There was therefore a violation of that provision by the respondent State.

A similar approach to the living instrument doctrine in which the Court did not engage in a comparative analysis to determine consensus was also adopted in *S A Dangeville v France,*[116] where the living instrument doctrine was relied on in coming to the decision that an application for refund of Value Added Tax (VAT) paid in error constituted an 'asset' and therefore a 'possession' within the meaning of Article 1 of Protocol No 1.[117] Also in *Société Colas Est and Others v France* the ECtHR did not conduct any inquiry into consensus when it decided that the provisions of Article 8 applied to juristic persons and afforded protection for business premises.[118] A similar approach was also adopted in *Berganovic v Croatia*, where the Court found that the acts of violence on the applicant which had been inflicted by other individuals, were severe enough to come within the ambit of Article 3 ECHR.[119] There was no reference to the existence or non-existence of consensus in relation to the application of the living instrument doctrine. The focus was rather on the need for an 'increased firmness in

[113] *Ibid* para 40.
[114] *Ibid* para 64.
[115] *Ibid* para 65.
[116] *S A Dangeville v France* App no 36677/97 (ECtHR, 14 April 2002).
[117] *Ibid.*
[118] *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 July 2002) para 115.
[119] *Beganovic v Croatia* App no 46423/06 (ECtHR, 25 June 2009) paras 58, 66.

assessing breaches of fundamental values of democratic societies'.[120] *Berganovic* case was significant in the sense that the Court was able to rely on the living instrument doctrine in finding that actions between individuals could come under the coverage of Article 3 where they were of a certain severe standard. The margin of appreciation doctrine was acknowledged in relation to the room for States to ensure criminal law remedies, but the supervision of that margin led to a finding of a breach of obligations on the State where the investigation had not been effective.

These cases suggest that the living instrument doctrine goes beyond a consideration of the practice within States and a comparative exercise to find the majoritarian approach. The living instrument doctrine in these cases was a tool that required the Court to engage in a greater scrutiny of the issues in order to ensure a higher level of protection of rights.

A different approach to the relevance of consensus is however seen in the case of *Bayatyan v Armenia* where the Court had to determine if the right to conscientious objection is within the scope of Article 9 which provides for the right to freedom of thought, conscience and religion.[121] This case was significant as it was the first time the Court had to make a clear pronouncement on this issue. In considering the issue of applicability of Article 9, the Court reiterated the jurisprudence from earlier case law of the Commission which had restricted the consideration of conscientious objection to Article 4(3) which left it to the discretion of contracting parties.[122] In deciding whether or not to move away from this existing jurisprudence, the Court noted the potential for conflict between legal certainty and the relevance of the Convention to present day society, but concluded that 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.[123] The Court found that there had been changes which showed consensus at the

[120] *Ibid* para 66.
[121] *Bayatyan v Armenia* App no *23459/03* ECtHR, 7 July 2011.
[122] *Ibid* paras 93-96.
[123] *Ibid* para 98.

international,[124] European[125] and national level,[126] to recognise conscientious objection. As a result, it could no longer confirm the earlier case law of the Commission on this issue. This finding of applicability of the ECHR as a result of consensus in the practice of States, resulted in a 'limited margin of appreciation' being granted to any State that had not introduced alternatives to military service.[127] In this case, the Armenian authorities were unable to justify the interference and were found to be in breach of their obligations under Article 9.

In the more recent case of *Magyar Helsinki Bizottsag v Hungary,* the Court had to decide whether Article 10 could be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities.[128] In that case, the Court was faced with a similar position as that in *Bayatyan*, where it had earlier jurisprudence on the issue which it had to decide to either follow or depart from. It recognised that there were inconsistences in its earlier case law and decided it needed to take a broader look at the extent to which the right of access to information could be gleaned from Article 10. [129] In a similar fashion to *Bayatyan*, the Court considered the *travaux préparatoires* [130] and through a comparative approach recognised European[131] and international consensus[132] on the right of access to information.

[124] *Ibid* paras 105-7. The Court referred to developments recognising the right to conscientious objection at the international level such as the interpretation of the provisions of similar provisions in the International Covenant on Civil and Political Rights 1966 (ICCPR) by the United Nations Human Rights Committee. It also referred to Article 10 of the Charter of Fundamental Rights of the European Union 2000 which explicitly provided for the right of conscientious objection in its guarantee of freedom of religion. Furthermore, within the Council of Europe itself, both the Parliamentary Assembly and the Council of Ministers had on several occasions called on member States which had not already done so, to recognise the right to conscientious objection. Recognising conscientious objection had also now become a precondition for admission to the Council of Europe.
[125] *Ibid* para 103. At the time of the alleged interference in 2002-2003, there was already a consensus in all Council of Europe member States as the overwhelming majority had already recognised the right to conscientious objection in their laws.
[126] Armenia was a party to the ICCPR, and it had also, when joining the Council of Europe, pledged to recognise the right to conscientious objection.
[127] *Bayatyan supra* n 130 para 123.
[128] *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016).
[129] *Ibid* para 133.
[130] *Ibid* paras 134-137.
[131] It referred to the practice of contracting states. In nearly all of the 31-member States of the Council of Europe that had been surveyed had enacted legislation on access to information and that there was in existence the Convention on Access to Official Documents 2009.
[132] It referred to inter alia the ICCPR and the UDHR as well as decisions of the United Nations Human Rights Committee, the European Union's Charter of Fundamental Rights and the jurisprudence of the Inter-American Court of Human Rights on the right of access to information. *Magyar Helsinki Bizottság* (n 102), paras 138-148.

The Court concluded that there was nothing to exclude the interpretation of Article 10 as including a right of access to information.[133] It decided that by denying access to the information in question, there had been an interference with the applicant's rights under Article 10. The applicant's complaint was therefore compatible *ratione materiae* with the Convention.[134] The Court also went on to find that there had been a violation of Article 10 by the State. It concluded that the interference was not necessary in a democratic society. 'Notwithstanding the respondent State's margin of appreciation, there was not a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.' [135] The State had violated its obligations under Article 10(2) of the Convention.

5.2.2.2 Strong Constitutive Model

In the Strong constitutive model, the living instrument doctrine is applied to the admissibility question and both the living instrument and margin of appreciation doctrines are applied to compliance. In *Demir and Baykara v Turkey* the admissibility question was centred on whether a right for municipal servants to form a trade union and engage in collective bargaining came within the ambit of Article 11 of the ECHR.[136] The applicants complained that, in breach of Article 11 of the Convention, by itself or in conjunction with Article 14, the domestic courts had denied them, first, the right to form trade unions and, second, the right to engage in collective bargaining and enter into collective agreements.[137] On the issue of the right of municipal servants to form a trade union, the ECtHR drew support for its position that municipal civil servants should not be excluded from the right to organise and form trade unions by adopting the living instrument doctrine. It examined international consensus, and

[133] *Magyar Helsinki Bizottság* (n 102), paras 138-149.
[134] *Magyar Helsinki Bizottság* (n 102), para 180.
[135] Ibid para 200.
[136] *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008)
[137] *Ibid.*

European practice which showed that the right of public servants to join trade unions was now recognised in all the Contracting States to the Convention.[138] Relying on this combination of international and European consensus, the Court concluded that 'members of the administration of the State' cannot be excluded from the scope of Article 11 of the Convention.[139] The restrictions by the State could not be justified as being 'necessary in a democratic society' within the meaning of Article 11(2) of the Convention.[140] The failure to recognise the rights of the applicants as civil servants to form a trade union was therefore a violation of Article 11 of the Convention.[141]

On the question whether Article 11 included the right to collective bargaining, this was another case in which the Court had to depart from earlier jurisprudence and it adopted a similar approach of conducting a comparative study to find out whether there was consensus on the issue. Taking all the developments at the international, regional and national levels into consideration, the Court was of the view that there was a need to reconsider its earlier 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.'[142] As a result of the developments, the Court concluded that the right to bargain collectively had in principle become one of the essential elements of the right to form and join trade unions under Article 11. States, however, remain free to organise their national system as they see fit and grant special status to representatives of trade unions. Civil servants, just like other workers should enjoy the rights under Article 11 subject to lawful restrictions.[143] In this case, the State had a 'limited' margin of appreciation

[138] *Ibid* paras 48, 106.
[139] Turkey itself was a member of the ILO Convention 87. The delay of 8 years by the Turkish legislature in enacting legislation to give effect to the commitments they had signed up to following the ratification in 1993 of ILO Convention No 87 prevented the State from fulfilling its obligations under Article 11.
[140] *Demir and Baykara* (n 103), para 125-6.
[141] Ibid para 127.
[142] Ibid para 153.
[143] Ibid para 154.

which would be considered in the light of current developments.[144] The Court found that the absence of the relevant legislation to give effect to the provisions of the International Labour Conventions already ratified by Turkey, and the Turkish Court's judgment based on that absence, with the resulting annulment of the collective agreement in question, constituted interference with the applicants' rights under Article 11 of the Convention.[145] The Court unanimously held that there had therefore been a violation of the Convention in respect of the applicants and their trade union.

Consensus was also important in *Glor v Switzerland*, where the Court found the existence of 'European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment'.[146] The Court relied on this consensus in coming to the decision that Article 14 taken in conjunction with Article 8 could be applied in relation to an allegation of discriminatory treatment on account of disability.[147] To evidence the consensus, the Court referred to a combination of European and international treaties.[148] This case is significant because it was the first time the ECtHR was applying Article 14 in relation to disability.

5.2.2.3 Deference Model

There was only one case in the sample, where the Court adopted the model of margin of appreciation applied to admissibility and living instrument applied to compliance.[149] In *Siliadin v France* the Court had to determine whether Article 4 which prohibits slavery, servitude and forced labour, includes a positive obligation to provide for criminal and civil remedies to protect individuals from these prohibited actions.[150] The Court referred to international treaties

[144] Ibid para 119.
[145] Ibid para 157.
[146] *Glor v Switzerland* App no 13444/04 (ECtHR, 30 April 2009) para 53.
[147] *Ibid.*
[148] *Ibid.*
[149] *Siliadin v France* App no 733316/01 (ECtHR, 26 July 2005).
[150] *Ibid.*

which provided protection from slavery.[151] Taking these different international Conventions into account, the Court concluded that it would be inconsistent with these provisions to hold that Article 4 only imposed negative obligations on the State.[152] Such a decision would render the protection under these instruments ineffective.

The Court held that in a similar fashion to Article 3, States have a positive obligation under Article 4 to adopt criminal-law provisions to penalise the practices prohibited and to apply them in practice.[153] In relation to whether the applicant was held in slavery or servitude, the Court referred to the living instrument doctrine. The Court noted that slavery and servitude were not classified as such under French Criminal law.[154] It was however of the view that the civil remedies which were available to the applicant were not sufficient. It concluded that the legislation which was available at the time did not provide the applicant with adequate practical and effective protection from the actions of which she was a victim.[155] The Court came to a unanimous decision that there had been a violation of the positive obligation on the State under Article 4 of the Convention. Consensus was therefore an important determinant of the Court's position on whether Article 4 included positive obligations and whether the provision in the French Criminal law to provided adequate protection in this area. Whilst the margin of appreciation was raised by the government to determine the issue of admissibility, the Court gave greater weight to the living instrument doctrine, effectively rendering the margin of appreciation irrelevant to the admissibility question.

[151] The Court referred in particular to Article 4 of the ILO Forced Labour Convention 1930, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, and relevant provisions of the Convention on the Rights of the Child.
[152] *Siliadin*, *supra* n 161 para 88.
[153] *Ibid.*
[154] *Ibid* para 141.
[155] *Ibid* para 148.

6 Conclusion

The aim of this paper was to examine the impact of living instrument and margin of appreciation arguments in determining the scope of applicability of the ECHR when admissibility questions of compatibility *ratione materiae* are raised. The question of compatibility *ratione materiae* is important as it determines whether the ECtHR has the jurisdiction to deal with the matter. Whilst a distinction between the use of the doctrines at the admissibility and merits stage is largely ignored in the literature, this article fills the gap and adds to the academic literature in this area by engaging in a systematic analysis of the case law with a focus on the use of both doctrines at the admissibility phase of the case.

The first analysis conducted in this paper was with the quantitative method of descriptive statistical analysis. The descriptive analysis revealed that the question of compatibility *ratione materiae* featured in 47% of the case sample, hence it was an issue worth considering in more detail. Furthermore, in almost all the cases where the living instrument doctrine was raised, the Court found the issue to be compatible *ratione materiae* with the Convention.[156] This prompted an initial finding which suggested that living instrument arguments were superseding margin of appreciation arguments at the applicability stage on the issue of compatibility *ratione materiae* and were leading to an expansion of the scope of the Convention. There was however a need to engage in some more analysis of the case law to see what impact this had on the overall outcome of the case.

To further examine the impact on the final outcome of the case, the descriptive statistical analysis provided further insight on the nature of the relationship between living instrument and margin of appreciation arguments. It revealed four models of interaction between the living instrument and margin of appreciation doctrines in the case law examined:

[156] It was only in two out of the 11cases that the Court did not find the issue to be compatible *ratione materiae* with the Convention.

Constitutive Model, Strong Constitutive Model, Weak Constitutive Model and a Deference Model. The most occurring model in the case law was the Constitutive Model. Interestingly, there were only two cases where the Weak Constitutive Model was adopted, which is the in Model where there was potential for a clear interaction between the margin of appreciation and living instrument doctrines both at the admissibility and compliances stages. This suggests that the issue of conflict between both doctrines in particular on the issue of compatibility *ratione materiae* was not at a very high level in the case law. It also ostensibly suggests that the supposed conflict between the two doctrines is not a simple issue of both doctrines appearing within the same part of the case. In both cases under the Weak Constitutive Model, the Court found that there had been no violation of the Convention. This shows that there was some impact of the margin of appreciation as a counteracting factor when the living instrument doctrine was raised to argue for compatibility *ratione materiae*, thereby restricting the scope of the obligations on States. The descriptive analysis was however limited in terms of what it could reveal about the reasoning of the Court in coming to either a positive or negative decision on compatibility *ratione materiae*. It was also restricted due to the limited number of cases that fell within this category for examination. It was therefore deemed necessary to engage in a doctrinal analysis by way of textual analysis.

The second analysis which was the textual analysis, was based on the findings that had been revealed from the descriptive statistical analysis. Two words 'expansion' and 'restriction' were relevant in structuring the presentation of the analysis. The examination of the interaction between the margin of appreciation and living instrument revealed that there was both 'expansion' and 'restriction' *ratione materiae* of the scope of the ECHR. The *Johnston and VO* cases were examples of restriction of the scope of the Convention even where there had been a living instrument argument. *VO* was considered in more detail because it was a Weak Constitutive Model case and could therefore provide further insights

to the issue of what happens when there is a conflict between the two doctrines. In *VO*, the margin of appreciation trumped the living instrument doctrine due to the Court finding a lack of consensus on the issue. This suggested that living instrument arguments were not superseding margin of appreciation arguments when both were placed side by side before the Court when dealing with the compatibility *ratione materiae* issue in that case.

An examination of the case law in relation to the expansion *ratione materiae* of the scope of the Convention revealed two outcomes. First, expansion of the scope *ratione materiae* of the Convention without a finding of violation on the part of the State. Second, expansion *ratione materiae* of the scope of the Convention plus a finding of violation by the State of its obligations under the Convention. In relation to the former, expansion of the scope *ratione materiae* without expansion of duty, *Schalk and Kopf* a Weak Constitutive Model case, revealed that the living instrument argument trumped the margin of appreciation argument even though there was no clear evidence of existing consensus in that area, thereby expanding the scope of the Convention. Nonetheless, there was no finding of a breach of duty which means the Court still restricted the Scope of obligations on the State.

The difference in outcomes in *VO* and *Schalk and Kopf* at the compatibility stage showed that it was not in all cases that the living instrument argument superseded margin of appreciation arguments. However, the similarity of the overall decision of the Court in both cases that the States were not in breach of their obligations under the Convention, suggests that the margin of appreciation doctrine superseded the living instrument doctrine at the merits stage. This finding is significant as it challenges the view seen in the literature that the living instrument doctrine is negatively affecting the margin of appreciation. In these two cases where both doctrines were placed side by side, the margin of appreciation doctrine superseded the living instrument doctrine at the point that counted – the determination of whether the State was in breach of its obligations.

In relation to the second outcome of expansion of scope *ratione materiae* and a finding of violation by the State, the analysis showed that a higher number of cases were found in this category. Cases where the Constitutive Model was adopted, had the highest incidence of expansion *ratione materiae* of both the scope of the Convention and the duty on the State. The doctrinal textual analysis showed that consensus was not always essential to the case even where the Court raised the living instrument doctrine. This suggests that contrary to the understanding of the living instrument doctrine which seems to link it with consensus, there is scope for the application of the living instrument doctrine even without the Court engaging in a comparative exercise to find out the existence or non-existence of consensus. The living instrument doctrine in such cases appears to be used as a reason to require a higher standard of protection which is not based on majoritarian State practice but based on the nature of the right in issue and the need to ensure effective protection.

The case analysis also revealed that the interaction between the margin of appreciation and living instrument doctrines spreads across a variety of Articles of the Convention. From Article 3 which would be considered to enshrine an absolute right, to Article 10 which is recognised as a qualified right. The living instrument doctrine has, therefore, to an extent increased the use of the margin of appreciation doctrine in that it is required when dealing with the assessment of positive obligations on the State. The doctrinal textual analysis showed that the interpretive method adopted by the Court in the case law examined follows the rules of interpretation under the VCLT in most cases. There are, however, some of the cases where strong dissenting opinions also relying on the VCLT come to different conclusions. Whilst the VCLT is seen as a starting point in most cases, there is not always similarity in the way the Court gives weight to certain aspects of the interpretive process. In some cases, where a particular issue is found to have been consciously excluded from the Convention, the Court finds that the case is not compatible *ratione materiae* but in

others, where such evidence exists, the Court has decided that those materials from the *travaux préparatoires* were not decisive. There is therefore to an extent, a lack of consistency in the approach of the Court when adopting the rules of interpretation in the VCLT.

It can therefore be concluded that the living instrument and margin of appreciation doctrines interact in a variety of ways within the case law of the Court. There is no 'one size fits all' explanation of the interaction but the four models of how they are used in the case law is an addition to the literature and this has been achieved through a combination of the quantitative and qualitative analysis adopted within this article. The case law shows a combination of expansion and restriction of the scope of the Convention as the Court's finding that a particular issue is compatible *ratione materiae* with the Convention does not guarantee a finding that the State has breached its obligations under the Convention. Beyond expansion and restriction, the different models of interaction leave room for further consideration of the role of the positioning of the argument at the admissibility phase, on the finding of a favourable decision on compatibility *ratione materiae*.